

UNITED STATES
Federal Maritime Commission ("FMC")
Via Email to: secretary@fmc.gov

Docket No. 22-04
Comments on
Demurrage and Detention Billing Requirements ANPRM
Relating to 87 Fed. Reg. 8506 (Feb. 15, 2022)

COMMENTS SUBMITTED BY:
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MODE Transportation, LLC including its subsidiary companies and consolidated affiliates (collectively, "MODE"), submits these comments in response to the notice and request for public comments published in the Federal Register on February 15, 2022. The FMC is seeking comments on whether the Commission should require common carriers and marine terminal operators to include certain minimum information on or with demurrage and detention billings. Also, the Commission is interested in receiving comments on whether it should require common carriers and marine terminal operators to adhere to certain practices regarding the timing of demurrage and detention billings. These changes were recommended by the Fact Finding Officer in Commission Fact Finding 29: International Ocean Transportation Supply Chain Engagement.

MODE is grateful for the Federal Maritime Commission ("FMC") and its work in the past years in support of ocean transportation services for the shipping public, especially during these unprecedented times. MODE applauds the FMC's efforts to continue to protect the public and contribute to the integrity and security of the U.S. supply chain and transportation system. MODE is appreciative of these actions and will continue its efforts to support the FMC in furtherance of these goals. We respectfully provide comments to questions raised by the FMC pertaining to the above matters as further outlined below.

BACKGROUND

MODE is a registered freight broker and a non-vessel operating common carrier ("NVOCC"). We are a full-service transportation and logistics company, and including revenue from its consolidated affiliates, have over \$3 billion in revenue and an extensive network of transportation experts with access to over 100,000 carriers and millions of pieces of equipment. We work with customers of all sizes serving numerous industry verticals to solve their domestic, international, air, and ocean transportation challenges. Our shipping expertise encompasses small parcels, LTL, truckload, intermodal, air, ocean, and supply chain solutions.

Third party logistics providers are a key component in the supply chain for many customers, ranging from small shops to Fortune 500 companies. MODE expends major financial investments in technology to meet our shipper and motor carrier needs. We are a link in the supply chain that companies use to outsource part or all of their distribution and fulfillment services. As a third party logistics provider, we offer seamless logistics services to customers to allow them to focus on other areas of their business. The efficiencies we create are key to helping our shippers and motor carriers remain competitive.

MODE provides comprehensive transportation services, including detailed analytics and reporting, integrated decision-making and proactive communication that supports the needs of our shippers and carriers. We provide solutions that optimize operational effectiveness. MODE's supply chain services support tens of thousands of shippers and carriers, bringing together and matching cargo needs with the corresponding capacity and special requirements

offered by rail, motor, air, and ocean carriers. We focus on finding the best mode of inbound and outbound transportation services for our customers, and then, using a comprehensive carrier compliance process, match our customers with the most suitable carriers for their need, based on the competency, skills, and efficiency of our carriers.

The FMC defines “demurrage and detention” to include “any charges assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. The transportation industry, including shippers and NVOCCs, have been plagued with demurrage and detention charges during these unprecedented times. Rising cargo volumes have increasingly put pressure on common carrier, port, and terminal performance, and demurrage and detention charges have been on the rise.

1. SHOULD THE COMMISSION INCLUDE BOTH VESSEL OPERATING COMMON CARRIERS (“VOCCs”) AND NON-VESSEL OPERATING COMMON CARRIERS (“NVOCCs”) IN A PROPOSED REGULATION ON DEMURRAGE AND DETENTION BILLING?

As to whether the ANPRM covers (and whether a subsequent rule will cover) NVOCCs, the technical answer is yes because NVOCCs are defined by both statute and regulation as “common carriers”. 46 U.S.C. § 40102(17)

However, “the Commission seeks comments on whether a proposed regulation on demurrage and detention billing should include NVOCCs as well as VOCCs, and to what extent any regulations should differ based on the type of entity involved”. ANPRM at 8507. In our opinion, the answer to this question is no.

The NVOCC is not in control of these detention/demurrage charges (“D&D”). This falls on the terminal operators and vessel carriers. It is the Vessel Operating Common Carriers (“VOCCs”) (that charge per diem for use of their equipment) and MTOs (who charge demurrage for containers that remain on port property beyond free time) who really control these charges. Often, the NVOCC is the customer to the steamship line, so the steamship line will bill the NVOCC for the charges.

MODE, as a third party, seeks to bill charges timely to the shipper/customer; however, if MODE, as the NVOCC, is not billed these charges on a timely basis, MODE has little control or recourse other than to bill the ultimate customer at that time (usually very late). If the NVOCC has already released cargo before it gets billed, its ability to collect those charges will be impacted.

MODE agrees with the FMC acknowledgement of the difficult position that a shipper is placed in when it receives a bill months after cargo has been released (e.g., the difficulty in assessing accuracy of the bill, or tying it back to a specific shipment); however, we respectfully would like to FMC to also acknowledge the plight of the NVOCC which might receive the bill months

after the fact and then be placed in the unenviable position of having to track down the shipper for payment.

