



WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

**Before the
FEDERAL MARITIME COMMISSION
Washington, DC 20573**

Docket No. 19-05

Interpretive Rule on Demurrage and Detention Under the Shipping Act

COMMENTS OF THE WORLD SHIPPING COUNCIL

The World Shipping Council (“WSC” or the “Council”) files these comments in response to the Federal Maritime Commission’s (“FMC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) published on September 17, 2019. 84 Fed. Reg. 48850. WSC is a trade association that represents the liner shipping industry on regulatory, policy, safety, and environmental issues. The Council’s nineteen members operate approximately ninety percent of global container capacity, and would be directly and adversely affected if the Commission adopted the NPRM without substantial changes.

WSC submitted written comments in Matter P4-16 and participated in the Commission’s non-adjudicatory fact-finding investigation, Fact-Finding No. 28. The Commission states in the NPRM (at 3) that the investigatory record and findings in those proceedings formed the basis

for the proposed rule, and thus WSC incorporates its comments and testimony in those proceedings by reference herein.

Summary of WSC's Position

Through the issuance of an “interpretive rule,” the Commission purports to be providing guidance to the industry as to what factors the Commission will consider in assessing whether a demurrage or detention practice is unjust or unreasonable under 46 U.S.C. § 41102(c) and 46 C.F.R. 545.4(d). Although WSC agrees that an interpretive rule that is properly constructed could be useful in promoting fluidity and reducing confusion, the guidance the Commission is proposing in the NPRM is neither an interpretive rule nor is it properly constructed.

The Commission grossly oversimplifies the underlying purposes of demurrage and detention to the sole criterion of whether the charge acts to incentivize the movement of a shipping container. It ignores critical portions of the extensive investigatory record upon which its guidance is purportedly based, and it departs from prior precedent without any explanation. With no analysis of the regulatory impact, the Commission prescribes sweeping new standards that would make ocean carriers financially responsible for circumstances beyond their control, impose significant regulatory costs on carriers in order to comply with those standards, and greatly increase the potential for unproductive disputes and costly litigation. In short, the Commission uses a broad brush to make new substantive law under the guise of merely

providing guidance, and in so doing exceeds its authority under the Shipping Act of 1984, as amended (the “Shipping Act”), and violates the Administrative Procedure Act (“APA”).

For the reasons discussed below, the Council urges the Commission to withdraw the NPRM, take into consideration all of the stakeholder feedback provided to it in this proceeding, as well as the proceedings in Fact-Finding No. 28 and Matter P4-16 that preceded it, and re-issue alternative guidance consistent with its statutory authority under the Shipping Act and its obligations under the APA.

I. The NPRM Constitutes a Legislative Rule.

As a threshold matter, it is important to accurately characterize the type of rule the Commission proposes in the NPRM, because that classification establishes the baseline for the agency’s rulemaking obligations and judicial review under the APA. The NPRM purports to be “guidance” by the Commission issued in the form of an “interpretive rule,” as opposed to a “legislative rule.” NPRM at 4. Broadly speaking, legislative rules impose new substantive obligations on parties that have the “force and effect of law,” while interpretive rules “only remind affected parties of existing duties,” *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566 (D.C. Cir. 1984), and do not effect “substantive change in the regulations.” *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995). Notwithstanding the Commission’s characterization of the NPRM as an “interpretive rule,” the Commission elected to seek public comments in this proceeding, even though interpretive rules are generally exempt from the notice-and-comment procedures under the APA. However, because the NPRM qualifies as a

legislative rule, it is not enough for the Commission to have simply sought public comment; it must satisfy all of the APA's substantive rulemaking requirements in order to withstand judicial scrutiny.

