**BEFORE THE**
**FEDERAL MARITIME COMMISSION**

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

**COMMENTS BY PORTS AMERICA**

Pursuant to the notice published by the Federal Maritime Commission ("Commission") in the Federal Register (84 Fed. Reg. 48850, September 17, 2019), Port Newark Container Terminal, LLC, Ports America Washington, Inc., Ports America Chesapeake, LLC, and Ports America Louisiana, LLC, (collectively "Ports America") comment on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.

## I. INTEREST OF PORTS AMERICA

Ports America's various affiliates operate over 80 marine terminals, including 35 container terminals, in 42 U.S. ports. The group operates approximately 35 percent of U.S. container terminal capacity, as well as various substantial breakbulk, ro/ro and other U.S. terminals in liner trades regulated by the Commission. These affiliates include Port Newark Container Terminal, LLC, Ports America Washington, Inc., Ports America Chesapeake, LLC, and Ports America Louisiana, LLC, all operators of container terminals which submitted responses to the Commission's inquiries in Fact Finding No. 28.

## II. SUMMARY OF PORTS AMERICA'S POSITION

Ports America supports the views expressed by the National Association of Waterfront Employers ("NAWE"), but wishes to emphasize several additional points.

Ports America commends the Commission for including marine terminals in the groups of industry stakeholders consulted by the Commissioners and staff regarding the aforementioned Notice of Proposed Rulemaking. However, Ports America opposes portions of the proposed rule on legal, factual and practical grounds, and strongly encourages the Commission to look more carefully at elements of this proposed rule before acting. The proposed rule is not necessary to remedy any material problems in the industry that are not already being addressed by the shipper, carrier, and terminal marketplace. This proposed rule would unreasonably impose governmental limitations on an established and functioning system, frustrating the commercial entities' freedom of contract. This rule will also invite multiple new disputes over minor issues, and would require terminals to incur capital costs with no material benefit to any parties.

## III. THE PROPOSED RULE IS UNLAWFUL, UNSUPPORTED BY THE FACTS, AND AN UNNECESSARY AND ARBITRARY INTRUSION INTO THE MARKETPLACE

### *A. The Rule Is Inconsistent with the Stated Purposes of the Shipping Act.*

The stated purpose of the Shipping Act is to establish a non-discriminatory regulatory process, "with a minimum of government intervention and regulatory costs," "in harmony with, and responsive to, international shipping practices," and "placing greater reliance on the marketplace." 46 U.S.C. §40101(1), (2) and (4). Contrary to these pro-competitive objectives, the proposed rule would result in significant new government intrusion into the commercial marketplace, imposing substantial regulatory costs on marine terminal operators. It will also likely result in demurrage and detention-related litigation before the FMC, where none currently exists,

further increasing compliance costs. The rule is heavily discriminatory, arbitrarily placing a disproportionate risk of delays due to force majeure and government inspections on the marine terminal operators.

In particular, the proposed rule states that the Commission may determine that a terminal demurrage practice that does not start free time computation on the basis of individual container availability is unreasonable, or at least consider the lack of individual container availability notice as a factor in determining reasonableness. First of all, assuming the practice currently used by most terminals is to start free time only when the ship is completely unloaded, this arrangement would mean that most shippers would in practice get less, rather than more free time. Additionally, not all terminals have systems, software and equipment capabilities to provide real-time container-by-container availability notice. The costs and burdens to develop and implement these systems would be burdensome on smaller terminals, many of which may be unable to amortize such costs over a larger cargo volume.

Responding to marketplace demands, terminals, carriers and shippers have historically negotiated free time in their service contracts with a view toward providing a generally adequate period for container pick up, taking into account that the parties do not measure free time separately for each container based on the exact moment it comes to rest on the terminal, and allowing flexibility considering the usual complications in cargo handling, scheduling, traffic, weather, holiday periods and other factors. As the Commission found, when major disruptions occur, such as storms or labor disputes, the terminals work out waivers or other suitable accommodations in individual cases. Terminals are already highly disincentivized by the marketplace from having disputes with their customer vessel operators and their shippers.

