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BY EMAIL

Ms. Rachel E. Dickon
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, DC 20573

Re: Proposed Interpretive Rule on Demurrage and Detention under the Shipping Act, FMC Docket No. 19-05

Dear Ms. Dickon:

Hoppel, Mayer & Coleman submits these comments on behalf of the Institute of International Container Lessors chassis provider members (IICL Providers),[1] pursuant to the Federal Maritime Commission ("FMC") Notice of Interpretive Rule on Demurrage and Detention under the Shipping Act, FMC Docket No. 19-05 (the "Interpretive Rule").

IICL Providers understand the significant effort made by Commissioner Dye and the Commission in Fact Finding No. 28 and in proposing to address the issues of detention and demurrage in the proposed Interpretive Rule.

The Notice of the Interpretive Rule states that

> [T]he proposed rule makes clear that it applies to charges related to shipping containers, not other equipment, such as chassis. (Rule at 5.)

With all due respect, for the most part, containers, whether carrier or merchant haulage, cannot move from or to (a) a marine terminal or (b) a rail depot or (c) a shipper door or (d) a consignee door, without the use of a chassis. In IICL Providers' opinion, the proposed Interpretive Rule, while relating to free time, detention and demurrage on containers, has a material and direct impact on chassis use and availability.

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[1] Direct ChassisLink, Inc., Flexi-Van Leasing, Inc. and TRAC Intermodal.

Common carriers currently have published in their respective Rules Tariffs rules relating to specific free time for use of containers and charges when free time is exceeded. Marine terminals publish rules in their terminal schedules relating to free time and storage of containers on their terminals. Sometimes the rules are modified by specific language in service contracts in the case of common carriers, or contracts in the case of marine terminals.

No one can reasonably disagree that there is a cost for containers, that there is a cost for use of space on terminals, and that there is a cost for chassis. Assuming reasonable free time at origin and destination, cargo interests should pay charges for using containers and chassis in excess of the free time. While the turn time for containers is significant in terms of the velocity of ocean transportation, that doesn't mean that that the containers don't have a cost for use irrespective of the desired turn time for equipment.

The contentious issue is, when events occur that result is use of a container in excess of agreed free time, who should be responsible for the costs of the delay? The difficulty, of course, is that there are many moving parts involved in the transportation of containers from origin at a shipper's place of business to delivery at consignee's warehouse at destination. Not only are there many moving parts, but at each stage of a movement, a number of variables can affect the timing of the transportation. The Final Report in Fact Finding No. 28 addresses many of these variables. We note, however, that statements and contentions by interested parties are generally reflections of the problems they have had; they have not been subjected to cross-examination; they may be true or partially true; they may reflect a single occurrence or many; they may be legally admissible or inadmissible; they frequently contain hyperbole.

IICL Providers would suggest that the best treatment of the matters reported in Fact Finding No. 28 would be to treat such contentions as informational.

This is not to say that there are not problems that should be addressed such as the failure of marine terminals and/or ocean common carriers to timely bill their customers for charges agreed in accordance with their tariffs, schedules or contracts. Billing for detention or demurrage, or for storage or per diem, six months after the event, where the cargo interest no longer has the ability to determine why the delays occurred and who was responsible, could be viewed, subject to the actual facts, as unjust or unreasonable.

In addition to IICL Provider concerns that the proposed Interpretive Rule would *de facto* affect chassis lessors, IICL Providers have several other issues of concern.

IICL Providers believe it important to restate that under the Shipping Act of

1984, as amended (the "Act"), the FMC has no jurisdiction over chassis and chassis providers, just as it has no jurisdiction over motor carriers or railroads, relating to the transportation of cargo in the trades not covered by the Act. Domestic transportation by motor carriers or railroads, to the extent they are regulated, is, as the Commission knows, subject to the jurisdiction of the Surface Transportation Board ("STB") or the Federal Motor Carrier Safety Administration ("FMCSA").

The FMC's jurisdiction is limited by the Act, as relevant here, to "common carriers" and "marine terminal operators" as defined in the Act and related FMC regulations, and to agreements and activities of those entities, as enumerated in the Act and FMC regulations.

