BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 19-05

INTERPRETIVE RULE ON DEMURRAGE AND DETENTION UNDER THE SHIPPING ACT

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Association"), submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in this docket on September 13, 2019 (84 Fed. Reg. 50369-50370), which proposes to issue an interpretive rule pertaining to what would be considered an unjust or unreasonable practice by ocean common carriers ("VOCC" or "carrier") and marine terminal operators ("MTO") when assessing demurrage or detention.

The NCBFAA, together with its over 1,000 members and 28 regional associations, is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. The NCBFAA's members are involved in the transportation and/or logistical arrangements for approximately 90% of the cargo that moves into and out of the United States by ocean. As virtually all of the NCBFAA's members operate as NVOCCs and/or ocean forwarders, they are directly affected by the demurrage and detention practices of the various VOCCs and MTOs. And, as NVOCCs are the shippers in their relationship with VOCCs, they receive the demurrage and detention bills and are accordingly directly and significantly affected by the current unfair situation pertaining to how these charges are assessed.

The NCBFAA was a member of a coalition that filed a petition with the Federal Maritime Commission ("FMC" or "Commission") requesting that the Commission clarify what constitutes

"just and reasonable practices" with respect to the assessment of demurrage and detention ("D/D") when ports are congested or otherwise inaccessible. *See* P4-16, *Petition for Rulemaking* (filed on December 7, 2016). The NCBFAA was concerned then, as it is now, that current D/D practices for cargo that is not readily available do not meet their intended purpose of encouraging the efficient movement of containers and have instead largely become a revenue stream for OCCs and MTOs. The NCBFAA generally supports the proposed rule as written and believes that the proposed interpretive rule will help "promote fluidity in the U.S. freight delivery system." Docket No. 19-05, *Interpretive Rule on Demurrage and Detention under the Shipping Act*, at 3 (served on Sept. 13, 2019). Moreover, the proposal will inject a badly needed note of fairness into what is now largely an arbitrary system of collecting money merely because VOCCs and MOTs are able to unilaterally publish tariffs without considering their actual revenue needs or the fairness of the practice. The NCBFAA appreciates the Commission's willingness to recognize that current industry detention and demurrage practices need improvement, but also respectfully suggests a few modifications of the proposal.

I. SUMMARY OF FACT-FINDING INVESTIGATION NO. 28

This NPRM arises from the Commissions Fact Finding Investigation No. 28 ("FF28"). FF28 was in response to a petition filed by the Coalition for Fair Port Practices on December 7, 2016.[1] In that petition, a group of 26 trade associations requested that the FMC initiate a rulemaking proceeding for the purposes of clarifying what constitutes "just and reasonable rules and practices" with respect to the assessment of demurrage, detention, and per diem charges by vessel operating common carriers (VOCC) and MTOs.

[1] P4-16, *Petition of the Coalition for Fair Port Practices for Rulemaking*.

After holding two days of public hearings and reviewing over 110 comments[2], on March 5, 2018, the Commission issued an order of investigation and designated Commissioner Dye as the Fact-Finding Officer.[3] Commissioner Dye began an investigation into the current conditions and practices of VOCCs and MTOs, and U.S demurrage, detention, and per diem charges. On September 4, 2018, Commissioner Dye issued her interim report. In that report, Commissioner Dye found that the resulting record strongly suggested that the industry's D/D practices needed improvement.[4] Through the course of her investigation, Commissioner Dye found that in general free time began to run either when the cargo was off-loaded from the vessel or when a container was moved to the terminal yard.[5] Free time was not tied to actual container availability and as a result so that, cargo interests were not able to properly utilize the contractual free time. Consequently, as cargo interests were often unable to access their cargo, the incentivizing purpose of D/D was not met. FF28 determined that a focus on actual cargo availability would help address many of the demurrage concerns that arise.[6]

FF28 also found, that there was a lack of uniformity and transparency in D/D policies, billing practices, use of terminology and dispute resolution procedures.[7] Moreover, due to the lack of dispute resolution procedures, there was no clear policy that a cargo interest could follow in the event of a D/D dispute and that resolving a dispute varied on an arbitrary case-by-case basis.[8] FF28 determined that this lack of uniformity and transparency only served to cause confusion and that the establishment of clear procedures was needed.[9]

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[2] Fact Finding 28, Interim Report at 2 (Sept. 4, 2018).