There is no showing in the Commission's fact-finding or rationale expressed for the proposed rule that suggests this is a material problem in the industry. This is demonstrated conclusively by the virtually total absence of Commission complaint proceedings for many decades. While developing and implementing advanced container tracking systems may be a feature in which some terminals have invested or will invest to provide better service and attract more business, the Commission should let the competitive marketplace determine which terminals decide to spend that capital, instead of imposing risk of non-compliance, penalties and engaging legal counsel for disputes on everyone who chooses not to or cannot afford to do so.

We also note that terminals do not have the capability to provide so-called "push notifications," which include affirmative electronic text and mobile phone messages to shippers and truckers that cargo is ready for pick-up. The containership line has the contractual relationship with the shipper, and the carrier and shipper have the relationship with the trucker, and may be able to send notices directly. In contrast, the marine terminal does not have the IT system or information to make direct contact with those parties. Notice of availability is posted on the terminals' websites now, and shippers and truckers can access it easily.

As the Ports America terminals responding to Fact Finding No. 28 noted, these terminals have invested enormous amounts of capital in physical and operational improvements in recent years, including extensive new IT systems and features, all designed to produce improvements in efficiency. These expenditures are in response to current and forecasted marketplace needs, and are designed to produce the best results at an efficient cost. Concepts like real-time individual container tracking and availability notices may become more widespread if and when there is carrier and shipper demand and a marketplace that rewards that investment or at least fully amortizes it. Moreover, the market intervention contemplated in the proposed rulemaking is likely

to have a stifling effect on incorporation of new technology to enhance efficiency (such as appointment systems) due to how the proposed rulemaking interprets the concept of "lack of availability of appointments" or lack of availability for any other efficiency/technology enhancement for that matter. In the meantime the Commission should not place itself in the position of making such a market decision for the industry.

As a general matter, the concept of free time gives all stakeholders generally-agreed reasonable latitude to pick up cargo and redeliver equipment, including known operating limitations such as weekends and holidays, and foreseeable but not controllable events such as weather, strikes or government actions. In the vast majority of cases, the free time is adequate, and in the small percentage of instances where it is not, typically the parties resolve any disputes. Trying to eliminate the free time concept and micromanage these relationships with real-time availability notices, tracking time and turning the clock on and off by the hour would require enormous capital costs and make the process overly mechanical, leading to a much greater incidence of disputes and lost productivity of personnel, and loss of perceived "fairness" in what has been a successful long-term market-driven practice.

*B. Using an "Incentive Principle" as the Sole Rationale to Determine Reasonableness of Terminal Practices Is Factually Unsupported, Arbitrary And Inconsistent with Precedent.*

The Commission's conclusion that the sole purpose of demurrage and detention is to incentivize timely shipper removal of cargo from the terminal and quick return of equipment ignores other basic commercial reasons for these charges. The Commission has previously recognized in prior decisions[1] that the terminals and their customers bargain at arm's length for sharing of the cost of terminal space, equipment and improvements, and allocation of risks of delays that are foreseeable but beyond the terminal's control.

[1] See, e.g., *Free Time and Demurrage Charges – New York*, 3 F.M.C. at 93.

Because the terminal cannot prevent delays beyond its control, imposing a rule which would arbitrarily shift the full burden of cost to the terminal does not further the "incentive principle." Indeed, the proposed rulemaking should take into account that huge demand fluctuations (i.e. more appointments are demanded) are largely driven by the greater supply chain (late ships, bunching of volume/ships etc…) and out of the control of an individual terminal using an appointment system or some other efficiency enhancing process. Absent this understanding, the proposed rulemaking will disincentivize the implementation of innovative technology or other efficiency enhancing processes by terminals.

Furthermore, as NAWE discusses in more detail, the application of the "incentive principle" to force terminals to give the shipper and carrier additional free time actually violates this "incentive principle." Arbitrarily extending free time because the terminal gate is closed randomly benefits or penalizes carriers and shippers depending on the day of the week when their free time for each particular shipment began. It rewards a party who through its own actions or economic decisions fails to pick up a container or return equipment on a timely basis. For example, a shipper whose free time expires on the Friday before a three-day weekend has little incentive to meet the deadline, as it will get free continued use of the terminal space or equipment for the weekend.

