BEFORE THE
FEDERAL MARITIME COMMISSION

FMC DOCKET NO. 19-05

INTERPRETIVE RULE ON DEMURRAGE AND DETENTION UNDER THE SHIPPING ACT

COMMENTS OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION

The Pacific Merchant Shipping Association ("PMSA") and its members hereby submit comments on the Notice of Proposed Rulemaking ("NPRM") published by the Federal Maritime Commission ("FMC" or "Commission") on September 17, 2019, at 84 Fed. Reg. 48850.

PMSA is a nonprofit association of owners and operators of marine terminals and US and foreign-flagged vessels operating throughout the world, who service the nation's trade demands through Pacific Coast ports. As MTOs and carriers, PMSA's members would be directly affected by the proposed rule with respect to both demurrage and detention.

PMSA believes the NPRM raises a number of important issues with respect to the incentive functions of demurrage and detention, and is appreciative of the Commission's extensive efforts to gather information from stakeholders on these issues. However, PMSA believes that the proposed rule should not be adopted at this time. PMSA is concerned that by enunciating what it would consider to be "reasonable" under Section 41102(c) of the Shipping Act, the Commission would effectively be establishing unnecessarily broad mandatory practices for carriers and terminal operators in the areas of demurrage and detention. The Commission seeks to mandate a "perfect world" with respect to demurrage and detention practices and

technology, ignoring local practices and needs, thereby discouraging carriers, terminal operators, and their customers from making reasonable business decisions in these areas.

While some of the practices effectively required by the NPRM may make sense in some cases, PMSA does not believe they should be mandatory. Some of these practices may be desirable in certain circumstances or certain ports, but may not make business sense in other circumstances or ports. Accordingly, they should be offered as suggestions to consider, leaving carriers and terminal operators and their customers to work out these issues through business decisions and free market negotiations. One of the policies of the Shipping Act is to regulate carriage of goods in U.S. foreign commerce "with a minimum of government intervention and regulatory costs."

PMSA also believes that the NPRM would institute a number of changes to current practice and legal precedent on demurrage and detention without reasonable justification or an adequate explanation of why the current market-based system is not reasonable. In PMSA's view, these changes are problematic from both a legal and practical standpoint. Before adopting such changes, the Commission would need to explain in further detail what the changes mean, and articulate clear reasons for the changes, and then provide an opportunity for further comment on the fully-explained proposed changes. It is impossible to meaningfully comment on some aspects of the NPRM at this time given that there is incomplete information on what they are and why they are proposed.

PMSA's discussion of specific aspects of the proposed rule follow.

A Broad-Brush Approach is Inappropriate

The NPRM seeks to mandate the same practices nationwide, without regard to geography, terminal configuration (including operating ports vs. landlord ports), cargo volumes,

and other local conditions. While theoretically merely interpreting the reasonableness requirement of Section 41102(c), as a practical matter the rule will force modifications of ocean carrier and MTO behavior in order to avoid the risk of being found unreasonable. Undoubtedly, the purpose of the rule is to change carrier and MTO behavior by adding potential legal risk through its interpretations.

To give one example, when the Commission states that it will consider as part of its reasonableness analysis whether notice is given that cargo is discharged, in an open area, free of holds, and proper paperwork has been submitted, its purpose is clearly to incentivize carriers and MTOs to give that specific type of notice. Courts have acknowledged that "non-binding guidance" in an interpretive rule 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").

The NPRM is a broad-brush approach to a very complex subject. The fact is, there is no "perfect" system for all carriers and terminal operators throughout the United States. The NPRM's approach, which seeks to impose nationwide standards for all terminals and carriers, fails to reflect the nuances of the hundreds and thousands of different factual situations. It becomes unworkable because it tries to mandate practices that may not be feasible or cost-effective for many situations. In its July 2015 study of congestion and possible remedies after forums held in Los Angeles, Baltimore, Charleston, and New Orleans, the Commission's Bureau of Trade Analysis warned against such an approach:

> The idea here is not to recommend or suggest 'best practices.' It would be invidious for the Commission to declare 'best practices.' Moreover, a practice considered 'best' in one set of circumstances may not be appropriate in other situations . . . Therefore, what may be an appropriate solution in one terminal, at one port, or in one region of the country, may not be the most appropriate approach in others.