[3] Fact Finding 28, Order of Investigation (March 5, 2018).

[4] Interim Report at 2-3, 18 (Sept. 4, 2018).

[5] Fact Finding 28, Final Report at 28 (Dec. 3, 2018).

[6] Final Report at 28.

[7] Final Report at 29-30; Interim Report at 10-11, 13-14.

[8] Interim Report at 14.

[9] Final Report at 29.

Accordingly, the findings in FF28 determined that the shipping industry would benefit from: (1) "Transparent, standardized language for demurrage and detention practices;" (2) "Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;" (3) "Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;" and (4) "Consistent notice to cargo interests of container availability."[10]

II. THE NCBFAA SUPPORTS THE COMMISSION'S PROPOSED INTERPRETIVE RULE REGARDING DEMURRAGE AND DETENTION UNDER THE SHIPPING ACT

The NCBFAA agrees that the proposed rule will provide much needed guidance and clarity to the Shipping Industry on what constitutes unjust and unreasonable D/D practices and regulations. In this NPRM, the Commission is proposing an interpretive rule that would provide guidance to the Shipping industry as to what factors it will consider when determining whether a demurrage or detention practice is unjust or unreasonable. The proposal seeks to provide clarity and guidance regarding: (1) financial incentives with respect to cargo availability, empty container return, notice of availability, and government inspections; (2) D/D policies; and (3) establishing transparent and consistent terminology.

III. THE PURPOSE OF DEMURRAGE AND DETENTION IS TO INCENTIVIZE THE TIMELY PICKUP/RELEASE OF CONTAINERS

Section 10(d)(1) of the Shipping Act, recodified as §41102(c), was promulgated to protect the "flow of commerce."[11] Under §41102(c), no regulated entity "may fail to establish, observe, and enforce just and reasonable regulations relating to or connected with the receiving, handling, storing or delivery of property." The Commission has long held that § 41102(c) requires terminal practices,

[10] Final Report at 2.

[11] *See* Commissioner Khouri Dissent in *Kobel v. Hapag-Lloyd,* A.G. 32 S.R.R. 1720, 1747 (FMC 2013).

like demurrage and detention, to "be fit and appropriate to the end in view." *Investigation of Free Time Practices-Porto/San Diego,* 9 F.M.C. 525, 547 (1966).

The primary goal of D/D is to incentivize the removal of cargo in an efficient manner. In FF28, Commissioner Dye found that if cargo interest is unable to pick up its cargo within the free time, then demurrage cannot serve its incentive purpose.[12] To that end, the NPRM clarifies that the Commission will consider the relationship between demurrage and cargo availability in its 46 U.S.C. 41102(c) analysis. The Commission has proposed that the more tailored a demurrage practice is linked to cargo availability the less likely the practice will be found unreasonable. The NCBFAA agrees and urges that the proposed rule be adopted.

A. Cargo Must Actually Be Available for Free Time to Run

Under a contract of carriage, a carrier's obligation to tender cargo requires more than depositing cargo on a pier or yard. A beneficial cargo owner ("BCO") or non-vessel operating common carrier ("NVOCC") (collectively "cargo interest") must be afforded a reasonable opportunity to pick up cargo within the provided free time.[13] Free time is not a gratuity, rather, it is a part of a carrier's transportation obligations under the contract. Accordingly, tendering cargo and the assessment of demurrage are interrelated because unless the cargo is actually tendered, it would be an unreasonable practice to charge demurrage.[14] Currently, as indicated in FF28, free time generally begins to run when cargo is off-loaded from a vessel or when the container is moved to the terminal

[12] Final Report at 28.

[13] A carrier tenders' cargo for delivery when it unloads the cargo, makes it accessible to the consignee, and affords the consignee a reasonable opportunity to remove it. *The Eddy*, 72 U.S. 481, 495 (1866); *Am. President Lines, Ltd. v. Fed. Mar. Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962).