Thus, as an example, when the United States government decides to inspect the contents of a container, a decision over which the ocean common carrier has no control, there would be a substantial question of whether the FMC had a legal basis to conclude it would be unreasonable for a common carrier to charge a cargo interest for delay if the governmental inspection of the contents of a container results in the container exceeding free time. Such inspections occur routinely. There may be many reasons for cargo inspections or government generated cargo holds, but virtually none of them are created by or at the fault of the common carrier who provides an empty container for packing; receives a sealed container from a cargo interest; and expects to have the container returned to it in a reasonable amount of time after discharge at the destination in accordance with its tariff rules or service contract agreements.

We choose this example from the proposed Interpretive Rule because virtually every government inspection of the contents of a container occurs while the container is on a chassis. The proposed suggestion that charging cargo interests for use of containers in excess of free time, when delays occur because of government inspections, would be viewed by the FMC as more discriminatory, and could likely lead to an extension of free time, which in turn will make the chassis non-operative with reduced revenues to IICL Providers, will increase the potential for chassis shortages, resulting in potential capital expenditures to increase the chassis fleet to replace the non-operative units and potentially increase costs for maintenance and repair as well as other operating costs.

In the process of addressing issues relating to detention or demurrage, the FMC's decisions may materially affect the costs and operations of the chassis lessors whose chassis are utilized to move containers within and to or from marine terminals by motor carriers or railroads or both. It follows that the proposals in the Interpretive Rule, while addressing practices by common

carriers and marine terminal operators with respect to detention and demurrage charges on containers, impact on IICL Providers.[2]

The Commission is well aware of the initial history of chassis ownership and leasing in the United States. When containerization began in the U.S., in the late 1950s, the ocean common carriers determined that they would provide the containers and the chassis to cargo interests; they owned and/or leased containers and chassis. At the same time, a number of container carriers leased and/or operated marine terminals directly or through related companies to handle the efficient movement of containers from vessels to terminals to cargo interests.

As relevant here, while containers are instruments of international traffic because they move on the high seas or Great Lakes between ports in the United States and ports in foreign countries, chassis are used on land and do not generally move on the high seas.

While the Interpretive Rule does not directly address chassis, we have noted that decisions made in relation to detention and demurrage charges on containers may directly affect the owners and/or the lessors of chassis.

IICL Providers understand that there are shippers and motor carriers who assert that chassis lessors are not providing chassis is sufficient numbers at specific locations or assert that chassis are too old or are in disrepair or that they do not have antilock brakes or radial tires. We note that the IICL Providers have invested in new or in refurbished chassis at significant capital cost. We also note that safety requirements for chassis, *e.g.*, whether they must have antilock brakes or radial tires, are matters under the jurisdiction of the FMCSA, and chassis lessors are registered with the FMCSA and comply with FMCSA regulations.

We note that chassis lessors make their investment decisions on a company by company basis, individually, without discussion or agreement between or among the chassis lessors. They have no antitrust immunity.

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[2] The fact that the Commission is participating in the discussions relating to the availability of chassis in Memphis suggests that the Commission is well aware of the importance of chassis, chassis management and chassis availability. But the FMC should make it clear that the Act does not give it jurisdiction over chassis, chassis lessors, chassis management or chassis leases.

Ocean Carrier Influence on Chassis Activities

IICL Providers believe that the efforts to address container detention and demurrage issues in an Interpretive Rule can be better informed by an understanding of the recent history of chassis ownership in relation to container shipping.

First, beginning about 10 years ago, the ocean common carriers, with few exceptions, began to monetize their investments in chassis by selling their U.S. chassis fleets mainly to chassis lessors. Following the enactment into law of "SAFETEA-LU"[3] on August 10, 2005, which contained provisions on chassis roadability in section 4118, ocean carriers, through their OCEMA agreement, effective June 30, 2006, determined to collectively control their respective chassis fleets under the Consolidated Chassis Management Pool Agreement ("CCMPA"), FMC Agreement No. 011962, pursuant to which Consolidated Chassis Management, LLC, ("CCM") a limited liability corporation, owned entirely by OCEMA, controlled and directed by a Board of OCEMA member ocean common carriers, was established as a separate entity to operate the chassis fleets of the OCEMA members. In fact, Agreement No. 011962 indicates that CCM is a party and signatory to this filed and effective agreement on behalf of itself and a number of additional limited liability corporations that were either owned by it or were being formed. [4] By Amendment 4, in March 2008, the CCMPA added as a party to the Agreement, the Midwest Consolidated Chassis Pool, LLC. Amendment 5, in August 2008, added the Gulf Consolidated Chassis Pool, LLC and Amendment 6, in January 2009, added the Chicago Ohio Valley Consolidated Chassis Pool, LLC.