U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges, at 10, n. 21; 44.

Indeed, the broad brush approach is inconsistent with the section of the Shipping Act the rule purports to interpret. The Commission notes in the NPRM that Section 41102(c) cases will "continue to be decided on the particular facts of the case," 84 Fed. Reg. 48851, as they have historically been. That is because the section 41102(c) standard is necessarily broad and fact-specific. The NPRM erodes that principle by imposing rigid standards of reasonableness regardless of specific facts.

There may be some concern that absent a rule such as proposed here, carriers, MTOs, and their customers will not work out reasonable solutions to the imposition of demurrage and detention when a container is not available. The Commission's Interim Report from Fact-Finding No. 28 indicates the opposite, i.e. that the free market will in fact address these issues. For example, the proposed rule indicates that it would be unreasonable for an ocean carrier or terminal operator to impose demurrage and detention charges when the container was not available for any reason not under the control of the shipper. This would presumably include factors such as weather or labor strikes. These factors are of course also outside of the control of the carrier or MTO. However, the report notes:

> Most VOCCs and MTOs stated that they have a policy for extending free time or waiving or otherwise mitigating demurrage and detention caused by circumstances outside of the control of cargo interest or truckers. Thirteen [out of 23] of the VOCCs stated that they either automatically extend free time when a container is unavailable for retrieval or do not charge when a container is unavailable for retrieval, and ten provided tariffs reflecting such policies. The circumstances that warrant the automatic extension of free time varied by carrier, but generally include labor strikes or weather events where the entire port or entire sections of a port are closed. The remaining VOCCs indicated that they either resolved demurrage and detention in such situations on a case-by-case basis or referred to language in their tariffs that granted them discretion to waive demurrage. Two VOCCs noted that while they have discretion to waive demurrage, they generally follow, and pass on, whatever relief is given by the terminal.

Interim Report at 12. The Report goes on to explain that most MTOs similarly extend free time on a case-by-case basis, i.e., depending on the facts of the particular case. Some stated that they would automatically extend free time when terminal access is impeded, typically through MTO schedules, port tariffs, or alliance tariffs. *Id*. The report further indicates that some VOCCs and MTOs have chosen to mitigate demurrage and detention due to Customs holds or lack of chassis. *Id*. at 13.

In other words, it appears from the Commission's report that the free market has voluntarily addressed the conditions raised in its NPRM. The Report does not explain why the 10 carriers that do not have a practice of extending free time do so, but this is presumably because they do not need a blanket rule because of the trades/ports in which they operate. Both categories of VOCCs and MTOs – those with general policies and those without – reflect the virtue of the free market in allowing the parties involved, rather than the government, to allocate the risk of demurrage and detention costs, especially those beyond anyone's control, based on specific local conditions, and demonstrates that the current legal standard under the Shipping Act is working appropriately. The Commission has made no attempt to explain why the actions of the remaining carriers and MTOs are unreasonable under their circumstances, or why letting the market allocate these risks would be unreasonable.

The following are particular areas where the Commission should not mandate broad-brush demurrage and detention practices.

Notice that Cargo is Discharged Free of Holds,
with Proper Paperwork, Should be Rejected

The NPRM states that these factors, which are linked with cargo availability, would "weigh toward reasonableness." 84 Fed. Reg. at 48853. These factors are not appropriate and

are in fact inconsistent with the Commission's incentive policy. The discharge of the cargo from the vessel is admittedly within the ability of the carrier and MTO, and notice is typically given of such discharge. However, whether the container is free of holds and the proper paperwork has been submitted is purely within the province of the cargo interest.

