BEFORE THE
FEDERAL MARITIME COMMISSION

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Comments on Interpretive Rule on Demurrage and Detention under the Shipping Act

Submitted by

NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS & BROKERS ASSOCIATION, INC.

The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. ("NYNJFFF&BA") respectively submits its comments in favor of an Interpretive Rule on Demurrage and Detention. Established in 1917, the NYNJFF&BA is one of the oldest trade associations for licensed freight forwarders, non-vessel operating common carriers (NVOCCs), and Customs Brokers in the United States with over 100 regular members and 25 industry–related affiliates. The membership, consisting of both publicly traded global logistics giants as well as small businesses, will be directly impacted by the proposed regulations.

We commend the Commission for having undertaken the almost impossible task of investigating the conditions at the ports and the practices of assessing detention and demurrage. During its two-year review it became apparent that detention and demurrage are being assessed at times when conditions outside the control of the cargo interests prevent the retrieval or return of containers. The NYNJFFF&BA has expressed to the Commission in its testimony January 2018 and in submissions in support of the petition of

the Fair Port Practices Coalition that to any reasonable person the assessment of these charges at those times serves no purpose. They do not increase the likelihood that the equipment can be better utilized or the cargo can flow faster. It is generally considered unreasonable in any industry to charge for a service that has no purpose.

Incentive Principle

The Commission has correctly re-focused attention on the purpose of detention and demurrage charges "to encourage the productive uses of assets (containers and terminal space) and promote optimal cargo velocity." Our Association welcomes the issuance of an interpretive rule to provide guidance in understanding when the assessment of demurrage and detention would be viewed as unreasonable. That the charge supports its intended purpose should become the gold standard for determining whether a practice is reasonable or not. This standard would be applied when viewing the facts triggering the charges. If their application allows them to achieve their intended purpose to incentivize cargo flow and equipment usage then the charge could be considered reasonable and having a legitimate function. But if cargo cannot move at all or equipment be released irrespective of the application of detention and demurrage or its escalation then it would be found to be unreasonable. In many cases, the issue of whether demurrage or detention charges are reasonable, applying the "incentive principal", will be determined by whether the party being charged the demurrage and/or detention is the right party---i.e., the party who has control of moving or controlling the cargo or equipment. In many cases, that is not the case as will be discussed below.

Demurrage / Detention Clock

When a container is unavailable for pick up or return due to the fact that the container yard / terminal is closed then the incentive principle should apply and demurrage and detention not be charged. This should be the case whether the free time for either the yard storage or container usage has expired or not. Typically, the free time for storage at the terminal or equipment usage is charged on the basis of business days until the free time expires. Thereafter it is charged on the basis of calendar days. When a carrier grants additional free time for terminal storage or container usage but bases it on calendar days, it would seem unreasonable to start charging for detention and demurrage when the free

time expires over a weekend or long holiday, when the terminals are closed. The same principle should apply whether the free time has expired or not. Quite simply if a terminal is not in a position to receive back a container no additional charges should be assessed for that period. It is recognized that the terminal has ongoing yard costs and the carrier has lost opportunity if containers are not returned on time. Those costs can be recovered by adjusting the amount assessed over the days when the terminal is open.

Cargo Availability

The NYNJFFF&BA agrees that determining the physical availability of cargo is central to the application of detention and demurrage. Current practices start the clock on terminal free time when the cargo is unloaded from the vessel. It has been assumed that once it is off the vessel it becomes physically available for pickup. Many examples have been provided to the Commission showing that true or actual availability is not certain when the vessel unloads. It can, for example, be negatively impacted by the location of a container in a stack or area that will not be worked. The free time clock should start ticking only when the cargo is identified as physically available or accessible to be picked up. If terminal operations or closures prevent the cargo from being picked up the clock should stop until availability or accessibility is restored. This principle should apply whether the free time has expired or not. The essential point is that carriers and terminals should not be placing additional charges to encourage the movement of the cargo off the port and simultaneously preventing that from happening,

Empty Container Return

The logic applicable to demurrage should apply to the return of equipment. The free time for container usage should be extended it the terminals are not open or not accepting back certain types of containers. It should be considered unreasonable to apply detention when containers are not being allowed back to the terminal.