Second, under FMC Agreement No. 011980, effective December 20, 2006, the OCEMA members, OCEMA itself, CCM, the Georgia Ports Authority and the South Carolina State Ports Authority entered into the South Atlantic Chassis Pool Agreement ("SACP"), which is managed by a subsidiary of CCM called

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[3] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users, Public Law 109–59, see https://www.govinfo.gov/content/pkg/PLAW-109publ59/pdf/PLAW-109publ59.pdf

[4] Consolidated Chassis Management LLC ("CCM")
Affiliates of CCM:
Denver Consolidated Chassis Pool LLC
Florida Consolidated Chassis Pool LLC
Mid-South Consolidated Chassis Pool LLC

South Atlantic Consolidated Chassis Pool, LLC. Paragraph 5.3.F. of the South Atlantic Chassis Pool Agreement specifically states:

> The primary purpose of this Agreement is to provide for the pooling of equipment by or on behalf of ocean carriers, . . . (Emphasis added.)

The "primary purpose" no longer exists because in the years after the formation of the SACP, and other OCDMA-owned chassis pool management LLCs, with a few minor exceptions, all of the ocean common carrier members of OCEMA have sold off their U.S. based chassis, and the IICL Providers were the primary purchasers. Notwithstanding the failure to meet the primary purpose, the OCEMA members effectively attempt to retain control of chassis, with antitrust immunity, through the chassis pools operated by their wholly-owned LLCs.

Under the SACP Agreement, when chassis owned by an ocean common carrier in the port of Savannah, for example, were sold to a chassis lessor, the chassis lessor was compelled by the Port Authority to either (a) place the chassis in the South Atlantic Chassis Pool, hosted by the Port Authority on its marine terminal or (b) to remove them from the marine terminal. Thus, while selling the chassis to the chassis lessors, the ocean common carriers, through the LLCs, attempted, with success, to retain in material ways the control of the chassis in the areas where they established pools and/or had agreements with ports.

As IICL Providers have contended over the last seven years, the FMC had no jurisdiction to permit the chassis management limited liability corporations that were formed by the ocean common carriers to become parties to FMC agreements with resultant antitrust immunity.

Nothing in the Act defines the terms "ocean common carrier" and "common carrier" as including subsidiaries or affiliates by such carriers. In fact, the Commission's regulations at 46 CFR §535.307(a) suggest just the opposite when they provide for an exemption for agreements between or among wholly-owned subsidiaries and/or their parent, with the following provision.

> (a) An agreement between or among wholly-owned subsidiaries and/or their parent means an agreement under section 4 of the Act (46 U.S.C. 40301(a)-(c)) between or among an ocean common carrier or marine terminal operator subject to the Act *and* any one or more ocean common carriers or marine terminal operators which are ultimately owned 100 percent by that ocean common carrier or marine terminal operator, or an agreement between or among such wholly-owned carriers or terminal operators. (Emphasis added.)

The regulation, like the Act, is clearly limited to "an ocean common carrier or marine terminal operator."

It is well-established that issues relating to jurisdiction can be raised at any time:

> "Jurisdiction can be challenged at any time." and "Jurisdiction, once challenged, cannot be assumed and must be decided."
> *Basso v. Utah Power & Light Co.*, 495 F. 2d 906, 910 (10th Cir. 1974).

We note that we are unaware of any FMC decision in which the FMC held, as a matter of law, that the OCEMA-owned limited liability companies, such as those discussed here, are "ocean common carriers" or "marine terminal operators." Indeed, if a person wanted to file a complaint with the Commission against one of the chassis management LLCs owned by OCEMA members, that person would be confronted with provisions of the Act that prohibit conduct by "common carriers," "ocean common carriers," "marine terminal operators" or "ocean transportation intermediaries" and none of these provisions would apply to the chassis management LLCs. Nothing in the Act suggests that the FMC has jurisdiction over limited liability corporations owned by ocean common carriers to manage chassis; and even less, over limited liability corporations that manage chassis owned by chassis lessors, motor carriers or other third parties.