The primary sources of holds are government inspections (discussed specifically below), incomplete paperwork, and failure to pay freight. If the carrier or MTO could not assess demurrage unless the cargo was free of holds, it would mean that the shipper could effectively gain extra free time to pick up or return a container by delaying payment of freight. This is exactly the opposite of the incentive the Commission is purportedly trying to encourage, since it would allow cargo interests to freely delay cargo delivery or equipment return. Thus, this criteria should not only be deleted as a consideration for when a carrier or MTO may reasonably impose demurrage or detention, the Commission should make clear that the cargo interest may be responsible for demurrage/detention, and free time may run, during any period when the cargo is under a hold for nonpayment of freight or incomplete paperwork.

Demurrage and Detention Should Not be
Deemed Unreasonable in No-Fault Situations

A number of the conditions relating to container availability addressed in the rule are not the fault of either the carrier or terminal operator on the one hand, or the cargo interest on the other. Examples are weather, labor actions, or chassis shortages. The proposed rule would deem assessment of charges by carriers or MTOs to be unreasonable in any such situations.

This is an area in which the proposed rule falls short. For one thing, the Commission has proposed to protect only the cargo interest in such situations, disregarding any financial interest of the carrier or MTO. It is unfair for the Commission to automatically assign the entire financial responsibility for no-fault situations to the carrier or MTO. The Commission should

leave it to the parties to allocate the responsibility for no-fault situations among themselves. As discussed above, the Final Report in Fact-Finding 28 notes how a number of carriers and MTOs have allocated risk in no-fault situations, in appropriate cases in the cargo interest's favor.

The NPRM's sole reliance on the incentive principle, to the exclusion of other important policy considerations, is inconsistent with the "reasonableness" concept that is the essence of section 41102(c). Commission case law has long recognized that in addition to the incentive policy, demurrage and detention also are designed to compensate carriers and terminal operators for the cost of their facilities and equipment. The Commission's Final Report in Fact-Finding 28 acknowledges this compensation principle at page 28, footnote 36, and cites two cases that recognize the policy. *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89, 107 (1948) and *In the Matter of Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 9 S.R.R. 860, 864 (FMC, 1967). Neither of these cases has been reversed or mitigated by subsequent Commission case law.

Without explanation, the proposed rule totally ignores the compensation policy acknowledged by the Report, which is not limited by considerations of incentive or fault. Under that policy, carriers and MTOs are entitled to demurrage and per diem revenue to compensate them for their valuable equipment and facilities. To enact a blanket rule denying them that option because of a lack of an incentive factor would be unfair and arbitrary. At the very least, the Commission needs to explain why it is fair to ignore the compensation policy and assign all costs to the carriers and MTOs, with none to the cargo interests.

A good example of allocation of no-fault risk is when carriers or terminal operators have rules that waive per diem or demurrage charges when a no-fault situation occurs during the free time period and assess such charges when they occur after the free time period is expired.

PMSA would encourage the Commission to acknowledge that this practice is reasonable, and that it promotes the Commission's incentive policy. If a cargo interest knows that if it does not pick up cargo or return equipment during the original free time period, it will be subject to charges even if a no-fault event occurs during the demurrage/per diem period, it will have a strong incentive to pick up the cargo during the original free time, promoting container velocity.

This type of allocation of no-fault risk is also consistent with past Commission precedent. The New York cases cited by the Commission indicate that higher "penalty demurrage" can be charged after the initial free time period as an incentive. Similarly, in another case, the Commission held that "it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charges resulting from a strike occurring after free time has expired." *The Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association, et al.,* 10 F.M.C. 409, 417-18 (FMC 1967).

Recognizing the ability to assess charges once free time is concluded would also be consistent with the "once on demurrage, always on demurrage" principle recognized in maritime charter law. Charter cases and arbitration decisions have long recognized that once laytime is completed, and free time has expired, demurrage charges should be continuous. The theory is that the charterer has failed in his duty to load the vessel within the allotted period, and that after laydays have expired, the exception for Sundays, holidays, and weather working days are no longer of any value. 2A Benedict on Admiralty Sec. 211. While this principle has eroded somewhat as a mandatory principle in recent years, it is still well-accepted and enforced when inserted by the parties. Id.