Notice of Cargo Availability

The NYNJFFF&BA strongly supports the idea of a Notice of Cargo Availability, which will inform the cargo interests that the container is physically available to be picked up. This

will greatly improve planning and help reduce port congestion by removing trucks that are attempting to retrieve unavailable containers.

A Notice of Cargo Availability would be a transport document sent after the vessel arrival and following but different from the Carriers' Notice of Arrival. It would serve the important function of clearly identifying when the cargo is truly available for pick up and thus when the free time clock should start and end. Just as the Arrival Notice is sent from the carriers to their customers so should the Notice of Cargo Availability. The carrier's contract of carriage with their customers includes making the cargo available at the place of unloading.

The carriers not the terminals should be the responsible party for sending this information because

- The contract of carriage and obligation to deliver the cargo to the consignee rests with the carriers. The Notice of Availability would be a transport document including key cargo details such as:
    - container number(s)
    - bill of lading number
    - vessel and voyage
    - arrival date
    - unloading from vessel date
    - accessibility date
    - location on dock for indication of placement in an open section
    - hold information, if waiting freight or customs release.
- As part of the service of carriage the carriers choose which terminals will provide the stevedoring operations
- The customer has a relationship with the carriers and has negotiated and agreed to the terms of the carrier. That customer does not have a relationship with the terminals nor an agreement of terms. Carriers do provide free time to their customers which differ from what is indicated in the terminal's standard. The information that the terminal makes available online would not match the agreement with the carrier. In the event of a discrepancy it is the carrier which must communicate any change or correction to the terminal, which is its agent.

- The terminals do not have the contact details of the carrier's customers who need to be notified on a particular cargo movement. These reside with the carrier.

Notices of Availability and any changes in availability should be pushed to the consignee and notify parties. The present system requiring multiple parties to check for online information from the terminal and carrier is inefficient. By having one party responsible and pushing the information to the correct entities, all industry participants will gain significant time-savings. In situations when free time is not available on line or unclear, both terminals and carriers are chased for the information. With one party responsible the communication flow is smoother. The technology exists to be able to have accurate information on container location and accessibility sent from the terminal to the carrier.

The method for distribution of the Notice of Cargo Availability should follow that of the Notice of Arrival, which works well. Notices are sent to specific consignee and notify party email addresses or fax numbers on record with the carrier. Information should be live and timing of the information should be as immediate as possible.

Carrier Notices for Export Cargo

Much of the detention and demurrage practices have focused on import cargo. Some practices concerning export cargo lead to significant additional costs for exporters as a result of situations outside of their control. These can be reduced with better advance notice from the carriers. Their booking confirmations will include the window in which containers may be delivered to the pier. Carriers will issue a notification within less than 24 hours from the first delivery date that the window has changed. Our members have complained that just prior to close of business they may receive a notice that they cannot deliver a container set up for the next day. That container is often already in route to the port and must be diverted and held with additional costs until it can be delivered. Or it is delivered and subject to demurrage for early delivery. The NYNJFF&BA would like to suggest that an interpretive rule include a recognition that it be considered unreasonable for carriers to change the dates for cargo delivery to the port without providing sufficient notice.