The D.C. Circuit has enunciated a four-part test for identifying legislative rules. If any one of these criteria is met, then the action is a legislative rule. As stated by the court:

Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has "legal effect," which in turn is best ascertained by asking: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

With respect to the first *American Mining* prong, the NPRM without question proposes new, enforceable obligations on carriers with respect to detention practices. A blanket rule, for example, that any detention charge will be considered unreasonable where a cargo interest or trucker is unable to retrieve cargo from a terminal "because the cargo is not available for retrieval due to circumstances such as weather, port or terminal closures, the container is in a closed area, or government inspections of the cargo" represents a substantive change to the current law. See NPRM at 6. There is no recognized legal theory under the Shipping Act today that would prevent a carrier from charging detention in any case in which a shipper failed to return a container due to its own fault, or in any force majeure-type instance where it was

neither the carrier nor the shipper's fault. If adopted, the NPRM would require substantial changes in the manner in which carriers do business today and force them to conform their conduct to a host of newly prescribed standards. Cargo interests and truckers would no doubt rely on those new standards as a basis for complaints on the theory that certain conduct was "unreasonable." Because the proposed rule would create new grounds for reparations actions, the first prong of the test to determine whether this is a substantive rather than an interpretive rule is satisfied. The *American Mining* test is stated in the disjunctive. If any one prong is met, it is unnecessary to consider the other prongs, and no further analysis is necessary to accurately characterize the NPRM as a legislative rule. Nevertheless, in the interest of completeness, we briefly review the other prongs below.

Under the second prong, while the rule is not yet final, the FMC has structured the proposed rule as an amendment to the Code of Federal Regulations, and thus it appears that the prong-two publication standard will be met. Under the third prong, the Commission has proposed to retain the stated authority for 46 C.F.R. Part 545, to which it would add a new section 545.5. The only relevant cited authority is to the Commission's general rulemaking power at 46 U.S.C. § 305, so prong three is also met. Finally, as noted above and in more detail below, because the interpretive rule makes significant changes to existing law, prong four would also be satisfied if the Commission adopted the rule as proposed.

Given that at least one, and probably all four, of the prongs of the D.C. Circuit's disjunctive *American Mining* test are met, the NPRM qualifies as a legislative rule. That means

that if the rule is to be a valid exercise of the Commission's authority able to withstand judicial scrutiny, the Commission must satisfy all of the APA's substantive rulemaking requirements, including demonstrating that it has given due consideration to all material facts and issues in the record, articulated a rational connection between the facts found and the decision made, and provided a reasoned basis for why any prior policies are being changed. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–52 (1983); *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (“The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments”). Any such action must also be within the authority delegated by Congress to the Commission under the Shipping Act.

For the reasons discussed below, the Commission has not met these legal obligations. Most critical at this stage of the rulemaking, there is no explanation that the Commission could offer in any final rule that would repair a fundamental procedural flaw in the NPRM. That flaw is that, although the Commission makes reference to multiple documents (*see* NPRM footnotes 1-4) in addition to “the investigatory record” as forming the record basis for its proposed rule, at no point in the NPRM does the Commission actually discuss any part of that record in any detail nor even attempt to explain how the evidence in the record relates to the Commission's jurisprudence applicable to the statutory standard in 46 U.S.C. § 41102(c)—the statutory provision that the Commission purports to “interpret.”

Because the Commission has provided only its conclusions, but not the factual basis or legal rationale to support those conclusions, the NPRM fails to provide the notice to interested parties required by the APA. *See Connecticut Light and Power v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully on the agency’s proposals.”). In short, parties cannot comment on the Commission’s explanations for its actions, because the Commission has not provided those explanations. Any final rule that resulted from such a flawed beginning would be invalid, which is why the Council urges the Commission to withdraw the current NPRM and formulate a new approach that is supported by the record and by a proper application of the law to the facts.

II. The Commission Ignores Its Own Extensive Record in Relying Solely on the “Incentive Principle” As the Basis for the NPRM.

Viewing the NPRM under its proper classification as a “legislative rule,” WSC turns to the substantive deficiencies in the NPRM. The single most fundamental shortcoming of the NPRM, and the one that leads to numerous additional problems, is the Commission’s oversimplification of the purpose and operation of detention and demurrage charges. Specifically, the Commission’s sole criterion for assessing the reasonableness of detention and demurrage charges is whether application of the charges in any given instance will have the effect of incentivizing the movement of cargo and equipment. The NPRM calls this single-factor test the “incentive principle.” *See* NPRM at 5 (stating that the Commission will “consider the extent to

which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity”) and 6 (stating that when demurrage and detention charges “do not incentivize cargo movement and productive asset use, there is cause to question the reasonableness of their application.”).

