

Ocean Network Express Comments to the Federal Maritime Commission's Interpretive Rule on Detention and Demurrage under the Shipping Act

October 31, 2019

Introduction

Ocean Network Express (North America) Inc., as general agent for Ocean Network Express Pte. Ltd. ("ONE"), submits the following comments in response to the Federal Maritime Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") published on September 17, 2019. 84 Fed. Reg. 48850. ONE is an ocean carrier operating in the international container trade and as such would be directly impacted by the proposed rule. ONE is a member of various trade groups submitting comments to the NPRM, however due to the potential impact the NPRM would have should the rule be adopted, ONE submits these individual comments as well.

ONE firmly supports the Commission's goal of clarifying issues related to detention and demurrage and, more generally, promoting freight fluidity at United States ports. While supportive, ONE does have serious concerns with the content of the NPRM and the impact it will have on the container shipping industry. In the NRPM, the Commission has adopted an "incentive principle" as the sole purpose underlying detention and demurrage charges imposed by ocean carriers and terminals. While incentivizing the movement of cargo is unquestionably a primary purpose of detention and demurrage charges, it is not the only purpose. The NPRM very noticeably ignores other purposes of detention and demurrage and does not take into account the burden that the NRPM, as written, would impose on members of the regulated industry.

ONE would like to take this opportunity to highlight some of the burden, both financial and otherwise, the imposition of the NPRM would have on ocean carriers and terminals.

Practicality

ONE's primary concerns stems from the question of how the processes "required" by the NPRM would be implemented from a practical standpoint. The NPRM implies that any time a container is unavailable to be picked up for any reason, regardless of who has control over the situation, no detention or demurrage should be charged. It is unclear from the NPRM if this would mean a whole day must be waived or just the portion of the day when a container could not be picked up. If the intention is that the full day be waived regardless of what proportion of the day the container is unavailable, then even if the terminal's appointment system was unavailable for 15 minutes, the full day would have to be waived. This would be in direct contravention of the incentive principle. Further, it is unclear if an unavailability of all containers in a particular area would then mean that the detention on all containers at the terminal would have to be waived, even if no effort was being made by the cargo interests to collect the container.

Further, if the approach is that a full day of charges must be waived when there is any unavailability, this does not consider the fact that there were likely many other windows within the allowed free time where the customer could have picked up their containers and did not. Free time provided contemplates by design that there are pockets within that time where units will be unavailable for various reasons – the proposed rule will completely upend this current system.

While more reasonable if the intention is that detention only be waived for the portion of the day when the container was not available, the practical challenge for carriers to track availability on an individual container basis would be extremely costly and impractical. Putting aside the system enhancements that would be necessary to provide that very specific type of notice, there is an immediate question of what party would be responsible for tracking the location of individual containers and providing notice whenever part of the yard is temporarily closed. To provide this type of information would require significant additional sharing of information between the terminals and the carriers and clear guidelines as to who bears what responsibility. Similarly, providing individual notices to the owners of each container every time there is an event that makes the container temporarily unavailable would be an additional burden, particularly if it was necessary any time there is any possible impact on container availability, appointment availability, congestion, etc. Additionally, detention is calculated on a per day basis – to require prorating in the event that a container was unavailable for a portion of a day would require a complete overhaul of carrier accounting systems.

As an additional note, the question of what party should receive the notice, what party would provide the contact information, and what party is responsible for its accuracy, is another hurdle that would need to be faced, and it is one that should not be the sole responsibility of the carrier. Accurate and complete contact information would need to be provided by the shipper/consignee, especially for CY moves where the carrier's contractual obligation ends upon delivery to the port of discharge, and it would need to be clear what party should be receiving the updates. Would this be the shipper, consignee, trucker, or all of the above? And if multiple parties are to be contacted, who is required to act on the information?

In suggesting that detention must be waived whenever a container is unavailable, including when appointments are not available, the NPRM also does not take in account what happens if an appointment is made and then missed. Similarly, it should be noted that the appointment systems are operated by individual terminals – in order for carriers to comply with the rules set forth in the NPRM, they will have to have a much more intimate knowledge of the appointment systems, which will result in more overlap between carriers and terminals.

Cost

While the NPRM limits the purpose of detention and demurrage to only incentivizing the movement of containers, in reality there are a number of other purposes, including compensation for the use of property and space. These compensation considerations aside, the NPRM does not consider the significant additional costs associated with the rule that would fall to the ocean carriers and terminals if the NPRM is adopted as written.

