BEFORE THE
FEDERAL MARITIME COMMISSION

INTEPRETATIVE RULE ON DEMURRAGE AND DETENTION UNDER THE SHIPPING ACT	)	**DOCKET NO. 19-05**

COMMENTS OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

Pursuant to the notice published by the Federal Maritime Commission ("FMC" or "Commission") in the *Federal Register* (84 *Fed. Reg.* 48850, September 17, 2019), the National Association of Waterfront Employers ("NAWE") hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.

I.

Interest of NAWE

Many of the members of NAWE are marine terminal operators ("MTOs"). As such, they would be directly and substantially affected by the NRPM, primarily as it relates to demurrage.

II.

Background and Summary of NAWE's Position

The process which led to the NPRM began with the filing of a petition for a rulemaking filed by the Coalition for Fair Port Practices. The Commission invited comments on the petition, and held two days of hearings on the petition, with widespread participation by various stakeholders. The Commission then initiated Fact Finding Investigation No. 28, and obtained extensive input from ocean common

carriers, marine terminal operators, shippers, truckers, and others. Following the final report in the Fact Finding Investigation, the Commission extended the proceeding to allow two innovation teams to further discuss and analyze the issues identified in the Fact Finding Investigation. At the conclusion of the foregoing process, the NPRM was issued.

The Commission is to be commended for the time and effort it has put into obtaining information and analyzing the complex issues of demurrage and detention. Any action on this issue would have widespread ramifications for all stakeholders, and thus a deliberate and thoughtful approach is required. NAWE applauds the Commission for the approach it has taken, and appreciates the opportunities that it and its members have had to participate in all stages of the process.

NAWE believes that the Commission's efforts in this area have already borne fruit. The issues of demurrage and detention are in the forefront of the industry consciousness. Industry groups such as OCEMA have adopted recommended best practices based on the Commission's work, and individual industry actors have begun to review and revise their own regulations and practices to address many of the concerns that would be addressed by the NPRM.

In light of the pro-active approach being taken by the industry to adopt commercial solutions tailored to specific circumstances, NAWE believes the NPRM would have the undesired effect of introducing unnecessary government regulation into a situation that is being resolve through the commercial efforts of stakeholders.

Moreover, aside from the desirability of any regulation, NAWE opposes the NPRM on both legal and practical grounds, and urges the Commission not to adopt

the NPRM. The NPRM violates the Administrative Procedure Act and an Executive Order on agency rulemaking. It is beyond the scope of the FMC's authority. The NPRM also establishes unrealistic standards with respect to subjects it addresses, fails to address other subjects, and is likely to create additional confusion, disputes, costs, and inefficiencies. As such, it is inconsistent with the purposes of the U.S. Shipping Act of 1984, as amended.

III.

Comments In Opposition To The Proposed Rule – Legal Objections

NAWE's comments first address its general legal objections to NPRM, then the practical concerns with specific provisions of the NPRM.

A. The Commission Lacks The Authority To Adopt The NPRM

Because the NPRM would have the effect of specifying those regulations and practices which are reasonable and those which are not[1], it is beyond the scope of the Commission's authority under the Shipping Act and would be unlawful.

Prior to 1984, the statutory provision governing the reasonableness of regulations and practices was Section 17 of the Shipping Act, 1916 (46 U.S.C. §816), which read:

> Every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced a just and reasonable regulation or practice.

[1] See section III.C of these comments, *infra*.

(emphasis added). The foregoing is the predecessor of current 46 U.S.C. §41102(c)(formerly section 10(d)(1)), which reads:

> A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Thus, prior to 1984 the FMC had the authority to prescribe just and reasonable regulations and practices. However, when Congress replaced the Shipping Act, 1916 with the Shipping Act of 1984, it eliminated the Commission's authority to determine, prescribe and order enforcement of a just and reasonable regulation or practice. This means the FMC can determine in an adjudicatory proceeding when a regulation or practice is unreasonable, but lacks the authority to prescribe just and reasonable practices.

The NPRM would exercise precisely that authority which Congress removed from the statute: to prescribe a just and reasonable regulation or practice. The NPRM would place terminal operators at legal risk if they do not adopt the free time policies and procedures described in the NPRM as "more likely" to be found reasonable. Thus, the proposed rule prescribes a specific regulation or practice, and is beyond the authority of the Commission.