The problem with the Commission’s sole reliance on the “incentive principle” in determining whether a charge or practice is “reasonable” within the meaning of 46 U.S.C. § 41102(c) is that there are other substantial purposes for detention and demurrage charges, and therefore there are other equally important considerations that must be taken into account in making a section 41102(c) reasonableness determination. By ignoring those other purposes for detention and demurrage charges, the Commission creates an analytical framework that is inconsistent with both the Shipping Act and the APA. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983) (failure to consider all relevant factors renders agency action arbitrary and capricious and contrary to law).

WSC does not argue that the incentive aspect of detention and demurrage charges is not important. To the contrary, WSC and its members testified that keeping cargo moving is important to all supply chain participants, including ocean carriers. What WSC and its members also made clear, however, is that when cargo does not flow freely, there are real costs involved, and detention and demurrage charges are used to allocate risk and provide compensation for those costs. Thus, for example, WSC explained in its comments on Petition P4-16 (February 28, 2017, at 7) that:

Although it is true that container detention charges to some extent play a role similar to that of demurrage – encouraging the flow of cargo and equipment – detention charges also compensate the carrier for direct equipment costs and opportunity costs associated with containers that are not returned on time. Those carrier costs do not cease when cargo flows are impeded by weather, labor unrest, or political actions (all of which would be bases for payment waiver under the petition’s proposed rule). Given these unavoidable carrier equipment costs, it is entirely reasonable for carriers to allocate such costs by contract or tariff rule, and competition in the marketplace—not regulation—is the best mechanism for setting the terms of that allocation.

The point was repeatedly reinforced at the Commission’s hearing on Petition P4-16. *See, e.g.*, Testimony of Paolo Magnani at p. 37 (“Ocean carriers still have costs when those charges are waived or discounted. Those charges are different—upon which carriers compete. Most do not realize the complexity of these charges.”); Testimony of Howard Finkel at 45 (“Like ships, containers cease making money when they sit idle.”); Testimony of Richard Craig at 33-39 (describing multiple types of direct and systemic costs when containers are not returned on time).¹ From the carrier’s perspective, detention charges are structured to serve as a recovery mechanism for the capital investment and cost of the container, including repair, maintenance, and leasing, as well as opportunity costs associated with not having the equipment available for revenue-producing cargo transport. The NPRM is silent on all of these points. Especially in the context of a “reasonableness” determination, which the Commission has itself said requires that “the merits of each claim must be considered *in toto*,” *Colgate Palmolive Co. v. The Grace*

¹ The Commission itself noted the compensatory aspect of detention and demurrage charges in the Fact Finding Investigation No. 28 Final Report, at p. 28, n. 36.

Line, 14 S.R.R. 600, 602 (FMC 1974), failure to consider all relevant and material factors renders the proposed rule invalid.

III. The NPRM is Beyond the Scope of the Commission’s Authority Under the U.S. Shipping Act.

Prior to 1984, the Commission had the explicit authority to prescribe commercial rules and practices that the parties were legally bound to adopt. Section 17 of the Shipping Act, 1916 (the predecessor to current 46 U.S.C. 41102(c)) provided:

Every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

The underlined portion of Section 17 was eliminated when the 1984 Act was enacted, meaning the Shipping Act no longer provides the Commission with the authority to “determine, prescribe, and order enforced a just and reasonable regulation or practice.” While the Commission can in the context of an adjudicatory proceeding decide whether a particular challenged charge or practice is unreasonable, it cannot prescribe particular practices in a rule, i.e., precisely the thing it seeks to do in the NPRM.² The NPRM effectively prohibits demurrage and detention practices that serve any purpose other than incentivizing return of the equipment (NPRM at 6). Such purposes may include instances where cargo or the container

² As noted above in Section 1, the Commission cannot avoid its lack of authority to prescribe rules by claiming to “interpret” 46 U.S.C. § 41102(c).

cannot be retrieved by the trucker due to lack of appointments (NPRM at 7), or that provide for the escalation of charges while cargo is undergoing a government inspection (NPRM at 11). Moreover, under threat of a finding of “unreasonableness,” the NPRM effectively requires carriers and MTOs to adopt particular processes with respect to when free time periods begin and end (NPRM at 8), how notice of cargo availability is given (NPRM at 9-10), how billing may be structured (NPRM at 13), and how carriers and MTOs define their commercial terms in tariffs and contracts (NPRM at 14-15). These examples, and others contained in the NPRM, constitute detailed and intrusive regulation of matters that have until now been left to commercial negotiation and competitive forces. On its face, the proposed rule would substantially restrict parties from defining the commercial terms and conditions of their own contractual relationships, an outcome that is sharply inconsistent with the market-based system contemplated by the Shipping Act, as amended by the Ocean Shipping Reform Act.