[14] *Free Time and Demurrage-New York Harbor* (*NY II*), 9 Shipping Reg. (P&F) 860, 873-874 (F.M.C. Dec. 7, 1967) (noting that tendering cargo for delivery is an obligation "for the performance of which [a carrier] may collect no greater compensation than that required by [its] contract of carriage" and carriers have an obligation to tender for delivery free of assessments); *see NY I*, 3 U.S.M.C. at 101 (stating that free time "is an obligation which the carrier is bound to discharge as part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties.").

yard. In some instances, free time begins when the vessel arrives at the port. But in neither of these cases is he cargo "available" to be picked up.

The NCBFAA agrees with the NPRM that if a container is unavailable for pickup or delivery, or the container cannot be returned, a cargo interest should not be assessed demurrage or detention, nor should free time commence.[15] The NCBFAA also agrees that cargo availability should turn on whether the cargo is "actually available" and should be something more than depositing the cargo at the pier. To that end, in order to be available the cargo must be (1) off the vessel; (2) assigned to a spot on the terminal; (3) in an open area; (4) an appointment is available; (5) a chassis is available; and, (6) there are no government holds on the cargo. The commencement of free time prior to these six factors being met would be an unreasonable practice, as the cargo has not actually been tendered, is not accessible to the cargo interest, and there can be no flow of commerce.

B. For Export of Cargo and Return of Containers, Carriers and MTOs Should Not Assess Demurrage and Detention for Cargo/Containers When They Have Been Constructively Placed

With respect to the return of empty equipment and the export of goods, it has become common practice that when cargo is rolled or a terminal does not accept the return of equipment, D/D is nonetheless assessed against the cargo interest due to the delay in loading or receiving the container. But the practice of rolling cargo and not accepting equipment is not attributable to any action of the NVOCCs or BCOs and are not controllable by them. To the contrary, these are action solely attributable to the ports and VOCCs. This past year has been especially difficult for empty container returns following the 2018 prolonged peak season.[16] Truckers went for several days or weeks trying to return a large number of containers to west coast terminals but were unable to do so due to closed

[15] Docket No. 19-05, *Comments of John S. Connor, Inc.* (filed on October 30, 2019) (Here, a shipper had containers at the terminal and many more arriving weekly during and after Hurricane Harvey hit Houston in August of 2017. Free time was not extended despite a chassis shortage and sufficient access to the containers was not available. This resulted in the shipper being unable to pick up the containers for several weeks and paying over $100,000 in demurrage charges.).

[16] Docket No. 19-05, *Comments of Richard J. Roche, Mohawk Global Logistics* (filed on Oct. 31, 2019).

terminals or restrictions to dual moves only. When terminals refuse to accept the return of equipment, the trucker is stuck holding the container, while chassis and storage yard charges continuer to accrue daily. As such, no amount of D/D assessed against NVOCCs or other cargo interests in these circumstances will incentivize any action by the NVOCC or BCO.

The NCBFAA accordingly agrees that assessing D/D against cargo interests when a terminal refuses to accept the return of empty equipment should be considered an unreasonable practice. However, the final rule should make it clear that the detention clock should cease running once a container is either actually or constructively delivered back to an appropriate container yard ("CY"). By use of the term "constructive delivery," the Association means that the container either has been or could be delivered back to the port, VOCC or CY but for the recipient's inability or unwillingness to receive the asset.

Parenthetically, although the term is not widely used in a maritime context, constructive delivery in the railroad industry has long been recognized as equitably tolling and satisfying delivery obligations when either the carrier or shipper cannot actually deliver a car to the other due to the other party's inability to accept it. *See Capitol Materials Inc.—Pet. for Dec. Order*, STB Docket No. 42068 (STB served April 12, 2004). The Surface Transportation Board, and the Interstate Commerce Commission before it, has found that cars were constructively placed or delivered, thus stopping demurrage or detention assessment, when the other party does not have the physical capacity to accept the cars. *See Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc.*, FD 34920, slip op. at 3 n.6 (STB served May 30, 2008). The final rule should be expanded to reflect this principle.