B. The NPRM Violates The Administrative Procedure Act ("APA")

The NPRM fails to acknowledge that it makes significant changes to existing law, and fails to set forth any rationale for those changes. It also has the effect of shifting the burden of proof in adjudicatory proceedings. As a result, the NPRM violates the APA.

The APA requires an agency to provide a reasoned analysis indicating that prior policies and standards are being changed deliberately, rather than ignored. The U.S. Court of Appeals for the D.C. Circuit has described this requirement:

> Under the Administrative Procedure Act (APA), a court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our review under the APA is highly deferential, but agency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970); see also *Philadelphia Gas Works v. FERC*, 300 U.S. App. D.C. 374, 989 F.2d 1246, 1250-51 (D.C. Cir. 1993). An agency's failure to come to grips with conflicting precedent constitutes "an inexcusable departure from the essential requirement of reasoned decision making." *Columbia Broad. Sys. v. FCC*, 147 U.S. App. D.C. 175, 454 F.2d 1018, 1027 (D.C. Cir. 1971).

Ramaprakash v. FAA, 346 F3d. 1121, 1124,1125 (D.C. Cir. 2003)(emphasis added). The NPRM makes no effort to address conflicting precedent including the Commission's decisions in *Free Time and Demurrage Charges – New York,* 3 FMC 89 (1948)(holding that it is reasonable under the Shipping Act to count Customs delays towards free time and that it is reasonable for carriers to charge compensatory element of demurrage when cargo is unavailable beyond control of either party); *Boston Shipping Assoc. v. Port of Boston Marine Terminal,* 10 FMC 409 (1967)(reasonable for carrier to assess demurrage against cargo that exceeded free time at time strike begins); and *Truck and Lighter Unloading Practices at New York Harbor,* 12 FMC 166 (1969) (terminal operators responsible only for delays within their

control).[2] The failure to acknowledge the change to existing law and provide a reasoned explanation for the change makes the NPRM arbitrary and capricious and contrary to the APA.

Adoption of the NPRM would also violate the APA in another respect. In any proceeding under Shipping Act, the burden of proof is on the proponent. 5 U.S.C. §556(d); 46 C.F.R. §502.155 ("In all cases, as prescribed by the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof shall be on the proponent of the rule or order."). Here, the NPRM would have the effect of shifting the burden of proof from a complaining shipper, receiver or motor carrier to the marine terminal operator, which would be required to overcome the presumption of unreasonableness effectively established by the NPRM and demonstrate the reasonableness of assessing the charge in that situation. Such a shifting of the burden of proof requires an act of Congress. *West Gulf Maritime Association v. Port of Houston Authority of the Port of Houston, TX*, 21 F.M.C. 244, 247 (1978)("The burden of proof in adjudicative proceedings is upon the party proposing the rule or order, unless otherwise provided by statute"), affirmed 610 F.2d 1001 (D.C. Cir. 1979). Accordingly, the NRPM violates the APA.

C. The NPRM Violates Executive Order 12866

By specifying the behavior or manner of compliance that regulated entities should adopt rather than performance objectives, the NPRM violates Executive Order 12866.

[2] In addition to the APA issue presented by the Commission's failure to explain its departure from existing precedent, the NPRM raises additional legal issues in that it seeks to change binding precedent through a non-binding, interpretative rule.

Executive Order 12866 was issued on September 30, 1993 for the purpose of reforming and making the regulatory process more efficient. Section 1 of the Executive Order sets forth a regulatory philosophy and principles to be followed by federal agencies in promulgating regulations. Among these principles is:

> (8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

Executive Order 12866, September 30, 1993, Section 1(b)(8)(emphasis added).

Although the NPRM is careful to state that it is "guidance" and an "interpretative rule," it is well accepted that non-binding guidance often has a "practical binding effect" on regulated parties. See, e.g., *Pacific Gas & Elec. Co. v. Federal Power Comm'n,* 506 F.2d 33 (D.C. Cir. 1974) (guidance creates "binding norms"); see also *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986); *Bellarno Int'l v. Food & Drug Admin.*, 678 F. Supp. 410 (E.D.N.Y. 1988).

