

## FEDERAL MARITIME COMMISSION

WAN HAI LINES, LTD. AND WAN HAI LINES (USA) LTD. –  
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

**DOCKET NO. 21-16**

### ORDER OF INVESTIGATION AND HEARING

The Federal Maritime Commission (“Commission”) deems it appropriate and in the public interest that a proceeding be, and hereby is, instituted pursuant to 46 U.S.C. § 41102(c), against Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. (collectively “Wan Hai”), a vessel-operating common carrier (“VOCC”) for possible violations of 46 U.S.C. § 41102(c) with respect to charges relating to container returns.

### BACKGROUND REGARDING PORT CONGESTION CONDITIONS

Since the spring of 2020, marine terminals in Los Angeles and Long Beach (LALB) have experienced unprecedented congestion. This congestion has affected the entire supply chain, including shippers attempting to return empty containers to the ports. To manage cargo velocity, terminals and VOCCs in LALB employ multiple systems.

For example, the VOCC specifies which terminals can accept its empty containers. Most VOCCs send this notice to truckers via email and post it on their website in advance.

Some terminals will only accept loads on certain chassis on certain days specified by the terminal. Additionally, most terminals employ an appointment system, where the trucker must make an appointment online, in advance. As a result, to successfully return a container within free

time, a shipper or its trucker must determine where the VOCC will accept the container, if the terminal will accept the chassis, and then secure an appointment at that location.

Detention (sometimes called “per diem”) is a charge applied for use of the container once it leaves the port past free time, which is the time a carrier must allow for the shipper to have a “reasonable opportunity to retrieve its cargo.”<sup>1</sup> The purpose of this charge is twofold: to compensate the VOCC for the use of its equipment (the container); and to incentivize its prompt return to port.<sup>2</sup>

However, due to the referenced congestion, on some days there are no return locations offered by the VOCC, or the locations offered by the VOCC have no available appointments with the terminal operator, or the terminal operator is not accepting containers on a particular chassis. In this scenario, the trucker cannot return the container. Under these circumstances, the incentive to return the container is not enhanced by detention charges. In addition, there is no alternative value of the container for the VOCC due to the congestion because the VOCC is unable to handle the volume of empty containers it already has within the terminal.

If the charges no longer relate to the intended purpose, they may amount to an unreasonable practice under these conditions.<sup>3</sup>

Based on information provided to it, the Commission’s Bureau of Enforcement makes the following allegations:

## **STATEMENT OF FACTS**

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<sup>1</sup> *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 at 539 (FMC 1966).

<sup>2</sup> 84 FR at 48851-53; *Fact Finding Investigation No. 28 Final Report* at 12 (Dec. 3, 2018).

<sup>3</sup> 46 C.F.R. § 545.5(c)(2)(ii)

## CONSTITUTING BASIS OF VIOLATIONS

1. Wan Hai Lines, Ltd. is a VOCC headquartered in Taipei, Taiwan at:  
  
Wan Hai Lines, Ltd.  
10<sup>th</sup> Floor, No. 136  
Sung Chiang Road  
Taipei 104528  
Taiwan
2. Wan Hai maintains offices in the U.S. at:  
  
Wan Hai (USA) Ltd.  
17200 N. Perimeter Drive  
Suite 200  
Scottsdale, AZ 85255
3. Wan Hai is the 25th largest VOCC for imports to the United States, with over 176,000 TEUs in the first 11 months of 2021, and the 18th largest VOCC for exports, with over 46,000 TEUs in the first 11 months of 2021.<sup>4</sup>
4. Upon information and belief, during the spring of 2021, Wan Hai charged detention under the afore described circumstances at least 21 times. A list of the containers involved is included as Attachment A, and charges invoiced range from \$125.00 to \$1,550.00 per container.
5. For each of these containers, Wan Hai issued an invoice for detention charges.
6. Upon information and belief, for multiple free days, and/or multiple days under detention, Wan Hai either offered no return locations, the designated terminal was not accepting the containers' chassis, or appointments were unavailable for the subject containers.
7. Upon information and belief, the invoiced party provided Wan Hai with screenshots verifying these restrictions and requested a waiver.

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<sup>4</sup> According to Datamyne query, November 23, 2021.

8. Upon information and belief, Wan Hai denied the request to waive the charges.
9. Upon information and belief, Wan Hai's justification for denying the dispute was that it was unable to waive the charges because it did not control the appointment system.