C. <u>There Should Be No Assessment of Penalty Demurrage or Detention When the Penalty Cannot Incentivize Action</u>

The assessment of any D/D where a cargo interest is unable to pick up cargo operates more as a revenue stream for carrier and MTOs as opposed to a financial incentive on cargo interest. In

situations such as government holds or inspections, no party other than the government has control over how long cargo will be held.

The Association assumes that the carriers and terminals may contend that the risk of a government hold should be borne solely by the cargo interest, as it is that party that sent the cargo into the stream of commerce. But that overlooks the fact that the carriers and terminals are specifically in the business of moving cargo and are well aware that CBP inspections and holds in the US, or government holds abroad, are a fact of life in the post-9/11 environment. So, while the NCBFAA is sympathetic to the notion that the carriers and ports may not in some circumstances receive full value for the use of their assets during such holds, neither will the cargo interests. In these events, every party is faced with losing asset value, whether that is space at the terminal, the use of a container, or access to cargo that was presumably paid for previously and may be badly needed for resale or maintenance of a facility. It is consequently unfair that only the cargo interest to bear the brunt of the cost of delay inherent in any government inspection.

That concern is all the more significant as these holds can last 2-3 weeks or even longer for reasons that typically have nothing to do with security or other problems with the cargo, but rather are attributable to the sheer volume of cargo that is moving. CBP simply does not have the manpower or facilities to inspect cargo as it comes off the vessels, even with the use of its sophisticated threat targeting systems which are intended to reduce the number of inspections.[17] Just as BCOs need trade for their businesses, so do carriers and terminals. Yet, the existing system taxes the cost of government inspections only to one segment of the industry.

[17] *Comments of Richard J. Roche* (where the inspection of two containers took over three weeks to complete, the primary reason being that many CBP inspectors were being transferred to the southern border, which caused delays in processing inspections in New York. As a result, the containers accrued $6,000 in dray and exam charges, and $11,000 in detention charges during the government hold).

Worse, as the NPRM recognizes, many carriers and terminal operator tariff provisions that escalate the demurrage and detention charges if the container is not removed or the container is not returned within some particular period of time. The following chart displays a few sample demurrage and detention rates based on the applicable published rates.[18]

[18] Parenthetically, the chart shows while the terminals will charge demurrage for use of terminal space beyond the free time, the carriers may also levy a demurrage at the terminals for use of space. Other than the fact that the demurrage charge is in the carrier's tariff, it is not clear that the carriers should ever be assessing a charge for the use of space they don't own or lease if the terminal is charging for the same space.