There is no question that if adopted the NPRM would change the behavior of terminal operators concerned about the liability they might incur if their individual regulations and practices were to be deemed "unreasonable." Likewise, there is no doubt that cargo interests and truckers would point to the interpretative rule as a basis for alleging that certain conduct is "unreasonable," and the FMC staff and administrative law judges would similarly be guided by the rule. As a result, the NPRM would have the practical effect of requiring marine terminal operators to conform their conduct to the standards described therein, which are quite detailed with respect to the behavior that is likely to be considered unreasonable. Thus, the

effect of the NPRM is to require regulated entities to engage in specific behavior, contrary to Executive Order 12866, which calls for agencies to adopt performance objectives rather than specific behaviors or manners of compliance.

D. The NPRM Is Inconsistent With The Shipping Act

The NPRM would require wholesale changes in the way ocean carriers and marine terminal operators do business, and would apply at all marine terminals nationwide. As such, it is unnecessarily broad and inconsistent with the Shipping Act.

The NPRM contemplates a supply chain in which terminal operators provide push notifications of cargo availability to consignees and pro-active updates of any change in cargo status, and in which free time starts based on actual cargo availability and is extended automatically whenever cargo becomes unavailable for any reason at all. Many terminal operators do not presently have the capability to provide push notifications of availability and changes in cargo status. Moreover, no terminal operator presently has the ability to start the free time clock at a different time for each of the hundreds or even thousands of containers that might be unloaded from a given vessel. Free time typically begins at a fixed time following the completion of vessel discharge to avoid the administrative burden of starting the clock at a different time for each container discharged from a vessel.

The NPRM overlooks the enormous administrative costs and difficulties that would be required to adhere to its definition of "reasonable" conduct and attempts to bring into existence via legislative fiat a futuristic cargo supply chain on the backs of the marine terminal operators with no regard whatsoever for the actual need for the

capabilities it requires, or the cost/burden involved in developing those capabilities. The costs and burdens would be exacerbated by the fact that these standards would apply at all U.S. ports and marine terminals, so that even the smallest terminal operator that experiences few or no issues with demurrage could be found to be acting "unreasonably" if it has not put into place the elaborate systems contemplated by the NPRM.

The stated purpose of the Shipping Act is to establish a non-discriminatory regulatory process with minimum of government intervention and regulatory costs. 46 U.S.C. §40101(1). The NPRM represents extreme government intrusion in the market and would impose significant regulatory costs on marine terminal operators, who would need to upgrade or develop systems with the capabilities required by the NPRM. The NPRM is also likely to result in an increase in demurrage and detention-related litigation before the FMC, thereby further increasing government intervention and regulatory costs.

The NPRM cannot be characterized as non-discriminatory. Indeed, if adopted it would discriminate against marine terminal operators and ocean carriers by arbitrarily, and contrary to existing law, placing all risk of delays due to force majeure-type circumstances on the marine terminal operator or carrier rather than permitting some of that risk to be assigned to the shipper, receiver, or motor carrier. An agency regulation which would assign all risk of a force majeure-type event impacting a shipper to a marine terminal operator that is ready, willing and able to perform cannot be considered "non-discriminatory."

In light of the foregoing, the NPRM is inconsistent with the purpose of the Shipping Act.

IV.

Comments In Opposition To The Proposed Rule – Specific Provisions

In addition to the foregoing legal objections to the NRPM, NAWE also has specific, practical concerns with respect to most provisions of the NPRM. These are set forth below.

A. The NPRM's Exclusive Focus On The "Incentive Principle" Is Contrary To Existing Law, And Is Unfair And Unworkable

By focusing exclusively on the "incentive principle," the NPRM produces results that are inconsistent with existing law and that are unfair and unworkable.

The NPRM is based on the premise that the purpose of demurrage and detention charges is to incentivize the prompt pick-up of cargo and the prompt return of equipment. While these incentives are in fact one purpose of such charges, they are not the only purpose. By ignoring the other legitimate purpose of such charges, the NPRM produces guidance that is inconsistent with existing law.

A second lawful purpose of demurrage charges is to compensate the terminal operator for the use of terminal space. The Commission has long recognized that there is a compensatory element to such charges. 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)(carriers legally bound to impose compensatory demurrage charges after expiration of free time). However, the NPRM does not acknowledge that such charges serve a compensatory

function.[3] As a result, the NPRM is fatally flawed because the sole criteria it uses to gauge reasonableness is the incentive principle.