For example, by requiring the detention/demurrage clock to be turned off every time the container could not be picked up (including weekends), the NPRM is actually removing the incentive for cargo interests to pick up cargo expediently. As a result, containers are likely to remain on the terminal for longer periods of time, which in turn will result in additional handling-related costs at the terminal. There is a certain amount of digging/moving units that is required for each unit being picked up from a terminal and the amount of moving for each individual container increases each day the container remains on terminal. By imposing significant limitations on when detention/demurrage can be imposed, there is a high likelihood that units will remain at the terminal for longer periods of time, which will result in additional terminal handling charges that will most likely be billed to the ocean carrier.

Beyond handling costs, there are also additional container capital costs that will fall to ocean carriers as a result of the NPRM. Putting aside the fact that under the NPRM ocean carriers would not be compensated for use of their property, there is also a concern regarding the cost for the loss of use and the resulting need to increase the number of containers in the fleet to address this loss of use. As noted in the NPRM, a primary purpose of detention/demurrage is to incentivize the pick-up and return of containers. By not allowing detention and demurrage to be charged over weekends, if the last free day is a Friday, cargo interests now have no incentive to prioritize picking up the container on the last free day, instead leaving it until Monday or even Tuesday, which is potentially four extra days of using a container and the container taking up space.

Detention and demurrage charges are intended to encourage the cycle of containers within a controlled time range. As written, the NPRM effectively results in a very low “use charge” for equipment, which will in turn promote the use of containers for storage of cargo (particularly if they are lower than warehouse costs). Storage demand could really fluctuate based on regulatory tariffs, cargo seasonality, warehouse capacity, and a variety of other factors. This fluctuation would then impact the ability of ocean carriers to forecast container supply/demand and result in a need for surplus containers and surplus land capacity to hold the units. Both have costs associated with them. This then also has an impact on terminal performance as capacity is impacted by this variable.

Finally, the complex system contemplated by the NPRM will likely require most carriers to perform substantial system upgrades to comply with the requirements. While this type of upgrade should be systematically possible, it will not be without costs to the carriers and terminals. These costs will come both from the cost of the actual upgrade and the requirement to train personnel on the new system, which could potentially result in higher daily detention and demurrage charges.

Government Inspections

In the NPRM the Commission has provided potential guidance for government inspection of cargo and requested specific feedback related to the interpretive rule being considered. At the heart of the Commission’s proposal is the idea that detention and demurrage should not be charged while cargo is undergoing government inspection. In this case, only one party has the ability to impact the timing and frequency of a government inspection of cargo, and that party is not the ocean carrier or the terminal.

Cargo is requested for inspection by United States government agencies for one of two main reasons: 1) Customs and Border Protection (“CBP”) targets cargo for an inspection due to a risk assessment of the import manifest data submitted by the ocean carrier. Notably, the data submitted by the ocean carrier as part of the import manifest comes directly from the shipment instructions provided by the Bill of Lading party that are used to create the Bill of Lading; and 2) CBP or another Partner Government Agency requests an inspection after reviewing the customs entry filing submitted by the importer or customs broker. In both cases, it is the cargo interests that provide the information which leads to the inspection. Considering cargo interests are the only party with control over government inspections, it would be unreasonable to expect an ocean carrier or terminal to discontinue detention or demurrage charges during inspection periods.

Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”)

With regard to the NPRM’s guidance on billing for detention, it is important to note that the UIIA is a contract signed on to by the carrier and the trucker which sustains an extensive system for billing and

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addressing billing disputes. The UIIA clearly establishes responsibility and terms of use for the lease of carrier owned containers, including terms for pick up/return of containers and billing. The NPRM would impose a set of requirements that would potentially conflict with the process and procedure set forth in the UIIA, and this conflict will undoubtedly lead to more confusion.

Similarly, the UIIA establishes requirements for providing notification to truckers to inform them where empty containers are to be returned. The current system requires that truckers take some responsibility for checking where empty containers are to be returned; in contrast, the NPRM appears to be placing the sole responsibility for notification on the carrier. Similar to providing notice any time there is any change in the availability of a container, this will impose an additional cost and burden to the carrier.

CONCLUSION

As stated from the outset, ONE supports the Commission's efforts to clarify issues related to detention and demurrage and, more generally, promote freight fluidity at United States ports. While we appreciate the efforts to standardize the imposition of detention and demurrage, we do have significant concerns with the additional costs and burdens this will place on carriers and terminals. We hope that the Commission will take these comments under advisement and consider appropriate amendments prior to drafting a final rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "JKL".

Jacob K. Lee
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Ocean Network Express (North America) Inc.,
as general agent for Ocean Network Express Pte. Ltd.