We believe that the law is clear that once jurisdiction is challenged, it cannot be assumed, and it must be decided. This is a simple and basic rule of law. It is also well-settled that grants of antitrust immunity must be narrowly construed. It does not appear that the Commission made any effort at any time to determine the basis for including OCEMA members' LLCs as parties to filed agreements with the benefit of receiving antitrust immunity under the Act.

The OCEMA-owned and -controlled chassis pools have a direct and substantial effect on the availability and cost of chassis and, as a result, the availability of containers that need chassis in order to move. Thus, the unlawful structure of chassis management with antitrust immunity has a direct relationship to the Interpretive Rule. It enhances the ocean common carriers' ability to pass their costs to cargo interests and chassis lessors.

By far, the largest expense that goes into establishing daily costs for a chassis is the maintenance and repair costs of the chassis. Since all maintenance and repair of chassis in an OCEMA owned and controlled chassis pool is required to be performed by or on behalf of the OCEMA-owned pool manager, CCM, without material input or supervision by the owners of chassis, who are mainly the IICL Providers, the maintenance and repair costs lead to higher costs for those who lease chassis to carry containers.

Chassis Availability

For the ports in Southern California, the chassis lessors, as a result of a U.S. Department of Justice Antitrust Division Business Review Letter, have formed the Pool of Pools that allows the members' chassis to be used interchangeably. But the fact is that the chassis lessors individually have hosting relationships with marine terminal operators that generally require that maintenance and repair of chassis be performed at the marine terminals without supervision by the chassis lessors. Chassis lessors have experienced demand for chassis at times when the stack of unrepaired chassis on a specific terminal may be in the thousands. Whether the chassis waiting to be repaired need a light bulb replacement, or a mud flap, or a new tire, or new brakes, is not clear. One would hope that there would be a triage system that would move easily repaired chassis off the stack and back into service.

Chassis availability at specific terminals is often affected by the way the terminals and carriers handle ever-larger container ships and by the fact that the carriers operate through consortia whose members operate at different terminals depending on each member's relationship with the terminals. One should not forget that ocean common carriers frequently have ownership interests in marine terminals or have contracts with marine terminals. These contracts may guarantee berth space on vessel arrival but the availability of chassis can be severely skewed by the timing and operation of the carriers and the terminals. In short, chassis, even grey chassis in the Pool of Pools, may not always be where the carriers decide they want them.

Repositioning of chassis between marine terminals at large ports, such as the terminals in Southern California, is the second largest operating expense, after maintenance and repair, to chassis providers. Each month in Southern California, approximately 100,0000 chassis are returned to a different marine terminal than the terminal where the chassis were originally picked up. This causes significant chassis dislocations and imbalances and significant cost to reposition the chassis to the next demand location resulting in increased costs to supply chains which has an adverse cost and efficiency impact on U.S. trade.

Third Party Impact on Chassis Availability

For movements inland by rail, the railroads are known to bunch trains carrying containers and then fail to inform the ocean common carriers or motor carriers or chassis providers that a train will arrive at "3:00 AM" and will need chassis at specific locations at that time. It doesn't matter whether the chassis are interoperable "grey" chassis, if they are not where they are needed, and if those

who need them do not communicate their requirements in a timely manner, the chassis will not be available.

The foregoing is significant because the Commission in its proposed Interpretive Rule on issues relating to free time, detention and demurrage, impacts not just the ocean common carriers or the marine terminal operators who charge per diem and storage charges, or the shippers and consignees who utilize containers of the ocean common carriers, or the motor carriers whose tractors pull the containers on chassis, it also impacts chassis lessors, who, for the most part, provide the chassis on which containers move on marine terminals between a container's point of rest and the gate, and then between the marine terminal's gate and the shipper's door.

Detention and demurrage charges and practices relating to containers, published in common carrier tariffs or agreed in service contracts, must be just and reasonable. The Interpretive Rule proposal recognizes that the issue of what is "just and reasonable" is not a legal question, it is a question of fact. Rules that attempt to delineate situations where conduct is "unjust" or "unreasonable," of consequence, clearly are dealing with generalities and not specific facts.