Moreover, by focusing solely on the incentive principle, the NPRM creates the presumption that terminals and carriers are acting unreasonably when they recover costs associated with the failure to promptly pick up cargo or return equipment due to circumstances beyond the control of the cargo interest. This means that the NPRM is a government mandate that effectively prohibits private parties from negotiating over how the risk of events beyond the control of either party (and some that are within the control of the cargo interest) are to be allocated between them, and which shifts all demurrage/detention costs resulting from events beyond the control of the terminal operator and/or carrier to those parties. By focusing solely on the "incentive principle," the NPRM would legally mandate that all risk of demurrage/detention costs in force majeure-type situations be placed on terminals and carriers. If the cargo interest knows that its free time will be extended because of terminal closure due to a force majeure-type situation, the cargo interest is not incentivized to retrieve its cargo before the event. This result is exactly contrary to the incentive principle. If the risk of such events is shifted to the terminals, freight fluidity is not necessarily incentivized.

This approach is inconsistent with the very "incentive principle" that the NPRM relies on for justification of not charging the cargo interest demurrage when charges result from events beyond the control of the shipper or consignee. Since a marine terminal operator cannot prevent events beyond its control, shifting the burden of

[3] As a result, the NPRM once again violates the APA by failing to acknowledge and explain the change it makes to existing law.

costs to the marine terminal operator in those scenarios does not further the "incentive principle."

The application of the "incentive principle" would also have the effect of prohibiting contractual arrangements that grant cargo interests additional free time, since there is a point at which additional free time violates the incentive principle.[4]

The contractual relationship is between the marine terminal operator and the carrier. Often, these contracts are for several years, and the parties have negotiated the allocation of risk. These contracts do not take into account the material changes in the allocation of risk in the NPRM. There is no justification for the NPRM's drastic interference with the rights of private parties to contact on whatever terms they wish, or the risk and cost-shifting that will be produced by the NPRM.

B. The NPRM's "Guidance" With Respect To Cargo Availability And Notice Of Same Are Impractical And Unworkable

The conduct the NPRM would require of marine terminal operators with respect to the availability of cargo and notice of same in order to have their conduct considered "reasonable" is in many cases impractical and unworkable.

The NPRM ties the reasonableness of free time and demurrage practices to the actual availability of cargo, specifying that the start of free time should correspond to actual container availability as opposed to container discharges from a vessel, and stopping a demurrage or free time clock when a container becomes unavailable.

[4] There is support for the position that excessive free time is unreasonable and contrary to the Shipping Act. See, *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525 (FMC 1966)(excessive free time found to be unreasonable practice in violation of Shipping Act). If an interpretative rule is adopted, it should include this principle.

Vessels often discharge hundreds or even of thousands of containers each time they call a marine terminal. Free time typically starts at a point in time after the vessel has completed discharge, or after the container has been discharged from the vessel, thereby placing all or most containers discharged from that vessel on the same free time clock. The NPRM would greatly complicate administration of free time by requiring that the clock start not at some uniform point in time, but at a different time when each container becomes "available." This creates an unreasonable and unworkable burden on the terminal operator.

As if the burden of starting free time at a different time for each container were not enough, the NPRM goes further and requires that the free time clock be stopped and restarted each time the container becomes unavailable. This "guidance" not only multiplies the administrative burden on the terminal operator, but is so unclear that it is likely to lead to numerous disputes over whether a particular event warranted stoppage of the free time clock.

For example, what if a container on the terminal begins leaking fluid? The terminal operator may need to shut all or a portion of the terminal so that a response team can ascertain the nature of the leaking substance and clean up the spill. The length and extent of the shutdown will depend on numerous factors, such as the size and configuration of the terminal, the extent of the spill, the nature of the leaking substance, the speed of the response, and others. When is the closure of sufficient extent and duration to warrant additional free time? Why should the terminal bear the expense of a leak caused by poor stuffing of the container? Does a container that

has already exhausted its free time get additional free time in this scenario?[5] And how much additional free time should a container receive? The NPRM provides no guidance on these very real issues, which can and will be presented in a variety of scenarios (e.g., temporary and/or partial terminal closure due to weather, labor action, traffic, problems with the terminal operating system, etc.). Instead, it imposes significant new burdens on marine terminal operators and creates the potential for significant amounts of litigation over these issues.

The NPRM suffers from similar flaws with respect to the requirements it imposes on marine terminal operators with respect to notice of cargo availability. Marine terminals generally do not have a direct contractual relationship with cargo interests. Yet, because the terminal operator is the only party in the supply chain that will have the up-to-the-minute information about the availability of a container required by the NPRM, the provision of the real-time status notifications envisioned by the NPRM will require substantial alterations to the existing carrier-terminal relationship and substantial investments in computer systems.

