

April 16, 2022

PUBLIC DOCUMENT

VIA EMAIL TO SECRETARY@FMC.GOV

William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street N.W.
Washington, DC 20573-0001

Re: **Docket No. 22-04, Comments on Demurrage and Detention Billing Requirements ANPRM**

Dear Assistant Secretary Dickon,

The Auto Care Association appreciates the opportunity to comment on the Feb. 15, 2022, *Federal Register* Notice regarding Demurrage and Detention Billing Requirements Advance Notice of Proposed Rulemaking (ANPRM)¹. We fully support the Federal Maritime Commissions' ANPRM on Demurrage and Detention Billing Requirements that would benefit trade and cargo moving through our nation's seaports.

The Auto Care Association

The Auto Care Association is the voice of the \$380 billion plus auto care industry. We provide advocacy, educational, networking, technology, market intelligence and communications resources to serve the collective interests of our members. The Auto Care Association serves the entire supply chain of the automotive aftermarket: businesses that manufacture, distribute and sell motor vehicle parts, accessories, tools, equipment, materials and supplies; as well as shops that perform vehicle service, maintenance and repair.

The Auto Care Industry

The auto care industry, also commonly referred to as the automotive aftermarket, is a significant sector of the U.S. economy. We represent 538,000 businesses that employ 4.5 million people and generated revenue of \$383 billion in 2020 (2% of the nominal GDP).

The 538,248 businesses in the auto care industry form a coast-to-coast network of independent automotive aftermarket manufacturers, distributors, repair shops, retailers, and service providers small and large. At its core, this integrated grid of professionals is dedicated to providing the quality parts, products and vehicle service and repair for all 290 million vehicles on the road today.

¹ *Demurrage and Detention Billing Requirements*, 87 Fed. Reg. 8506 (Feb. 15, 2022).

Detention/Demurrage Issues

In the last several years, Auto Care Association members have experienced repeated incidents of disruption in port operations and congestion at container terminals at virtually every port in the U.S. that have prevented our members from picking up cargo or returning empty containers.

Most recently, the shipping crisis that importers are currently experiencing, due to severe congestion at ports across the nation, have led to costly unfair demurrage and detention fees and the inability to swiftly move freight. These rising costs and delays coupled with increased supply chain challenges are causing financial strain on businesses already facing challenges caused by the COVID-19 pandemic.

We are providing the following information as requested in the Federal Register notice:

A. Scope.

1. *Should the Commission include both VOCCs and NVOCCs in a proposed regulation on demurrage and detention billing?*

Yes, both VOCCs and NVOCCs should be included in a proposed regulation on demurrage and detention billing.

2. *Should the Commission include MTOs in a proposed demurrage billing regulation?*

Yes, MTOs should be included in a proposed demurrage billing regulation.

3. *Should a proposed demurrage billing regulation distinguish between the demurrage MTOs charge to shippers and the demurrage MTOs charge to VOCCs? That is, should the Commission regulate the format in which MTOs bill VOCCs?*

Yes, a proposed demurrage billing regulation should distinguish between the demurrage MTOs charge to shippers and the demurrage MTOs charge to VOCCs.

4. *What percentage of demurrage and detention bills contain inaccurate information, and which information is most often disputed?*

The Auto Care Association does not have specific data related to demurrage and detention bills that contain inaccurate information. However, commonly disputed billing information often occurs when penalties are assessed for:

- inability to pick up containers due to lack of appointments within the free time period;
- inaccurate information on when the contracted free time starts and stops; and
- ignoring the fact that an appointment could not be completed due to problems at the terminal (e.g., closed yards, stuck or lost containers, unavailability of chassis, etc.).

5. *How much does the type of information included on or with demurrage and detention billings vary among common carriers, among marine terminal operators, and between VOCCs and NVOCCs?*

There is significant variance in information among carriers, marine terminal operators, VOCCs and NVOCCs. The Auto Care Association encourages the FMC to standardize exchange of data between all parties and standardize terminology across all of the ports.

B. Minimum billing information.

6. *What type of information should be required on billings? Should the Commission require certain essential information included on invoices such as:*
 - a. *Bill of lading number*
 - b. *Container number*
 - c. *Billing date*
 - d. *Payment due date*
 - e. *Start/end of free time*
 - f. *Start/end of demurrage/detention/per diem clock*
 - g. *Demurrage/detention/per diem rate schedule*
 - h. *Location of the notice of the charge (i.e., tariff, service contract number and section or MTO schedule)*
 - i. *For import shipments:*
 - i. *Vessel arrival date*
 - ii. *Container availability date*
 - j. *For export shipments:*
 - i. *Earliest return date, including identifying any modifications to the earliest return date*
 - k. *Any intervening clock-stopping events, for example:*
 - i. *Unavailability of container*
 - ii. *Unavailability of pickup or return locations*
 - iii. *Unavailability of appointments (where applicable)*
 - iv. *Restrictions on chassis accepted*
 - v. *Force majeure-related events*
 - l. *Please note if any portion of the charge is a pass-through of charges levied by the MTO or Port.*

Yes, the Auto Care Association believes all the information listed above should be required and included on billings, in addition to: Ocean Carrier Name, Drayage Carrier Name and Equipment Type on Unit (Chassis).

Additionally, we strongly encourage carriers to supply invoice data in a spreadsheet format to better facilitate analysis of demurrage and detention data.