Shipping[19] Lines/ Terminals	Free Time	Demurrage Rates	Escalated Demurrage	Detention	Escalated Detention
Maersk	**Export**: 4 Days **Import**: 4 Days **Detention:** 4 Days	**Export:** Days 5-8 $150/Day **Import:** Days 5-8 $235/day	**Export:** Days 9+ $180/Day **Import:** Days 9-13 $285/Day Days 14+ $335/Day	**Export/Import:** 5-8 $120/day	**Export/Import:** 9-12 $170/day 13+ $200/day
MSC/APL	**Export**: 4 Days **Import**: 4 Days **Detention:** 4 Days	**Export: Days 5-8** 20 DV/40 DV: $115/Day **Import:** Days 5-9- 20 DV: $65/Day 40 DV: $80/Day	**Export: Days 9-12** 20 DV/40 DV: $165/Day 13+: 20 DV/40 DV: $195/Day **Import:** Days 10+- 20DV: $120/Day 40DV: $150/Day	**Days 5-9:** 20 Ft. $165/Day 35-40 Ft. $165/Day	**Days 9+:** 20 Ft. $195/Day 35-40 Ft. $195/Day
CMA-CGM	**Export:** 5 Days **Import**: 4 Days **Detention:** 4 Days	**Export:** Days 6-9- $160 **Import**: Days 5-7- $235 Note: Rates differ for New York/New Jersey	**Export:** Days 10+ $180 **Import:** Days 8-12 $275 Days 13+ $300 Note: Rates differ for New York/New Jersey	**Days 5-9:** $ 135/Day	**Days 10+:** $ 190/Day
Maher Terminals*	**Export:** 5 Days **Import:** 4 Days **Detention:** 4 Days	**Export:** Days 6-9: $172/Day **Import:** Days 5-8 $172/Day	**Export:** Days 10-14 $225/Day Days 15+ $393/Day **Import:** Days 9-13: $225/Day Days 14+ $393/Day	**Days 1-30 (after free time)** 20 Ft. $65.00/Day 35-40 Ft. $98.00/Day	**Day 30+** 20 Ft. $131.00/Day 35-40 Ft. $197.00/Day
LA/Long Beach	**Export**: 5 Days (coastwise) 10 Days (intercoastal) 6 Days (foreign) **Import:** 4 Days (coastwise, intercoastal, and foreign)	**Export:** Days 6-10 (coastwise): 20 Ft. $14.00/Day 35-40 Ft. $28/Day 45 Ft.+ $38.00/Day **Import**: Days 5-9: 20 Ft. $21.00/Day 35-40 Ft. $44.00/Day 45 Ft. -$58.00/Day	**Export:** Days 11+: 20 Ft. $28.00/Day 35-40 Ft. $58.00/Day 45 Ft.+ $77.00/Day **Import**: Days 10+ 20 Ft. $40.00/Day 35-40 Ft. $87.00/Day 45 Ft. $116.00/Day	**N/A**	**N/A**
Red Hook Terminal*	**Export:** 5 Days **Import:** 5 Days **Detention:** 5 Days	**Export/Import:** Days 6-9: $170.00	**Export/Import**: Days 10-14: $220 Days 15+: $380/Day	**Days 1-30 (after free time):** 20 Ft. $71.38/Day 35-40 Ft. $103.94/Day	**Days 31+** 20 Ft. $135.42/Day 35-40 Ft. $202.58/Day
Port of Houston	**Export:** 3 Days **Import:** 3 Days	**Export/Import**: $12.32/Day, and the cost of removal plus 20%	No escalation.	**N/A**	**N/A**

[19] It is not clear why Maher Terminals and Red Hook Terminals assess a detention charge for containers. The chart uses the demurrage and detention rates published in the tariffs of the shipping lines and terminals. *See* Maersk: www.maersk.com; Mediterranean Shipping Company: https://www.msc.com/getattachment/9a12e5f8-cf62-4108-8eac-8efc9e8add62/636899885724055931; CMA: https://www.ratebase.net/index.html; Maher Terminals: http://www.maherterminals.com/wp-content/uploads/2019/09/SEPT_9.pdf; LA/Long Beach: https://dpiusa.com/; Red Hook Terminal: http://redhookterminals.com/NYTC_Tariff_File.pdf; Port of Houston: https://porthouston.com/wp-content/uploads/Tariff-8-June-2019.pdf.

The chart shows that charges significantly increase after a 4-5-day period, and that these increases take place without regard to fault.[20] In other words, whether the cargo interest really doesn't care to move the cargo or container (a notion for which there is scant if any evidentiary support) or whether it is impossible to do so for reasons beyond its control, the escalation (or penalty) aspect of the demurrage and detention charges kick-in. And, in some cases, the escalated charges may increase by 25%, 100% or even 200% if the hold goes on for more than 9 days.[21] Yet, the NVOCC or BCO listed as the shipper on the master bill of lading never has control over the length of the government hold. That is entirely dependent on the volume of CBP business, whether the agent involved is on vacation or in training, or whether the agent needs to seek additional input from the agency for the purpose, for example, of determining whether the cargo is subject to any import or export licensing controls. Even if it turns out, as is most often the case, that the cargo is benign, holds of 3 weeks or more are not uncommon. Consequently, the escalated D/D charges can far outstrip the value of cargo.