More specifically, either carriers will need to provide more detailed consignee contact information to the terminals or marine terminal operators will be required to provide up-to-the-minute updates on container availability to the ocean carrier for

[5] In its *Boston Shipping Association* decision, *supra.,* the FMC properly recognized that it is reasonable to place the risk of any disability that arises after free time has ended upon the consignee. That risk forms part of the incentive for the consignee to ensure that the cargo is picked up during free time. However, under the NPRM, that incentive is apparently eliminated because it would not be consistent with the "incentive principle" to assess demurrage charges during a disability that commences after free time has ended. This is an absurd result which eliminates the existing incentive for the consignee and creates no incentive for the marine terminal operator or carriers, which have already fulfilled their obligations by making the cargo available during free time.

forwarding to the cargo interest. In either case: (i) substantial investment will be required to develop and maintain systems capable of handling the data and notifications; (ii) there will be considerable cost and it will take significant time for the terminal operator to input the status changes; and (iii) existing terminal services arrangements will need to be amended to address the obligations of each of the parties with respect to transmitting and safeguarding the data, and providing the requisite notices. All of the foregoing represents a very real and substantial cost to the marine terminal operator and/or ocean carrier. However, the NPRM fails to take into account any of the burdens it will create.

C. The NRPM Should Maintain The Status Quo With Respect to Demurrage Charges Arising From Government Inspections

The Commission should maintain the status quo with respect to government inspections of cargo and not adopt any of the three proposals contained in the NPRM.

The FMC's current rule on demurrage charges during delays resulting from government inspections is that carriers and terminals are not required to extend free time based on delays in the availability of cargo resulting from government inspections. *Free Time and Demurrage Charges – New York*, 3 FMC 89 (1948). The Commission should maintain that rule.

As between the ocean carrier and marine terminal operator on the one hand and the cargo interest on the other hand, any risks associated with cargo inspection are most appropriately assigned to the cargo interest, which is the party responsible for clearing the cargo. The Commission recognized this in *Free Time and Demurrage Charges – New York*. This is the most reasonable assignment of risk, and incentivizes

the cargo interest to have its paperwork in order. Given that this is the existing law, there is no need to adopt any of the proposals contained in the NPRM.

To the extent the proposals in the NPRM would require that the terminal operator and/or carrier extend free time or waive or cap demurrage in the event of government inspections, they unlawfully shift the risk of government inspection from the cargo interest to the terminal operator and/or carrier. As noted above, the purpose of demurrage charges extends beyond the "incentive principle" and includes compensation for terminal storage. Government inspections are a part of the import process, and one over which the terminal operator and carrier have no control. If there are delays or problems obtaining inspections, cargo interests should be lobbying the relevant inspection agencies to improve their operations, not pressuring the FMC to shift the demurrage costs to terminal operators.

In light of the foregoing, none of the NPRM's proposals with respect to government inspections should be adopted.

D. NAWE Is Concerned With The Guidance On Demurrage Policies

NAWE is concerned with certain aspects of the "guidance" on demurrage policies, at is appears there is tension between the NPRM and the existing law governing marine terminal operator schedules.

Section 40501(f) of the Shipping Act states:

> A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

The Commission has adopted certain regulations governing marine terminal operator schedules, which are set forth in Part 525 of the Commission's regulations. These regulations set forth general requirements regarding the availability and accessibility of marine terminal operator schedules.

However, the NPRM's suggestion that practices and policies be "available in one, easily accessible website" rather than buried "in scattered sections of tariffs" appears to go beyond the statute and existing regulations. The regulations are very specific as to how a marine terminal operators schedules are published to the public to constitute notice. If a marine terminal operation is following the regulations as they relate to notice, then the schedule is the appropriate place for these policies. To the extent the NPRM purports to add any requirements beyond those set forth in the statute and Part 525 of the regulations, such requirements would be unlawful.

Congress has expressly stated that a marine terminal operator schedule is enforceable as a contract without proof of actual knowledge of its provisions.[6] The Commission cannot alter that statutory provision by suggesting that a schedule which is insufficiently "accessible" is unenforceable by virtue of being "unreasonable." If the Commission wishes to amend its regulations governing marine terminal operator schedules, it needs to do so through a rulemaking proceeding which specifically deals with those regulations rather than through the NPRM.