In addition, one of the stated purposes of the Shipping Act is to “establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs.” 46 U.S.C. 40101(1). The NPRM cannot be considered nondiscriminatory when it places all of the risk and responsibility on carriers for situations over which they have no control, including weather, terminal closures, and government inspections. Throughout the NPRM the impact of demurrage and detention on cargo interests and truckers is discussed, but in virtually

no instance are the rationale and impact of such practices on carriers even mentioned, despite significant input from carriers on this issue in the record.

In addition to the substantial government intrusion into the ability of private parties to negotiate their own commercial terms, the NPRM fails to address the significant costs and burdens that would be required for carriers to adhere to the Commission's new concept of "reasonableness." Information technology solutions would likely need to be developed and/or coordinated with terminals to push out a variety of new notices mandated by the Commission. Organizations would likely need to hire additional staff to form new dispute resolution teams. New rules and charges might need to be implemented if storage, chassis, and other out-of-pocket costs can no longer be recovered through detention. There is no discussion at all of the costs/burdens on the carriers in having to develop the necessary capabilities to comply with the Commission's proposed rules.³ Nor does the Commission provide any legal basis that would permit it to interfere with the rights of private parties to allocate costs and risks of equipment. As noted by numerous commenters in the record, private negotiation and competition in the marketplace—not regulation—is the best mechanism for setting the terms of that allocation. *See, e.g.,* Testimony of Paolo Magnani at p. 40-41 ("Those charges and the way each line build[s] them and use[s] them creates real competition among carriers and should not be

³ Related to the policy of minimal government intervention, the President issued Executive Order 13777, 82 FR 12285, on March 1, 2017, which called for reduction in the burdens of government regulation. The Commission has taken steps to support this EO, including designating a Regulatory Reform Officer, and issuing a Notice of Inquiry asking the public to identify "ways to make the Commission's regulations

regulated because these would distort those factors in the marketplace.”); Testimony of Richard Craig at 35 (“I want to be clear that demurrage and detention terms are subject to negotiation in the marketplace.”); Testimony of John Butler at 74-75 (discussing the difference between commercial flexibility and government regulation).

IV. The Commission Has Not Adequately Explained its Reasoning in the NPRM or its Departure from Prior Commission Precedent.

Although raised directly with the Commission in the proceedings that formed the basis of the NPRM, the FMC makes no attempt to distinguish or explain existing Commission precedent that has found it reasonable for carriers to charge detention for situations beyond their control. *See Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948) (holding it is reasonable under the Shipping Act to count Customs delays toward free time and that it is reasonable for carriers to charge compensatory element of demurrage when cargo is unavailable beyond the control of either party); *Boston Shipping Assoc. v. Port of Boston Marine Terminal*, 10 FMC 409 (1967) (holding it is reasonable for carrier to assess demurrage against cargo that exceeded free time at time strike begins). As the Council noted to the Commission in its comments in Matter P4-16, the relief sought by the petitioners in that proceeding (and the guidance the Commission is now proposing in the NPRM) has already been rejected by the Commission in the *New York* case. In that case, the U.S. Maritime Commission found that it would be improper to place responsibility on carriers for delays associated with pest

less burdensome and more effective. . . .” The NPRM’s imposition of additional regulatory costs and burdens is in direct contrast with the EO.

quarantines, food and drug inspections, customs inspections, truck congestion, and port congestion. The Commission's failure to acknowledge this departure from directly conflicting precedent, and provide a reasoned explanation for this departure, renders the NPRM arbitrary and capricious on its face. See *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (“[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a ‘reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970)); *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017) (If “an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

