



April 15, 2020

The Honorable Michael A. Khouri
Federal Maritime Commission
800 N. Capitol Street, NW
Washington, D.C. 20573

Dear Chairman Khouri:

The World Shipping Council (WSC), National Association of Waterfront Employers (NAWE) and Pacific Merchant Shipping Association (PMSA) submit this letter in response to four virtually identical letters dated April 1 through April 3, 2020, and filed in Docket 19-05 by Kontoor Brands, Marc Fischer, Perry Ellis, and Under Armour. Each of the four letters includes the following operative language:

"I am writing to urge the Federal Maritime Commission (FMC) to immediately finalize, as published, the FMC's Proposed Interpretive Rule addressing fair demurrage and detention practices at our nation's maritime gateways. Further, with the global supply chain disruption and massive loss of business resulting from the coronavirus, I urge the Commission to issue strong guidance stating that, based on the final interpretive rule, the current crisis constitutes a situation where detention and demurrage fees should be waived." (emphasis added)

This request by four large and sophisticated shippers for such a sweeping Commission order underlines the need for the Commission to be clear in any final rule about both the scope of its statutory authority and also the scope of what it has characterized as a proposed "interpretive rule" on detention and demurrage.

As the Commission stated in the preamble to its proposed rule, "each §41102(c) case would continue to be decided on the particular facts of the case" 84 Fed. Reg. 48851. The action requested by the four recent letters, in contrast, asks the Commission to issue a blanket order requiring waiver of all detention and demurrage charges for an indefinite period on the basis of business disruption associated with the coronavirus pandemic.

Put simply, if the request made by these four companies (none of which submitted comments during the comment period for Docket No. 19-05) is in any way indicative of other parties' expectations about the scope of the Commission's intended final rule, we urge the Commission to redouble its efforts to make sure that the final rule clearly states what it does and does not do.

Multiple parties, including the undersigned, have argued that the Commission may not issue broad prescriptive mandates about what detention and demurrage rules and practices may or may not be adopted by carriers and marine terminal operators. We have further argued that many of the statements in the proposed rule cross the line of what is permissible, and we continue to urge the Commission to make appropriate changes in the final rule to address those shortcomings. As substantial as many of those concerns are, however, none rises to the level of the request by these four companies that the Commission determine – by fiat, for the entire country, and for an indefinite time – that it is unreasonable to collect detention and demurrage.

We must keep our ports fluid and cargo moving. The action proposed by the four shipper letters would do just the opposite. Waiving detention and demurrage on a blanket basis would cause cargo to remain on marine terminals and at shipper facilities, thereby congesting terminals and preventing empty containers and chassis from being available to move essential cargo. This would make the problem worse, not better.

All businesses are fundamentally challenged by the COVID-19 pandemic, and the undersigned sincerely hope and expect that reasonable commercial accommodations can be reached by all supply chain partners to allocate risks and losses appropriately. What we cannot countenance is a raw request that the FMC issue an order relieving entire classes of supply chain participants from their contractual obligations. In its final rule in Docket No. 19-05, we urge the Commission to do two things. First, it must clarify that its purported “guidance” only describes factors for its administrative law judges to consider in contested cases within the totality of the circumstances of those cases. Second, the Commission must make clear that it cannot and will not issue sweeping orders of the sort sought by the four recent letters.

Sincerely,



John W. Butler
President & CEO
World Shipping Council (WSC)
jbutler@worldshipping.org
(202) 589-0106



Lauren K. Brand
President
National Association of
Waterfront Employers
(NAWE)
lbrand@nawe.us
(571) 400-1835



John McLaurin
President
Pacific Merchant Shipping
Association (PMSA)
jmclaurin@pmsaship.com
(510) 987-5000