[6] Similarly, a shipper is conclusively presumed to have knowledge of the provisions of a carrier's tariff. See, *Kraft Foods v. Moore McCormack Lines,* 17 FMC 320, 323, n.4 (1974), *citing Kansas City Southern Ry. Co. v. Carl,* 227 U.S. 639 (1913).

E. NAWE Objects To One Aspect Of The Guidance On Transparent Terminology

The principle that the definition of terms used in demurrage practices and regulations should be clear obviously is unobjectionable. However, the NPRM suggests that there will be a subjective element in determining the transparency of such definitions, to which NAWE objects.

More specifically, the NPRM indicates that the clarity of definitions will be assessed in part based in part on how the terms have been used by the regulated entity in the past, how the terms are used elsewhere in the port at issue, and how the terms are used elsewhere in the U.S. trade. This approach represents a morass that should be avoided.

Marine terminal operator schedules are the equivalent of carrier tariffs. MTO schedules and carrier tariffs are subject to the same rules of interpretation as other documents. *Himala International v. Fern Line*, 3 FMC 53, 53 (1948). The first and foremost rule of interpretation is that if the document is clear on its face, there is no need to look beyond the text itself. See, e.g., *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)(when statute is unambiguous, judicial inquiry is complete). Therefore, there is no need to introduce comparisons to past definitions used by the terminal operator in question, or those of other entities, to determine if those definitions are clear.

Indeed, the NPRM's statement to this effect creates a chilling effect when it comes to improvements in terminology. If a terminal operator decides that its definition or use of a term can and should be revised to provide greater clarity to

affected stakeholders, it may be reluctant to do so on the grounds that a change from past terminology would be interpreted as reducing rather than improving clarity.

Perhaps more importantly, the manner in which other operators define or use terms and/or the way terms are used in other ports should not be a factor in whether a particular terminal's regulations and policies are sufficiently clear. Terminals and ports differ in configuration, operations, and other factors. They may also adopt different regulations and practices as a means of competitive differentiation. Thus, there are legitimate transportation reasons for terminology to vary as between ports and terminals. The Commission should not require slavish uniformity in the way terminal operators set forth their regulations and practices.

The Commission frequently uses distinctions between competitors as barometer for the degree of competition between those entities. The NPRM appears to say that the Commission prefers uniformity over competition. NAWE is concerned that a need to have consistent if not uniform definitions in terminology will result in terminal operators copying one another, with definitions evolving to the point of uniformity over time. This in turn creates the risk that the Department of Justice and/or private plaintiffs could accuse terminal operators of unlawful concerted in action in the establishment of demurrage policies. This significant legal risk would result from the NPRM's use of comparisons to assess the "transparency" of a terminal operators policies and regulations.

In addition, the Commission should focus on the clarity of each regulated entity's schedule or tariff without requiring the use of specific terms. The NPRM suggests that the use of terms such as "storage" and "per diem" add unnecessary

complexity. However, the use of one term rather than another to describe a charge imposed for a particular cost or service is not inherently complex or confusing, provided the terms are defined clearly. For example, if a marine terminal operator calls the charge it imposes for storing containers on its premises a "Loaded Container Storage Charge," how is this less clear than calling the charge "demurrage," a term that has other meanings in the maritime context? Regulated entities should be able to use any terms they wish, provided they are used clearly.

In light of the foregoing, the Commission should assess the "transparency" of each marine terminal operators demurrage policies and regulations on the face of those policies and regulations, and not compare the terminology used to past terminology or to the policies and regulations of other terminal operators in the same or other ports.

F. The Commission Should Not Require Marine Terminal Operators To Bill Cargo Interests Directly

The proposal that terminal operators bill the cargo interest directly for use of terminal land is not practical and should not be adopted. The terminal's contractual relationship is with the ocean carrier. The ocean carrier has the contractual relationship with the cargo interest. If the terminal is required to bill storage charges to the cargo interest with which it has no contractual relationship at present, this will either require the creation of thousands of new contractual relationships between terminal operators and cargo interests (something the cargo interests have resisted in other contexts) or it will require the terminal to hold containers until paid, thereby negatively impacting freight fluidity. There is no need or justification for such extensive, government-mandated change to existing contractual relationships.

V.

Conclusion

For the reasons set forth above, the NPRM should not be adopted.

Respectfully submitted,

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

By: _____
John E. Crowley, Jr.
President

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