The Commission provides no legal or factual support in the NPRM (and WSC is not aware of any) for holding carriers solely responsible for various circumstances beyond their control. In the case of government inspections, for example, holding the carrier responsible completely ignores the fact that such inspections are imposed due to the nature of the cargoes, rather than the status of the equipment carrying those cargoes, and the period of time in which such an inspection takes place is completely out of the carrier's control. The Commission's proposed rules would require the carrier to assume all of the risk and cost associated with these types of delays, while the party in the best position to avoid or minimize those delays (the

cargo interest), would share no responsibility. Even members of the Commission had difficulty agreeing with that concept. *See* Statement of Commissioner Maffei, Hearing Transcript at 88 (“But government inspection really, actually the terminal is going to argue that if anybody can do anything about that it’s because it’s the kind of cargo that actually does have more to do with the BCO or the shipper.”).

The Commission’s vague and confusing conclusions and lack of any explanations throughout the NPRM create more questions than answers. For example, in listing weather-related issues separately from port and terminal closures (NPRM at 6), is the Commission suggesting there could be situations in which weather is not significant enough to force a port or terminal closure, but could still require the carrier to extend free time in order to be reasonable? The Commission also states (NPRM at 7) that any detention charge when cargo cannot be retrieved due to a lack of appointments cannot incentivize equipment return and therefore is likely to be unreasonable. But the Commission does not discuss or acknowledge in the NPRM how the carrier would even know if or when there was a lack of appointments, which are set by terminal operators, not carriers. Nor does the Commission explain whether it would factor in circumstances, such as when a trucker first attempts to make an appointment, in its reasonableness analysis (i.e., when is an appointment request too late to be considered reasonable?).

The Commission likewise suggests (NPRM at 8) that starting the free time clock upon container availability as opposed to container discharge from a vessel would be considered a

more reasonable practice. But there is no discussion in the NPRM of the significant cooperation from terminals and/or cargo interests that would be required for this practice to be adopted, or even if the Commission has considered whether this is technically feasible for the carriers from a systems perspective. Moreover, what if the container was not “available” (i.e., fully released) because of a shipper-created Customs issue or shipper non-payment issue? These types of questions underscore that the evidentiary issues and potential disputes in trying to establish when a container is “available” for purposes of starting the free time clock would be substantial, but the Commission does not even attempt to grapple with these complex issues.

As another example, the FMC states (NPRM at 9) that imposing detention in situations of “uncommunicated or untimely communicated changes” regarding cargo availability would be unreasonable, but provides no explanation of what would constitute such practices. The Commission states that it would consider the format, method, and timing of notice to cargo interests that cargo is available for retrieval, but says nothing about what it considers to be the proper format, method, or timing. Under the proposed rule, carriers would be responsible for notifying cargo interests that the cargo was “free of holds,” but Customs communicates directly with the consignee regarding entry holds, meaning it would be impossible for carriers to provide notice in these situations. Modifications to current notification systems would also require enhancements to carriers’ electronic data interchange (“EDI”) systems, and would be dependent on both terminal and cargo interests’ capabilities with respect to receiving EDI

notice, which are of course beyond the control of the carrier. The NPRM again lacks any discussion or consideration of these issues.

The above discussion highlights examples of numerous individual factual scenarios that are unexplained in the NPRM's "guidance." There are other scenarios identified in the NPRM that also warrant mention. These include:

- The Commission states (NPRM at 12) that it will favor practices and regulations that make demurrage and detention policies "available in one, easily accessible website" rather than "burying demurrage and detention policies in scattered sections in tariffs." The Commission does not adequately address the fact that publication in the tariff is currently required by law, or explain whether it is requiring carriers to implement multiple forms of notice or cease using tariffs as a means of public notice.
- The Commission suggests that it will consider reasonableness of material terms of demurrage and detention practices (NPRM at 14) in the context of "how those definitions differ from a regulated entity's past use of the terms, how the terms are used elsewhere in the port at issue, and how the terms are used in the U.S. trade." This new interpretation of reasonableness would essentially require carriers to use uniform language in each respective carrier's detention and demurrage practice, but the Commission does not provide definitions. Simultaneously, the Commission suggests that it will view reasonableness in light of the carrier's prior use of terms, which calls into question the benefit of changing terms in hopes of creating uniformity. This process will likely result in additional confusion rather than any clarity for customers.
- The Commission attempts to uproot the billing practice structure used by individual carriers (NPRM at 13) without providing adequate justification for such changes. In particular, the Commission's interpretation would discard the industry-wide UIIA agreement structure, which provides significant control for collection of detention invoices. The Commission's interpretation of reasonable billing practices would require separate invoices by MTOs and carriers. Under the Commission's interpretation, it is likely that the only beneficiaries would be larger exporters that have the means to negotiate directly with marine terminal operators.
- The Commission discusses a variety of factors in determining the reasonableness of dispute resolution processes, but fails to adequately explain each of these factors. In addition, the Commission does not acknowledge or address the fact-specific nature of