The Commission Should Retain the Status Quo
<u>on Government Inspections</u>

PMSA does not believe any of the three suggested approaches on government inspections in the NPRM should be adopted. PMSA recommends that parties be free to allocate demurrage and per diem risks in inspection situations. PMSA also believe the proposals, particularly the second one, would be contrary to the incentive principle cited by the Commission.

It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations. The most common type of inspection is the VACIS/X-ray inspection, which usually occurs on-dock. These inspections are sometimes random, but are also often based on questions about manifest information, commodities, origins, shippers/consignees, intellectual property issues, etc. Radioactive Portal Monitor (RPM) inspections are the other typical on-dock inspection, which seeks suspect commodities. These initial inspections can on rare occasions lead to more-detailed "tailgate" inspections.

The above are just the Customs-specific inspections. Initial Customs inspections are gateways for inspections for other government agencies as well. Customs and Border Protection inspections are used by over 40 other U.S. Government agencies, to address issues as broad as agricultural regulations, food and drug laws, and fish and wildlife regulations.

One reason the NPRM's proposals are unsatisfactory is that they are based on an incomplete policy analysis. The Commission states that the problem is that the costs and delays associated with inspections are "a significant problem for cargo interests and truckers." 84 Fed. Reg. 48853. There is no mention or apparent consideration to the operational and financial impact of such delays on marine terminal operators or carriers. This is ironic because carriers and MTOs have no relation to government inspections, which are always related to a shipper's cargo or paperwork. Because the Commission has only considered the impact on one set of

parties, the three proposed approaches would each limit demurrage that can be charged and therefore unduly burden carriers and/or terminal operators.

It would frustrate the NPRM's stated incentive principle to impose limitations on demurrage collections during government inspections. PMSA understands that shippers and consignees in many cases cannot control the timing or duration of an inspection. However, they do have some control over *whether* cargo is inspected. Excusing shippers and consignees from paying demurrage would remove any incentive for them to make sure their paperwork was in order, to pay attention to their commodity descriptions on manifests, ensure they are dealing with reputable business partners and that those partners are adequately described on the shipping documentation, join C-TPAT to obtain inspection priority, and so forth.

PMSA is unable to comment in detail about the first and third options proposed by the Commission, relating to caps and escalation. There is no explanation of what caps or escalation are contemplated, or why they may or may not promote appropriate policy objectives. The Commission would have to provide further explanation of the options and permit a further round of public comment before pursuing either option. That said, consistent with the free market approach, PMSA generally believes that the Commission should not impose any additional general rules on imposition of charges in the case of government inspections.

Push Notifications Should Not Be Required

The NPRM states that shippers have convinced the Commission of the "superior merits of 'push notifications' related to cargo availability." 84 Fed. Reg. at 48853. Accordingly, failure to use such notifications would apparently be unreasonable. The Commission appears to be mandating technology that may be nice to have, but which is not feasible or necessary in many cases.

The Commission's Interim Report in the Fact-Finding found that "[f]ew VOCCs or MTOs indicated that they affirmatively notify cargo interests that an event triggering such policies has occurred." Interim Report at 12. The Final Report did not find that the practice had proliferated any further. Thus, few industry players use push notifications, in many cases because their existing technology does not accommodate them. Furthermore, marine terminal operators do not have an established direct relationship with the BCO or trucker, and carriers may not have a direct relationship with the trucker, so they may not be able to establish such a system. The Commission cannot mandate technology that has not sufficiently developed to allow for broad application. If the Commission required this, it would have to include a transition period of at least a year to accomplish it technically. That would be an unusual and unworkable approach. It would be best to let technology develop at its own speed through the market.

The Commission has failed to explain why push notifications are superior. In particular, PMSA's members' experience is that the prevailing practice of making container availability status available on a web site or app provides pretty much the same information as a push notification, just in a different form. Even with a push notification, the shipper or trucker will still have to make some effort to look at the notification and access the information. That is not significantly different or more burdensome from accessing the web site or app to get the information at the shipper's or trucker's convenience.