*C. Terminals Cannot Control Delays Arising from Government Inspections.*

Government inspections are a part of the import process, and one over which the terminal and carrier have no control. The cost of delays associated with such inspections are more appropriately assigned to the cargo interest, which is the party which has the information regarding the shipment and is the importer of record responsible for clearing the cargo. CBP "holds" on cargo release often arise due to inaccurate, incomplete or delayed submission of information by

the shipper. If the costs for holds and inspections are arbitrarily placed on the terminal, the shipper has less incentive to have its paperwork in order on time.

The Commission's suggestion of a regulatory shift to the terminals of all delay and capital cost for government inspection time is also highly discriminatory and will have adverse unintended consequences. This shift will force the terminal, as the service provider, and the shippers of cargoes that do not require frequent inspections, to subsidize the shippers whose cargoes do require inspection. Logically, if the terminal is forced to absorb these delay costs without recovering demurrage from the inspected cargo shippers, the terminal will have to spread that cost at least in part to all shippers, including those whose cargoes are not delayed by inspections. In significant part, cargo inspections are not random. Certain commodities and shippers, by their business nature and without fault, are likely to require more inspections. Other shippers, by fault such as submitting incomplete, delayed or inaccurate data and paperwork, will also have their containers inspected more frequently. Precluding the terminal from collecting demurrage from the shippers whose cargo is inspected thus unfairly shifts some of this cost to the shipper whose commodities do not need inspections, and to those shippers who are more diligent about paperwork and thus help speed up the flow of cargo through the terminal.

Of equal importance, depriving the terminal of the ability to impose some cost recovery on the shippers whose cargoes require inspections, for whatever reason, disincentivizes these shippers from taking measures to reduce inspections and associated delays. The shippers who are delinquent in getting their paperwork in timely and in good order would have less incentive to improve their performance. Even the shippers who get inspected through no fault but just because their industries and commodities need more inspections for public policy reasons are not incentivized to develop better technologies or procedures to minimize inspection delays. In either

case, the Commission's concept of barring demurrage charges on containers that are beyond free time allowances but are held for inspection will be counterproductive.

*D. FMC Should Not Dictate Rigid or Impractical Billing Practices.*

The proposed rule includes a conclusion by the Commission (Memorandum p. 13) that carriers should bill cargo interests for use of containers and terminals should bill cargo interests for use of terminal land, rather than the terminal billing cargo interests or other contractors who may be obligated to pay demurrage costs on behalf of both the terminal and the carriers. While Ports America understands the Commission's rationale, this would be an unwise universal rule.

Generally, by agreement of the parties, the terminal collects demurrage on behalf of the carrier and other parties. This "one stop" arrangement is practical and simple and provides the greatest efficiency and transparency for all interests.

Additionally, commercial parties should be free to agree upon whatever billing arrangement they might best choose to accommodate their interests efficiently. The reasonableness of each arrangement should be reviewed by the Commission on a case by case basis. We note that to our knowledge, no party - carrier, shipper or other services provider - has initiated any complaint proceeding with the Commission alleging that any specific billing practices are unreasonable under the Shipping Act.

The carrier and shipper are the terminal's customers. If the terminal can render a value-added service by handling billing, that may provide the best efficiency and allow cost savings to be passed through to the shipper.

*E. Ports America Is Concerned With The Guidance On Demurrage Policies.*

There is no reason for the Commission to try to rewrite common law with respect to tariff publication by conceptually redefining what constitutes an "easily accessible" website.

Section 40501(f) of the Shipping Act states:

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

The key term is "make available". Most terminals self-publish their schedules on their websites, and the contents of their schedules are found by internet searches. If the terminal fails to publish its schedule, or for any reason it might be unduly difficult for a carrier or shipper to find the terminal's demurrage and detention terms, the terminal would be at risk of not being able to enforce those terms because the shipper would argue the terminal did not "make available" those terms. Disputes on this topic appear to be rare, and in any event would be entirely fact intensive in each particular situation.

## IV. CONCLUSION

For the reasons set forth above, the NPRM should not be adopted. Arguably, if this proposed rule existed today, it might be a candidate for elimination. The Commission has previously espoused a general policy of reducing and eliminating unnecessary regulations, especially those that restrict commercial freedom in place of relying on marketplace solutions. This is not a situation that calls for such intrusion.

Respectfully submitted,

By:_____
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