**THE COMMISSION'S JURISDICTION  
AND REQUIREMENTS OF LAW**

10. Section 41102(c) of Title 46 of the United States Code provides that "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."
11. Section 41302(a) of Title 46 of the United States Code empowers the Commission to investigate any conduct or agreement that the Commission believes may be in violation of the Shipping Act.
12. Under section 41304 of Title 46 of the United States Code, the Commission may, after notice and an opportunity for hearing, issue an order relating to any violation of the Shipping Act, including assessment of a civil penalty.
13. The activities of Wan Hai, described above, were provided as part of and in connection with the transportation by water of cargo between the United States and a foreign country for compensation over which the Commission has jurisdiction per 46 U.S.C. § 41302.

**VIOLATIONS OF THE SHIPPING ACT  
AND COMMISSION REGULATIONS**

14. On April 28, 2020, the Commission issued an interpretive rule providing guidance as to

what it may consider in assessing whether a detention practice is unjust or unreasonable.<sup>5</sup>

15. This guidance applies to “practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including ‘per diem,’ assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (‘regulated entities’) related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.”<sup>6</sup>
16. With respect to reasonableness, 46 C.F.R. § 545.5(c)(1), the interpretive rule, states “in assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.”
17. The Commission has made it clear that “the guidance on the incentive principle, demurrage and detention policies, and transparent terminology would apply in situations involving exports.”<sup>7</sup>
18. In the final rule, the Commission noted the well-established principle that under § 41102(c), a regulation or practice must be tailored to meet its intended purpose.<sup>8</sup> Even if a practice has a valid purpose, if it goes beyond what is necessary to achieve that purpose, it may still be unreasonable.<sup>9</sup>

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<sup>5</sup> 46 C.F.R. § 545.5(c)(1); 85 FR 29638 (May 18, 2020), *also available at* [https://www2.fmc.gov/readingroom/docs/19-05/19-05\\_fnl\\_rul\\_fr.pdf/](https://www2.fmc.gov/readingroom/docs/19-05/19-05_fnl_rul_fr.pdf/)

<sup>6</sup> 46 C.F.R. § 545.5(b).

<sup>7</sup> 85 Fed. Reg. at 29650.

<sup>8</sup> Final Rule: Interpretive Rule on Demurrage and Detention under the Shipping Act, 85 Fed. Reg. 29638, 29651 (May 18, 2020) (citing *Distribution Servs. Ltd. v. Trans-Pac. Freight Conference of Japan and Its Member Lines*, 24 S.R.R. 714, 722 (FMC 1988)).

<sup>9</sup> *Distribution Services, Ltd. V. Trans-Pacific Freight Conference of Japan and its Member Lines*, 1988 FMC LEXIS 52, at 19, (FMC 1988).

19. Section 41102(c) derives from section 17 of the 1916 Act, which was described by the Commission as requiring a practice to be “fit and appropriate to the end in view.”<sup>10</sup> Courts have also included within the standard of reasonableness, as “whether the charge levied is reasonably related to the service rendered.”<sup>11</sup>
20. This reasonableness requirement extends to carrier practices relating to demurrage and detention. These are fees imposed by carriers on shippers and others (such as truckers) for use of the carrier’s containers, or, in some instances, imposed by carriers on shippers and others for use of the marine terminal.<sup>12</sup>
21. In view of the foregoing, the Commission has decided that an adjudicatory proceeding is required to determine whether Wan Hai is in violation of 46 U.S.C. § 41102(c) by its practice of assessing detention charges where: (a) Wan Hai either failed to provide an equipment return location; (b) where Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) appointments were unavailable for equipment return.
22. Furthermore, it is alleged that upon such charges being disputed and evidence being produced to Wan Hai that no such appointments were available, Wan Hai failed to waive detention charges.
23. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease-and-desist order should be issued.

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<sup>10</sup> *Investigation of Free Time Practices, Port of San Diego*, 9 F.M.C. 524, 547 (FMC 1966).

<sup>11</sup> *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 282 (1968).

<sup>12</sup> Fact Finding Investigation No. 28 Order of Investigation at 2 (Mar. 5, 2018).

[https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28\\_ord2.pdf/](https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/); 46 C.F.R. 545.5(b).

