

October 15, 2019

Federal Maritime Commission

Rachel Dickon

Commission Secretary

secretary@fmc.gov

Re: SUPPORT: Interpretive Rule on Detention and Demurrage under the Shipping Act

Honorable Commissioners:

On behalf of the intermodal and drayage carriers represented by the Harbor Trucking Association, we first wanted to thank the commission for taking time to take on this important issue. It has been a growing concern of the motor carrier community that the once well intended practice of using detention and demurrage to incentivize an expedient movement of cargo has now been abused through the use of unreasonable business practices to be used as a profit center. These unreasonable practices have forced motor carriers and their customers to pay hefty penalties and assume the costly administrative role in an unfair dispute resolution process. The leadership of the Federal Maritime Commission (FMC) on this important issue has been greatly appreciated by the motor carrier community, and we strongly urge you to move forward with adopting the interpretive rule to help end the current abuses that result from antiquated rules regarding detention and demurrage.

1. The proposed rule provides important guidance to the maritime industry regarding how the FMC will evaluate the reasonableness of port demurrage and container charges.

☐ There is a need for FMC guidance to address serious concerns over ocean carrier and marine terminal demurrage/detention charges as demonstrated in the Fact-Finding Investigation and the Petition filed by the Coalition for Fair Port Practices.

☐ The proposal identifies key principles and examples of reasonable practices that will be considered by the FMC in the context of a 10(d) claim as to demurrage/detention, while providing the necessary flexibility to account for differing factual circumstances (e.g. rule provides a non-exhaustive list of principles but is non-binding).

☐ The proposal will greatly benefit the US maritime industry by promoting efficient cargo handling and delivery, improving commercial fairness in the assessment of the charges, while also reducing confusion and disputes.

2. The Interpretive Rule seeks to align demurrage/detention rules and practices with their intended purpose of incentivizing efficient cargo handling and delivery.

☐ The Incentive Principle is supported by the law and Shipping Act policies.

☐ Support suspension of charges (or at least extension of free time) where efficiency incentives are not able to be achieved.

☐ Appropriate for cargo interests to fulfill their responsibilities to receive and pick up cargo but no need for advance payment of all charges where credit has been agreed to between shipper and ocean carrier. Also, pre-payment should not apply to disputed charges.

3. Comments on Specific Aspects of the Interpretive Rule

☐ Scope of the Rule: Rule broadly applies to all charges applied to use of marine terminal space or shipping containers, except freight, and to containerized trade only.

☐ Cargo Availability. Under the current rules and the Shipping Act, cargo is deemed available when it is unloaded from the vessel. However, in this case the cargo is never truly available until later. With

cargo being held for holds by customs, being inaccessible because the terminal has kept it in a “close area”, or, in the more modern terminal operations, the container not having an available appointment, cargo is rarely, if ever, available when the free-time clock starts. Knowing when cargo is actually available will help ensure that pickup is timely scheduled—reducing idle and wasted hours truckers spend waiting for containers to become available. Free time should be tied to actual cargo availability and not vessel arrival since you cannot incentivize efficient cargo pickup if the cargo may not yet be available (i.e. held in a closed yard or location at the terminal). Free time should be stopped if container is no longer available. Important to consider the workings of terminal appointment systems in evaluating reasonableness—should be some minimum period of appointment availability.

☐ FMC correctly determined that the manner in which notice of cargo availability is communicated is a critical aspect of reasonableness. Notice must be timely and readily accessible to the contracting party or its designee, must provide clear information as to when and where cargo may be retrieved, and “push notices” are favored.

☐ Government Inspections. Need input here as to which of the 3 offered approaches makes the most

sense: (1) waiver or extension of free time; (2) cap on the amount of charges that may accrue; or (3) no escalation of demurrage/detention during inspections. Option 1 seems the most commercially-oriented but understand that parties may see benefits in the other proposals.

☐ Dispute Resolution. FMC has properly identified the types of policies, rules and practices that would greatly improve dispute resolution processes. Defined time frames should apply to both filing and responding to claims must operate to facilitate resolution of disputes and not unreasonably cut off claims.

☐ Billing. Agree with FMC that demurrage/detention invoices must include adequate information to allow a shipper/trucker to bill, audit and contest the charges. Invoicing should be directly tied to contractual relationships rather than ownership or control of the assets, i.e. ocean carriers should continue to bill their customers directly, rather than terminals billing for demurrage. In turn, ocean carriers on carrier haulage should bill their shippers directly given motor carriers are not party to the contract. Demurrage and detention terms are negotiated in ocean service contracts and ownership of billing belongs to parties tied to the contract.

☐ Evidentiary guidance. Support FMC proposal encouraging the identification of information that can facilitate dispute resolution, such as appointment logs and trouble tickets.

☐ Terminology. Support FMC proposal for the use of more consistent demurrage and detention terminology in carrier and terminal tariffs, including that the most common understanding of these terms is based on the source of the charge (land for demurrage) and (container for detention) as opposed to the location (inside or outside the terminal).

4. FMC should proceed to adopt its proposed interpretive rule promptly.

Should you have any questions, the HTA is always available to answer or clarify any of our statements. Inquiries can be sent directly to me at weston@harbortrucker.com.

Respectfully,

David Cannillo

Vice President

MTI, Inc.