In recognition of the fundamental unfairness of having terminals or VOCCs reap exorbitant and unwarranted economic benefits in this situation, the NPRM raises two possible alternatives – either precluding any increase in D/D during government holds or capping the charges. While both have merit, there are problems associated with both. For example, the no-escalation option can be circumvented simply by increasing the D/D charges at the outset, something the carriers and terminal operators might to do simply by amending their tariffs. And, even assessing the regular D/D charges during extended government holds still can create an enormous economic burden on NVOCCs and

[20] *See* Docket No. 19-05, Comments of C.H. Powell Company (filed on Oct. 30, 2019) (Demurrage was assessed due to a government hold and the carrier's inability to release the shipment due to a clerical error); *See* Docket No. 19-05, *Comments of Lee Hardeman Customs Broker, Inc.* (filed on Oct. 29, 2019) (this company's customers been charged $73,248 in demurrage and detention in the past 10 months).

[21] In addition to escalated demurrage, costs can add up quickly during a government inspection and may include: "dray fees to the exam station; an exam fee; demurrage charge for time on terminal; more demurrage charges for containers on the same bill of lading that are orphaned on the dock until the inspection is completed; liner detention charge for extended use of the equipment." *Comments of Richard J. Roche.*

shippers that are far in excess of the value of the cargo, all for reasons that are not attributable to anything other than CBP or some other government agency has selected a container for review.

Similarly, while a cap on D/D charges during a government hold would be helpful in mitigating the costs, what level of cap would withstand scrutiny if challenged in court as being somewhat arbitrary? One might be tempted, when addressing a cap for detention charges to set the cap at some multiple of a container's net book value – perhaps using a multiple of two times that number. While that would certainly reduce the cost below the 4 or even 5 figures that are often assessed by carriers, it is an arbitrary measure that could be difficult to administer.

As the Commission is aware, certain ports already agree that it is not appropriate to assess demurrage charges during periods of government holds. In the NCBFAA's view, that is the appropriate position with respect to all D/D charges regardless of the terminal or VOCC involved. While there may be an extreme case where a shipper is tendering contraband that is the basis for the hold, that is a statistical anomaly that should not serve as justification for tarring all cargo. The Association accordingly suggests that the proposed rule make it clear that the assessment of any D/D, by either a terminal operator or VOCC, during a government hold is an unreasonable practice unless the carrier or terminal can demonstrate that the shipment involved contraband, counterfeit goods or otherwise violated US laws or regulations.

D. Notice of Availability

Current industry practice only provides cargo interest with notice of arrival but typically this does not provide notice when a container is actually available for pick up. As such, the burden currently rests upon the NOVCC or shipper to determine whether a container is actually available, a process which is often little more than guess work. To the contrary, while carriers do provide status information on their website, they typically do not provide notice when a trucker actually has access to containers. As a result, truckers must proactively check multiple websites regarding the status of

containers they have been assigned. [22] This is especially burdensome in ports such as Los Angeles and Long Beach, where there are 13 different terminals from which they must gather this information.

This shortcoming limits the benefit of contractual or tariff-based free time periods and inexorably leads to unanticipated and unwarranted demurrage and detention. By placing the burden NVOCCs and BCOs to determine whether a container is actually available (rather than on the carrier, which is best situated to know the status of cargo), the failure to provide actual notice of container availability unnecessarily delays the pickup and release of goods/equipment and exacerbates the very terminal congestion of which the terminals and carriers complain. Terminals and carriers providing notice of availability would also serve as a trigger for commencement of the free time clock for demurrage. Accordingly, the notice of availability should include, at a minimum the following: bill of lading number; consignee and notify party(s); container no(s); location(s) on the terminal; last free day. The NCBFAA agrees with the NPRM proposal that the failure to provide actual notice of container availability, and including the factors suggested in proposed §545.5(d)(3), should be considered when determining whether contested D\D charges are unreasonable.

IV. CARRIER POLICIES REGARDING DEMURRAGE AND DETENTION

The current lack of clarity in policies administered by VOCCs and terminals addressing contested D/D charges creates disputes among parties, which failure is itself unreasonable in violation of Section 41102(c) of the Act. The NCBFAA agrees with the NPRM that clear and transparent D/D practices are necessary to facilitate efficiency and that a failure to enunciate them in an enforceable tariff should be evidence of an unjust and unreasonable practice.