Ultimately, there is no justification offered for why the Shipping Act would consider specific types of technology of providing notice to market actors as reasonable. Indeed, in most instances, such a pronouncement would be antithetical to the purposes of the Act.

Notice methods are currently a matter of customer service. Different carriers or terminal operators may or may not choose to invest in push notification technology depending on their

budgets and their customers' needs. If a customer is dissatisfied with a particular carrier's or MTO's customer service, it has the ability to switch to one with better service. The Commission should not be usurping the market place in customer service, and obviously it would be inappropriate for the Commission to mandate particular technology or software.

The Proposed Rule is Inconsistent with
Shipping Act Tariff Requirements

The Commission's effort to mandate the perfect system, as opposed to a reasonable system, is exemplified in its discussion of accessibility of demurrage and detention policies. The NPRM states that policies need to be accessible on one easily accessible web site, and that "burying demurrage and detention policies in scattered sections in tariffs would be disfavored." 48 Fed. Reg. at 48854. While this appears reasonable on the surface, the Commission has no authority to require non-tariff publication of rates and charges, however desirable it might be from a customer service standpoint. Indeed, under the Shipping Act, carrier provisions on detention and demurrage are *required* to be included in the tariffs that the rule disparages.

Section 40501(b)(4) of the Shipping Act provides that every common carrier shall "state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges." The only statutory requirement on access is that the public have electronic access to a carrier's tariff. It is long-established law that cargo interests are bound by common carrier tariffs, and are assumed to have knowledge of the tariff's contents, when they tender cargo to the carrier. *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).

Section 40501(f) of the Act further provides that marine terminal operators may publish MTO schedules and that, if they do, "[a]ny 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."

Neither of these provisions authorizes an apparently new requirement that demurrage and per diem policies be posted on a web site. Accordingly, it is beyond the Commission's statutory authority to add notice requirements inconsistent with the tariff requirements. Including notice in one place on a web site might be a desirable customer service practice, and a number of carriers and terminal operators already do it, but it cannot be legally required, or deemed unreasonable, if a carrier or MTO has fulfilled its statutory requirements.

The Proposed Rule Would Disrupt
Existing Industry Contractual Relationships

In the purported interests of transparency, the rule asks for comments on a proposal that would "tie billing relationships to ownership or control of the assets that are the source of charges." 48 Fed. Reg. 48854. Specifically, it is proposed that MTOs would bill cargo interests directly for use of terminal land and ocean carriers would bill cargo interests directly, rather than third parties, for use of containers. For the explanation of the basis for this proposal, the NPRM refers in a footnote to page 18 of the Interim Report. 84 Fed. Reg. at 48854, fn. 26. However, neither the text of the NPRM nor the Interim Report provides any substantive explanation or reasoning as to why these billing approaches would be the only reasonable ones, or even preferable.

The suggested carrier approach would be a significant change in paradigm for most carriers. Specifically, equipment charges (detention or per diem) are generally assessed against motor carriers, not cargo interests, under the provisions of the Uniform Intermodal Interchange & Facilities Agreement ("UIIA"), which the NPRM holds up as a model business agreement. The UIIA has been in effect for several decades and has been negotiated with the participation of

equipment providers (carriers), motor carriers, and rail carriers during that time. The UIIA contains provisions about the substantive charges of each carrier, invoicing procedures and timetables, and dispute resolution procedures.

PMSA submits that while individual parties should have the option to enter into billing relationships as they see fit, the Commission should not mandate wholesale changes that are inconsistent with the UIIA without strong reasoning and explanation. Indeed, the Commission probably does not have jurisdiction to do so. In any event, as noted above, the Commission has provided no explanation as to why these modified billing relationships would be beneficial to any parties. If the Commission wishes to pursue this area, they should republish a proposed rule with a clear explanation of the rationale and permit further comment.

For all the above reasons, PMSA respectfully urges the Commission not to adopt the proposed rule in this docket.

Respectfully submitted,

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