Government Inspection

The NYNJFFF&BA applauds the Commission's including the thorny issue of the practice for imposing and escalating detention and demurrage in situations where cargo is being held for government inspection. It is a particularly serious problem in the port of NY/NJ where inspections are handled off terminal at carrier designated Container Examination Sites (CES). At present all extra costs are borne by the consignee or "merchant," as broadly defined by the carrier. Aside from the actual examination charges, these costs include any extra time the container remains in the terminal before it is moved to the CES, the costs of the examination, and the detention charges for the container once it leaves the terminal even though it will be sitting at the CES while waiting for examination. The detention clock often starts when the container leaves the terminal for the CES but it can be earlier if the transfer is delayed. Detention does not start when the trucker is picking up at first moment of true availability after a government hold is removed. While government inspections are out of the control of the carrier and the terminal they are also out of the control of the cargo owner. It is clear that when cargo is held for government inspection the assessment of detention and demurrage have no effect and cannot fulfill their intended purpose.

Based on the incentive principle, detention and demurrage should not be charged in the instances of government holds. However, based on the fairness principle recognizing that all parties have incurred additional costs reasonable practices of cost sharing should be put in place. This situation is similar to disasters at sea when losses suffered in an emergency, such as the need to jettison cargo to prevent capsize, are shared on a pro-rated basis amongst the carrier and the cargo owners . It is the principle of general average that has been applied and accepted for centuries in order to have a smoothly ordered system that supports the shared risk of ocean carriage. Similarly, today the risk of government holds for any reason and increasingly for safety and security comes with costs that should be shared by all the partners in the freight movement, i.e., carrier, terminal, CES, and cargo owner. It is useful to include the CES in these extra charges as this will further incentivize them to work efficiently to minimize the costs. At present, if a CES is running behind in retrieving containers at the terminal storage will accrue but the CES will not bear any of that cost.

The NYNJFF&BA supports the concepts that in the absence of extenuating circumstances when cargo is on government hold, it is unreasonable to escalate

demurrage and detention charges, or not to limit the amount that is charged in relation to the true costs, or not to provide some extension of time relief. All of these remedies would contribute to the concept of a sharing of costs amongst the affected parties. This is a reasonable and just allocation of risk to all parties since no single party is the responsible party. The Commission should adopt the interpretative rules that clarify unreasonable demurrage and detention practices to include escalation, non-mitigation, and non-capping of charges when cargo is on government hold.

Clarity of Policy

It is only reasonable that demurrage and detention polices be clear and easily located on ocean carrier websites. What is most relevant is the linking of those policies to a particular cargo movement. The Notice of Availability is the practical application of this and should include a reference on where to find full policy and dispute resolution detail.

The policy should incorporate clear instructions on how disputes should be communicated and resolved. What is most important is that it should be considered unreasonable for a carrier to freeze all activity with the cargo owner or its subcontractors such as truckers and OTIs when there is a dispute on one shipment. As an example, one of our members recently reported that a major carrier recently locked an OTI from its website user access and as a result delayed release of Bills of Lading on the water as well as new bookings when $11,000 in export demurrage and detention on one shipment was still in dispute. This affected the cargo of unrelated shipments handled by that OTI. Similarly, when carriers threaten to cut off truckers from picking up any containers for any of their customers all shippers are affected when detention is not paid for one of them due to a dispute. When all shipments are brought to a halt because of a dispute on an unrelated movement tremendous time and costs are incurred by the carrier and the OTI in unnecessary communication and the holding of equipment hostage. These actions constitute an unreasonable handling of cargo in the care and custody of the carrier.

During the Commission's fact finding investigatory process, the NYNJFF&BA had communicated that it would be in the interests of all parties if carrier dispute resolution policies can include:

- Staff dedicated to impartial review of the facts. Usually this is tasked to the sales or customer service teams that have other marketing or operational responsibilities.

Thus, the resolution of disputes cannot be given the priority attention that is critical to keeping the cargo moving. This staff should be available throughout the time period when the terminals are operating as problems can arise at any point and outside normal business hours.