A. Demurrage and Detention Policies Should Be Published in a Tariff

The NCBFAA agrees with the NPRM that a carrier's D/D policies should be easily accessible to its customers. At a minimum, these policies should be published in the VOCC and terminal tariffs

[22] *Comments of Richard J. Roche.*

in a form and manner that is comprehensive and can be easily reviewed by the customer. Although the proposed rule does not go so far as to mandate that they be included in tariffs, the Association believes that doing so would be more likely to both provide notice to the public about the policies and promote an atmosphere within the carriers and terminals that recognize\s the need to abide by those terms.

B. Need Clear Processes in the Event of a Dispute

Under the Shipping Act, 49 U.S.C. § 41102(c) was promulgated to protect the "flow of commerce." Accordingly, § 41102(c) provides the Commission with authority to order a just and reasonable rate, regulation or practice. As D/D practices and disputes resolution procedures affect the "flow of commerce" they fall under the purview of the Commission. As such, the Commission has authority to hear these complaints, and award the prevailing party attorney's fees and costs. Therefore, the FMC should make clear in its proposed rule that these disputes fall under the Commission's jurisdiction under the Shipping Act.

As reflected in FF28, the process for resolving disputes can vary and there are no formal guidelines. Accordingly, when a dispute arises a cargo interest has little to no guidance on how to resolve its dispute, who has authority to resolve the dispute, what evidence should be submitted, who should even be contacted in the event of a dispute, and the length of time it can take to resolve the dispute. The record in FF28 demonstrates the current ad hoc method for resolving disputes largely serves to frustrate all parties and extend the time containers are not released so the carriers can maintain leverage to collect D/D charges, whether disputed or not. This opacity in current dispute resolution "procedures" does not serve to facilitate efficiency.

Moreover, when seeking mitigation or disputing demurrage charges, NVOCCs often have to go through carrier sales organizations to obtain relief, but this brings into play commercial considerations as the main focus, rather than any considerations regarding any inequity or factual

accuracy.[23] Carriers often decline mitigation citing FMC regulations that necessitate that they must apply all tariffed charges without exception, which is of course not a reasonable construction of the Shipping Act's requirements. In some instances, where demurrage was charged for a carrier's own errors, C.H. Powell had to rely on compensating discounts on future shipments, rather than receiving refunds for inappropriate prepaid demurrage.[24] But this typifies the current arbitrary nature of the D/D/ practices of carriers as they are applied.

The NCBFAA agrees with the proposed NPRM that these policies should not only be easily accessible but, in order to be reasonable, should specify: (1) a qualified point of contact; (2) a reviewing official who can review whether the charges were warranted; (3) a time frame to resolve the dispute; and (4) the information or evidence that would be relevant to resolving the dispute.

With respect to evidence, as the type of issue[25] causing the disputed D/D can vary, and these policies should provide explicit guidance on the type of evidence that parties should provide at the first instance. For example, it has been suggested that truckers should take a phone screen shot capturing their gate-in/gate-out times to show when they first got into the terminal, as well as any appointment time, to help show why D/D may not have been appropriate. Similarly, providing logbooks and trouble tickets might be considered relevant and productive. The policies should delineate the type of documentation the carriers and terminals would consider appropriate such as with information about the container and container unavailability would help facilitate the resolution of disputes and should be included in a carrier's D/D policies.

[23] *Comments of C.H. Powell Company.*

[24] *Id.*

[25] *E.g.*, buried containers; trucker or shipper unable to get an appointment within free time; trucker unable to get to terminal due to closure; insufficient equipment.

C. Carriers Should Release Cargo to NVOCCs Where There Are Disputed D/D Charges

At present, when NVOCCs have a dispute regarding D/D, they are presented with two options: (1) obtain the release of the goods after the dispute has been resolved, while D/D to continues to accrue or (2) pay the disputed D/D to obtain the release of the cargo and litigate the charges at a later time. Neither option is an ideal or reasonable approach.

In that regard, the "argue now/release cargo later" is only reasonable if there is a process in place to quickly and fairly resolve D/D disputes. But the voluminous record in FF 28 demonstrates that is not the situation. Often, the NVOCC can't find anyone at the carrier with whom the issue can be discussed. And, that person, when located, must ultimately obtain approval of anything less than 100% payment of disputed claims from various upline officials who may, but often are not, located at the port where the dispute arises. Consequently, a claim for a few days of allegedly inappropriate D/D increases by a week or more while the back and forth discussions between the parties takes place. This leads to the oft expressed complaint that D/D is used as a revenue item for the carriers and ports; the longer the dispute goes on, the more the cash register rings.