C. Billing practices.

7. *What information or timeframes should be required for VOCC and NVOCC demurrage and detention bills? Should the Commission require different types of information or timeframes?*

VOCC and NVOCC demurrage and detention bills should be made available within a reasonable but, ultimately, timely manner. We support a timeframe of 10-14 days from when the container is received by the beneficial cargo owner ("BCO"). Our members report receiving invoices months later, which makes auditing and disputing invoices more difficult.

8. *Do common carriers invoice multiple parties for demurrage and/or detention charges? If multiple parties are invoiced for charges, should the billing party be required to identify all such parties receiving an invoice for the charges at issue?*

Yes, the billing party should be required to identify all parties receiving an invoice for the charges at issue.

9. *Should the billing party be required to identify the basis of why the invoiced party is the proper party in interest and therefore liable for the charges? (i.e., as shipper, consignee, beneficial cargo owner, motor carrier or an agent, or as a party acting on behalf of another party pursuant to the common carrier's merchant clause in its bill of lading.)*

Yes, the billing party should be required to identify the basis of why the invoiced party is the proper party in interest and liable for the charges.

10. *Should the Commission, for purposes of clarity and visibility of charges, require MTOs to bill demurrage directly to shippers (rather than billing VOCCs who then bill shippers for demurrage)? In that scenario, MTOs would bill shippers directly for demurrage, and carriers would continue to bill detention to shippers.*

The Auto Care Association does not have an opinion on requiring MTOs to bill demurrage directly to shippers.

11. *How long from the point of accrual of a demurrage or detention charge does it typically take to receive a demurrage or detention invoice or billing?*

The Auto Care Association does not have specific data on the time it takes to receive demurrage and/or detention invoices as it varies between carriers. However, we are aware of incidents where members do not receive an invoice for several months.

12. *Should the Commission require demurrage and detention invoices to be issued within 60 days of date when the detention/demurrage/per diem stops accruing?*

The Auto Care Association recommends a timeframe for invoicing of 10-14 days from when the container is received by the BCO.

13. Should the Commission require specific information be included on the invoice regarding how to dispute a charge? If so, what information should be required? For example, should the Commission require invoices to include contact information for disputing charges, identify circumstances for when a charge may be waived, or identify the billing parties' evidentiary requirements sufficient to support a waiver of the charges?

Yes, the Auto Care Association supports requiring specific information on the invoice regarding how to dispute a charge, including but not limited to:

- contact information (including name, email and phone number) for disputing charges;
- identify circumstances for when a charge may be waived; and
- identify the billing parties' evidentiary requirements that are sufficient to support a waiver of the charges.

14. How long from the point of dismissal of a charge does it typically take to receive a refund? Should the Commission require that refunds of demurrage or detention bills be issued within a certain time period and what should that timeframe be?

The Auto Care Association does not have specific data on the typical time period to receive refunds, but we are aware of some refunds taking up to one year. We support a timely refund of 10-14 days for demurrage and/or detention bills.

15. How would a regulation on demurrage and detention billing requirements impact, conflict with, or preempt any other applicable laws, regulations, or arrangements (such as the UIIA)?

The Auto Care Association does not have any comments on how regulation of demurrage and detention billing requirements would conflict with any other applicable laws, regulations, or arrangements.

16. Please provide any other views or data you believe would help inform the Commission's decision whether to pursue a proposed regulation on demurrage and detention billing information and practices.

Since the start of the COVID-19 pandemic, our members report that their annual spend on unfair and unjustified detention and demurrage fees, depending on the size of the importer, have gone from virtually nil to hundreds of thousands, if not millions of dollars annually.

The issue of unfair and unjustified detention and demurrage fees presents itself every time there is disruption in the shipping industry, for example:

- ILWU labor negotiations and the resulting work slowdown in 2014-2015
- Hanjin Shipping Company's bankruptcy in 2016
- Trump administration's Section 301 tariffs on imports from China in 2018
- COVID-related slowdowns started in late 2019 and continuing today

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In past public testimony before the FMC commissioners on demurrage and detention fees, the MTOs have stated that demurrage and detention fees are a profit center. According to the “incentive principle” which is supported by law, charges should be mitigated when efficiency incentives cannot be achieved. This is especially true when demurrage and detention charges are applied for an illegitimate purpose, which when specifically applied at a penal level, are not justifiable to a carrier’s or MTO’s need for revenue.

The business model of an importer (or BCO) is to get their merchandise on the shelf as quickly as possible to service their customers and ultimately, to make a profit. In most cases, the merchandise being imported has already been paid for. When considering these two very salient and important facts, there is significant incentive for the BCO to retrieve their cargo as quickly as possible.

The Auto Care Association agrees that demurrage and detention charges are important tools for incentivizing container velocity through the terminals. However, BCOs that act in good faith to retrieve their cargo in a timely manner should not be penalized for mitigating factors at the ports and terminals that are beyond their control and that prevent the retrieval of their cargo within the allotted free time. The demurrage and detention fees should only be used on a penal level on “bad actors” or where it can be proven conclusively that the BCO failed in its good faith efforts to retrieve its cargo in a timely manner.

* * *

We appreciate the opportunity to comment and support the FMC’s efforts to adopt rules to regulate demurrage and detention billing practices of common carriers and marine terminal operators. We encourage the FMC to move forward with a rulemaking to ensure U.S. importers and exporters are not burdened with unfair demurrage and detention charges.

Sincerely,

/s/ Aaron Lowe

Aaron Lowe

Senior Vice President, Regulatory and Government Affairs

Auto Care Association