- Well defined and available process for disputes
- Clear deadlines for filing, reviewing, and resolving disputes
- Procedures for quick determination of requests for free time extension or removal of the charges
- Contacts including escalation personnel for free time, demurrage and detention disputes or requests. These contacts should be available throughout the time period when a terminal is operating. Problems arise at any point in time.
- Availability of priority appointments when the free time has expired. If free time has expired and appointments are not available but the trucker has tried, demurrage should not be charged when it is not possible to pick up the cargo. There should be a process that recognizes the attempt to make an appointment and suspend the demurrage for the time period until the appointment is granted. For example, if a container is in demurrage and a trucker tries to make an appointment for a Tuesday, but none are available until Thursday, then demurrage for Wednesday and Thursday should not be charged.

The Commission's investigation and focus on detention and demurrage processes has already had an impact on improving accessibility to information on carrier's free time and associated charges when that has expired. More carriers have added links on the Ocean Equipment Management Association's (OCEMA) website to access their best practices and charges. While this is helpful in a general sense there is still a lack of clarity when the carrier or the terminal's tariff will apply. It is important that the detail related to a specific shipment should be clear. This can be done through a vehicle such as the Notice of Availability. Any special agreement of a carrier with a customer for terminal or equipment free time will be indicated or the default dates of the standard will apply. When contracts are signed overseas it can happen that this information is not always correctly accessed or annotated for arriving containers. This leads to a dispute over free time that may have been granted. If it is clearly stated in the Notice of Availability then the receiver will have a

better chance to address the issue before it becomes a problem instead of being billed detention or per diem after the fact.

Correct Billing

The NYNJFF&BA has received numerous examples and complaints from its members that carriers are billing demurrage and detention to parties that are not in control of the cargo and therefore not responsible for the payment. Most carriers identify the responsible party for adherence to their bill of lading terms and conditions to be the "Merchant." They define this term to include the Shipper, Consignee, owner, Person owning or entitled to possession of the Goods or of this Bill, Receiver, Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors, non-vessel operating common carriers ("NVOCCs"), and freight forwarders. As a result the carriers have been following a practice of billing detention and demurrage to any of those parties, regardless of whether they are truly in control of the cargo when the charges were incurred. One of the more egregious examples of incorrect billing has resulted in disastrous consequences for one of our members. This member acted solely in the capacity of being a Customs Broker and did not arrange any trucking for the retrieval of the cargo from the pier and is facing nearly $ 1,000,000 in demurrage and detention costs because their name happened to be erroneously placed in the consignee box on the steamship line bill of lading.

Similarly, many NVO OTIs have found themselves to be in this position. Their contract of carriage with the steamship line terminated at the port. These NVOs turned the cargo over to the receiver who became responsible for arranging their own trucking from the port to themselves or another ultimate consignee. Where detention is concerned the steamship lines routinely have ignored the Uniform Interchange and Facilities Access Agreement (UIIA), which holds the trucker accountable for the charges incurred when equipment is not returned on time. In the case of demurrage, it is routinely billed to the consignee and/notify party and even in instances of prepaid door moves where the line itself is responsible for the delivery to destination. The NYNJFF&BA cannot emphasize enough the importance that the **CORRECT** party be billed. In the circumstance where the NVOCC has delivered the cargo to its customer at the port/terminal, and the customer has arranged for its own drayage to its location via its own trucker, it is clear that under the

Incentive Principle the NVOCC has no impact on when that container is returned to the terminal or CFS. In one circumstance an NVOCC in that predicament was invoiced over $200,000 two years after the detention had been incurred! This is clearly unreasonable under any interpretive principle. The NVOCC was not even aware of the issue, never mind being in a position to alleviate it.

In the billing section (C.2.) of the proposed interpretive rule, it is stated that "carriers should bill their customers, rather than imposing charges contractually-owed by cargo interest on third parties." It should be clarified that carriers must only bill their customers for the charges for which they are responsible under the terms of the bill of lading. For example, an NVO who has contracted with the carrier for the freight movement is the customer of the carrier, but its responsibility has ended once the cargo has arrived at the terminal. In the example above, the importer, who has contracted the trucker for pick up and delivery, should become responsible for any delay in pick up and use of equipment. The steamship line will correctly hold the trucker responsible for detention / per diem . the trucker in turn will bill his customer, the importer, who engaged him. Demurrage must be satisfied prior to pick up of the container and this will naturally be paid by the cargo interests. Detention charges should be assessed against the correct party who can influence the demurrage/detention process.