Similarly, the "pay now/argue later" option just uses coercion as a means to extract money from NVOCCs. Once the disputed D/D is paid, the difficulty for an NVOCC to recover any portion of those charges is almost insurmountable. Despite the almost innumerable disputes over D/D charges that occur, some of which were detailed in the FF 28 record, the Association is not aware of a single instance in which an NVOCC actually filed a complaint at the Commission or in court challenging these charges. Certainly, given the record demonstrating that D/D charges were often assessed in circumstances when cargo was not actually available, one would have assumed that there would have been some attempts to recover inappropriate charges. That this has not been the case shows that a significant amount of money was inappropriately transferred to the carriers and terminals for reasons that were not the fault of the NVOCCs that paid them.

The NCBFAA believes that there should be a mechanism in place that allows for the release of cargo to NVOCCs without requiring them to first pay disputed D/D charges. The NCBFAA is not suggesting that the carrier should lose its rights to the D/D charges if they are later found to be valid. Rather, the NCBFAA contends that procedures should be developed that facilitate rather than stall the movement of cargo while a dispute is being resolved. After all, NVOCCs do have significant bonds as a condition of maintaining their license with the Commission, so the carriers and terminals would not be in position of chasing unknown, judgment proof companies. The NCBFAA suggests that the proposed policies include a mechanism by which the carriers and terminals agree to non-binding mediation, perhaps using the Commission's Consumer Affairs and Dispute Resolution Service, and release containers to NVOCCs without first requiring disputed payments in those instances where the NVOCC also agree to this process. By doing so, the Commission – and the carriers and terminals – would remove an unduly and unfair coercive aspect of the demurrage and detention problem.

D. Billing Practices

Directly tied to dispute resolution policies are the D/D billing practices. FF28 found that there was a lack of uniformity in billing practices and that billing transparency varied depending on the type of billing arrangement that was employed.[26] The Interim Report[27] noted that there were three different types of billing arrangements for import demurrage. Due to a lack of uniformity and because billing is not tied to ownership or control of the assets, in many instances it can be unclear to NVOCCs and shippers what the charges are for and who they relate to.

For anyone to, first, understand and, second, contest disputed charges, it must be clear what is being billed and by whom. The NCBFAA agrees with the NPRM that billing for these charges

[26] Interim Report at 10.

[27] Interim Report at 10.

should be tied to the party having ownership or control of the assets that are the source of the charge. Doing so allows for greater transparency, consistency, prevents double billing, and eliminates confusion as to who and what the charges are for. For example, as reflected in the above chart, we note that some terminals are charging for demurrage but also charging for detention on containers. As result, it appears that cargo interests are being double billed on containers. However, it is not entirely clear what cargo interest are being billed for.

In addition, as reflected in FF28, the terminology for demurrage and detention in the shipping industry is not used consistently by carriers or MTOs.[28] This lack of clarity prevents NVOCCs and BCOs alike from being able to ascertain the nature of the charge and if it is justified. Some carriers and terminals use the term demurrage to indicate a charge for space, while others also use the term detention for that purpose. And, some carriers and terminals bill for something called demurrage at the same location for the same time period. On the assumption that the carriers and terminals are not double billing for the same cost, it would certainly further an understanding of what charges are appropriate (and what are not) if there was a consistent terminology employed for this purpose. And, consistent with the NPRM, the Association believes that the absence of a clear and succinct terminology for the separate space and equipment costs should be a basis for finding any charges to be unreasonable.

V. CONCLUSION

The NCBFAA appreciates the opportunity to submit these comments to this proposed interpretive rule and agrees that the proposed interpretive rule would assist in both facilitating the fluid movement of cargo in the shipping industry and reducing disputes between the parties involved in the various shipping transactions.

[28] Final Report at 30; Interim Report at 5-6, 18.

Respectfully submitted,

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