all dispute resolution policies, which are created by each individual carrier. The Commission also states (NPRM at 12) that carriers should provide an appeals process following dispute resolution, but does not provide any guidance on what would render such process sufficient.

- In its “Guidance on Evidence” (NPRM at 13), the Commission states that “providing truckers with evidence substantiating trucker attempts to retrieve cargo that are thwarted when the cargo is not available” will “weigh favorably in the § 41102 analysis.” This interpretation would require carriers to supply truckers with evidence that truckers already possess in several circumstances.
- In determining “cargo availability” (NPRM at 8 n.16) the Commission notes that a container may be deemed “unavailable” if the wait for a trucker outside the terminal gate is longer than fifteen minutes. Accessibility of a terminal following discharge of a container is generally tied to the ability of the terminal to keep cargo moving at an efficient rate. The Commission’s determination of “reasonable demurrage practices” related to container availability fail to identify that some aspects of congestion (*e.g.*, whether the terminal cannot provide an appointment) are not the responsibility of the carrier.

Beyond all of these specific examples of the missing and incomplete explanations for the Commission’s proposals, a common thread runs through the NPRM. That thread is that the proposed rules are completely one-sided in their approach as to what the Commission would find “unreasonable” under the Shipping Act as it relates to carrier detention practices. Throughout the NPRM, the Commission notes that a practice would likely be unreasonable “absent extenuating circumstances,” but there is little or no explanation as to what the concept of “extenuating circumstances” means in practice.

For example, the Commission states (NPRM at 8) that “absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes ... are likely to be found unreasonable.” Similarly, the NPRM

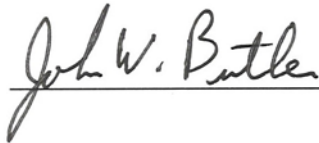
states (at 8-9) that “absent extenuating circumstances, practices and regulations that result in detention being imposed when a container cannot be returned weigh heavily in favor of a finding of unreasonableness.” The NPRM provides (at 9) that “absent extenuating circumstances, assessing detention [if the marine terminal operator refuses to accept empty containers], or declining to pause the free time or detention clock, would likely be unreasonable.” Finally, the NPRM notes (at 11) that absent extenuating circumstances, certain practices in assessing detention charges while the cargo is undergoing a government inspection are likely to be found unreasonable.

Despite the fact that the Commission goes to great lengths to prescribe new rules on what carrier practices would be considered unreasonable, its statements regarding “extenuating circumstances” are so vague as to be useless in shedding any light on what particular circumstances would counter-balance those situations that the NPRM would otherwise define as presumptively “unreasonable” under the Shipping Act. Such an approach is fundamentally at odds with the need to consider the totality of the circumstances in making an equitable “reasonableness” determination. Failure to address all sides of the reasonableness equation is likely to encourage disputes and litigation in circumstances in which such claims may ultimately be held to be unpersuasive when the Commission’s administrative law judges consider all of the relevant facts in any given case, as they are duty-bound to do. Such an outcome would not be an improvement over the situation today.

Conclusion

For the reasons set forth above, the World Shipping Council respectfully urges the Commission to withdraw the NPRM, reconsider its conclusions in light of the record in this and the related proceedings, and re-issue guidance to the industry consistent with its authority under the Act and in a manner that complies with the APA.

Respectfully submitted,

A handwritten signature in black ink that reads "John W. Butler". The signature is written in a cursive style and is positioned above a solid horizontal line.

John W. Butler
President and CEO
World Shipping Council

October 31, 2019