In the event that demurrage or detention is somehow not paid, the steamship line just because of the broad definition of "merchant" should not have a free reign to bill just any party. It is only reasonable that the correct party responsible for the charges is the sole entity to be billed. It should be considered unreasonable to bill any entity just because their name may be correctly or incorrectly appearing on a bill of lading, in whatever capacity, if the reality of it is that the party has no control or connection with the pick up of cargo or return of empty containers.

The proposed interpretive rule raises the idea that the billing relationship should be linked to the control of the assets. Thus, the marine terminal operator would invoice for the storage or demurrage at the terminal. While this billing model has the advantage of minimizing additional charges that can occur when billed through the carriers, it will disrupt the service provider – customer relationship, which is essential for correct billing and dispute resolution. The NYNJFF&BA maintains the position it has previously expressed to the Commission that the information and billing model should preserve the customer

relationship. The terminals are a subcontractor of the carrier. The carrier negotiates the services and charges it bills to its customers, whether they are the direct cargo owners or OTIs, The carriers have the contact information and correct charges negotiated with their customers. The terminals do not have this information. The OTIs and beneficial cargo owners do not have direct relationships or contractual agreements with the terminals. They have them with the carriers. Thus, the carriers should be held responsible for the fulfillment of the services at the correct pricing that the terminals provide. There should be one party responsible for this and it should be the carriers.

Dispute Documentation

The type of evidence to be used in a dispute resolution process will vary depending upon the specific situation. It is most important to identify the underlying facts in order to determine the validity of a dispute and to resolve it. If all parties adopt this policy and work to provide the necessary data it should lead to a quicker fairer resolution. In the case of unavailability of appointments, it would be useful if the online process can recognize the containers attempting to be booked and capture that record or provide the ability for an automatic messaging with the detail of the failure, much like the undelivered notices of email providers. In the case of long wait times outside the terminals and missed appointments, perhaps a message to a dedicated mailbox or time-stamped photo, or GPS log information can be retained and then supplied with other supporting documentation.

Transparent Terminology

The NYNJFF&BA supports a standardization of the definitions for demurrage and detention. The simplification of the definitions will lead to greater clarity and understanding of what is being charged. It is logical to define the charges based on their nature and not the location where they occur. It should be immaterial if a container is inside or outside the terminal. Thus, “demurrage” should be a charge for terminal space and “detention” should be a charge for use of the container..

This simplification of terminology will work well with the carrier billing model. The dates on the invoice would clearly indicate the period once free time has expired and the charges incurred.

Conclusion

The issuance of an interpretive rule providing guidance on the reasonableness of demurrage and detention practices is an excellent first step to encourage the improvement in the current application of these charges. However, for it to become fully effective will depend upon the cooperation of all industry participants. The present system puts an interested party, the carrier or terminal, as the ultimate decision maker of whether a dispute is accepted or rejected. Even with this interpretive rule the industry is left with the same options that it has at present either to bring a complaint proceeding to the FMC or to commence legal action in the courts. Either of these approaches are time consuming and inevitably expensive. The NYNJFF&BA would like to suggest that disputes that cannot be easily solved between the parties be decided by binding decision of an impartial arbitrator. Perhaps more authority can be given to CADRS or parties incorporate the use of arbitrators in their contracts and agreements.

The NYNJFFF&BA believes the Commission should issue an interpretive rule that at the very least will provide regulatory clarity, which is essential to business in making decisions. It is also to be hoped that more transparency and timely communication will contribute to a more efficient and less costly freight delivery system for all parties.

Executed on October 31, 2019
On Behalf of the NYNJ Foreign Freight Forwarders & Brokers Association, Inc.

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