We have all seen the complaints about detention or demurrage charges. It is rare that a shipper or consignee claims that it did not exceed free time. Rather, the responses by cargo interests to detention or demurrage bills by carriers are, not in any particular order: weather conditions made pick up and return late; the terminal was congested; the motor carrier did not wait for the container to be unloaded, and came back after the free time expired; the ocean carrier went bankrupt; there was an insufficient supply of chassis; we were billed six months after the event; there is no written evidence of the dates equipment was interchanged between the ocean carrier and the motor carrier; it was the motor carrier's fault; responsibility is that of the shipper, or the consignee, or the origin agent or the destination agent. It becomes a blame game. The chassis lessors, in the meanwhile, have had their chassis tied up and unable to be used to move other containers.

Another issue is that the ocean common carrier tariffs require the charge of detention or demurrage if free time is exceeded. Failure of a carrier to collect its tariff charges could be viewed as a violation of the Shipping Act because the carrier is not collecting the charges in accordance with its tariff rules or service contracts. In short, a form of a rebate. What circumstances would allow a carrier to waive some or all of the charges required to be paid under applicable

rules? This isn't addressed in the Interpretive Rule. Would acting in accordance with a published tariff be presumptively lawful?

Still another issue is that bills of lading contain provisions such as the following:

> If Containers supplied by or on behalf of the Carrier are unpacked at the Merchant's premises, the Merchant is responsible for returning the empty Containers, with interiors brushed and clean, to the point or place designated by the Carrier, his servants or agents, within the time prescribed by the Carrier. Should a Container not be returned within the time so prescribed, the Merchant shall be liable for any detention, loss or expenses which may arise from such non-return.

The Commission should be aware that a carrier's Protection and Indemnity Insurance coverage is rated, in part, on the provisions of its bill of lading. When a carrier waives or deviates from those provisions, it could theoretically result in voiding the coverage. In addition, because ocean common carriers incorporate their bill of lading provisions into their published tariff rules, any non-adherence to the tariff could be a violation of the Act.

The one thing that is clear is that if there are delays in picking up or returning containers at origin or destination, depending on whether an import or export, chassis remain unavailable for the next load and there is a cost to the chassis lessors, or its lessees such as motor carriers, or the shippers or consignees, relating to the chassis.

Conclusion

In sum, for the reasons stated above, while the FMC is well-intentioned in trying to deal with issues relating to use of containers and issues of free time, detention and demurrage, in IICL Providers' view the Interpretive Rule presents more problems than it attempts to resolve because the problems at issue exist at many levels and across multiple jurisdictions.

IICL Providers believe the FMC's Mission "To ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices" offers general guidance to the Commission in crafting effective interpretive rules on container free time, demurrage and detention.

The ocean common carrier business is capital intensive. The industry has searched for ways to reduce its costs by transferring its costs to others. The

FMC permitted the ocean carriers to obtain antitrust immunity for companies they created to manage the chassis they owned or leased; they then sold most of their chassis to the IICL Providers. The chassis management LLCs are not ocean common carriers and they are not marine terminal operators. They are not within FMC jurisdiction and certainly not entitled to operate with antitrust immunity. The ocean common carriers not only sold their chassis; they found a way to continue to manage them. The Commission's first step should be to take away the CCM management and CCM pools' antitrust immunity.

Organizations engaged in chassis provisioning, truck transport of containers, harbor towing or crane and hostler rentals, to ocean carriers, marine terminals or any agreements under the Act to which carriers or marine terminal operators are parties, should not be subject to unfair and unreasonable transference of costs from the regulated entities. Elevated maintenance/repair costs, pool management fees, unreasonable and uncompensated repositioning demands, last minute redirection of chassis returns to another marine terminal, and the failure to provide adequate notice of equipment requirements in marine and rail terminals are some examples of cost transference opportunities. IICL Providers believe the FMC knows what problems have been created by these efforts and where the Commission has jurisdiction over regulated persons' activities, it should exercise it.

The proposed Interpretive Rule helps to bring into the bright sunlight the practices that generate the concerns of the cargo interests.

IICL Providers request that careful assessments be exercised by the FMC in the rulemaking process to avoid the creation of unintended consequences from a final rule that would adversely impact companies that provide services to, as well as those that receive services from, the FMC's regulated entities.

Thank you for your consideration.

Respectfully submitted,

HOPPEL, MAYER & COLEMAN

By Neal M. Mayer

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