## **ORDER**

NOW THEREFORE IT IS ORDERED that pursuant to 46 U.S.C. §§ 41102(c) and 41302(a), and 46 C.F.R. § 502.63, an investigation is hereby instituted to determine whether Wan Hai Lines, Ltd. and/or Wan Hai Lines (U.S.A.) Ltd. (collectively “Wan Hai”) are violating or have violated section 41102(c) of the Shipping act by failing to establish, observe, and enforce just and reasonable regulations and practices relating to its assessment of charges on containers when return locations with corresponding appointments were unavailable.

IT IS FURTHER ORDERED that the requirements of 46 C.F.R. § 502.63(d) be waived, under 46 C.F.R. § 502.10 for the expeditious conduct of business. This waiver is necessary to help alleviate the unprecedented stress being placed on the United States’ supply chain, including the significant role that unreasonable detention plays in congestion and freight fluidity.

IT IS FURTHER ORDERED that Wan Hai is designated as Respondent in this proceeding.

IT IS FURTHER ORDERED that the Commission’s Bureau of Enforcement is designated a party to this proceeding.

IT IS FURTHER ORDERED that notice of this Order be published in the Federal Register, and a copy be served on each party of record.

IT IS FURTHER ORDERED that Respondent must file with the Commission an answer to the Order of Investigation and Hearing and serve a copy of the answer on the Bureau of Enforcement within 25 days after being served with the Order of Investigation and Hearing as per 46 C.F.R. § 502.63(c). Failure of a respondent to file an answer will be deemed to constitute a waiver of the respondent’s right to appear and contest the allegations in the Order of Investigation and Hearing and to authorize the presiding officer to enter a decision on default as provided for in

46 C.F.R § 502.65. Well pleaded factual allegations in the Order of Investigation and Hearing not answered or addressed will be deemed to be admitted.

IT IS FURTHER ORDERED that this matter be assigned for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined by the Administrative Law Judge in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61. This hearing shall include oral testimony and cross-examination at the discretion of the presiding Administrative Law Judge only after consideration has been given by the parties and the presiding Administrative Law Judge to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

IT IS FURTHER ORDERED that if violations of the Act are found, this proceeding shall determine whether civil penalties should be assessed against Respondent and, if so, in what amount.

IT IS FURTHER ORDERED that if violations of the Act are found, this proceeding shall determine whether a cease-and-desist order should be issued against the Respondent.

IT IS FURTHER ORDERED that persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68.

IT IS FURTHER ORDERED that all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record.

IT IS FURTHER ORDERED that all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, at Secretary@fmc.gov, in accordance with the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.113 and shall be served on each party of record.

IT IS FURTHER ORDERED that in accordance with the Commission's Rules of Practice and Procedure, that the initial decision of the Administrative Law Judge shall be issued within six months of the date of this order of investigation; and

IT IS FURTHER ORDERED that in accordance with Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.10, the Administrative Law Judge retains the discretion to amend the procedural timelines in this proceeding to ensure the expeditious conduct of business; and

FINALLY, IT IS ORDERED that in accordance with the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the final decision of the Commission shall be issued by 90 days from service of the Initial Decision.

By the Commission,

William Cody,  
Secretary

Order of Investigation and Hearing

ATTACHMENT A

**Shipments at Issue**

	Container Number	Invoice Number
1	DFSU7646758	LGBD20210685929
2	CAAU5035436	LGBD20210690251
3	WHLU5716982	LGBD20210686630
4	WHSU5891907	LGBD20210686625
5	TGCU0162124	LGBD20210675536
6	WHSU5092840	LGBD20210682107
7	WHSU5490756	LGBD20210681777
8	WHSU5806274	LGBD20210685924
9	CAIU9533960	LGBD20210666913
10	WHLU5791944	LGBD20210692167
11	WHSU5589780	LGBD20210712122
12	WHSU5368959	LGBD20210710604
13	DFSU7623979	LGBD20210737497
14	TCNU7805928	LGBD20210751739
15	WHLU5674439	LGBD20210741975
16	WHSU5236870	LAXD20210789780
17	WHSU5368624	LAXD20210787636
18	WHSU5053015	LGBD20210789146
19	WHSU5807408	LAXD20210789943
20	TCLU5413495	LAXD20210789626
21	WHSU6005639	LGBD20210789318