If the NVOCC receives D&D (or any additional assessorial fees) invoices, there is no logic in the NVOCC unreasonably delaying billing or notifying the customer. The NVOCC is the party who is being billed by the carrier/terminal and will have the outstanding payables due to the carrier, so clearly, there is no general logic that encourages them to delay billing to their end customer. In our opinion, including the NVOCC in the same regulatory bucket as the vessel or terminal operator is flawed, since they are not the originator of these charges.

2. SHOULD THE COMMISSION INCLUDE MTOs IN A PROPOSED DEMURRAGE BILLING REGULATION?

MODE supports inclusion of MTOs as the originator of demurrage charges. If MTO's are not included, it may give rise to an enforcement gap. Accordingly, we welcome any reasonable regulation that can interject appropriate criteria and/or timeframes.

The process for how MTO's interact with VOCCs seems inefficient, causing significant delays. In our opinion, VOCCs and MTOs should be subject to tighter billing timeframes to give NVOCCs better ability to pass charges through (though depending on the billing cycle, it still may not be enough for NVOCCs to avoid problems with billing for these charges).

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?

MODE believes that more clarity on invoices will aid in resolution.

4. WHAT PERCENTAGE OF DEMURRAGE AND DETENTION BILLS CONTAIN INACCURATE INFORMATION AND WHICH INFORMATION IS MOST OFTEN DISPUTED?

A "back of the napkin" rough assessment, given these unprecedented times, might be that around 25%-30% are inaccurate. In "normal" times (not the current market) this number would likely be far lower.

5. HOW MUCH DOES THE TYPE OF INFORMATION INCLUDED ON OR WITH DEMURRAGE AND DETENTION BILLINGS VARY AMONG MOTOR CARRIERS, AMONG MARINE TERMINAL OPERATORS, AND BETWEEN VOCCs AND NVOCCs?

From our understanding, it is common for each VOCC to have its own process, pricing schedules etc. Each may have different rate schedules, different day calculations and methods of payment (who or how to pay). The major marine terminals are fairly straight-forward and generally easier to deal with. It's a known number of days free and they use the day in and day out multiplied by a flat and known rate. VOCCs seem to assess all different rates and the application of days, at time, appear less than accurate.

6. WHAT TYPE OF INFORMATION SHOULD BE REQUIRED ON BILLINGS?

The following are examples of information that should be required on billings: bill of lading (BOL) number, container number, billing date, payment due date, start/end of free time, start/end of demurrage/detention/per diem clock, demurrage/detention/per diem rate schedule, location of the notice of the charge (i.e., tariff, service contract number and section or MTO schedule, Vessel arrival date & container availability date (for import shipments), and for export shipments—earliest return date, including identifying any modifications to the earliest return date.

In our opinion, the goal should be to provide all the facts or data that a party needs to accurately understand and validate the reason for the invoice. The invoice should also accurately show the contract or free time allowance specific to each shipper or NVOCC if it is different from the tariff or standard free time. The apparent lack of carrier-wide visibility often creates confusion, consequently falling on the shipper or NVOCC to “prove” they were granted additional time by the carrier.

Also, noting any intervening clock-stopping events, such as unavailability of container, unavailability of pickup or return locations, unavailability of appointments (where applicable) and restrictions on chassis accepted v. force majeure related events, is of increasing importance, especially given the current chaotic market conditions. It is common in this market for a marine terminal or carrier container depot not to be able to handle or accommodate pickup or returns. Congestion, lack of space or inability to handle a certain ocean carrier equipment (often without notice) and lack of appts are the primary causes. These “intervening” events preclude a motor carrier from accomplishing their movement and end up costing additional money for dry runs and certainly lost efficiency...and the D&D clock continues to run.

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?

MODE respectfully looks forward to understanding in greater detail the Commission’s view on this, and the view of others in the industry. As noted above, MODE does not see value in subjecting NVOCCs to regulations regarding the timing of billings.

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, it is common for these charges to be inconsistently assessed to multiple parties. In many cases, in addition to charges being assessed to the NVOCC or cargo, the local dray/truck

carrier is also billed for these types of charges (due before release of cargo) and may then seek to pass those charges through to the NVOCC and then ultimately to the cargo owner. This puts a considerable hardship on a local truck carrier who just wants to do the pickup and get paid (but now has to outlay additional money just to get the load moved and who may have no control over when the underlying equipment is moved from or to the terminal). In addition, this further delays the ultimate billing of D&D to the customer because the trucker must get these extra charges added to their bill to the tendering party (shipper or NVOCC). We also see invoices being sent on the same container to multiple parties, and at times, it is paid more than once which obviously creates even more issues.

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 MOTOR CARRIER'S MERCHANT CLAUSE IN ITS BILL OF LADING?)

Yes, it would be helpful for invoices to disclose the role of the invoiced party in the transaction.

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.

MTO's should invoice the BCO directly, The benefits to such a proposal are that the charges would then be assessed directly against the party best in position to ensure that its cargo moves off the port, and would also limit the unnecessary layers of additional billing (e.g., MTO to VOCC to NVOCC to BCO, plus motor carrier to NVOCC or BCO).

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?

One important frustration (made much worse by the current chaotic market) is that VOCCs and terminal operators simply fail to bill D&D charges on a timely basis. It is common for MODE to receive these types of invoices weeks and even months after the release and return of containers. It is not uncommon for us to never even get an invoice on a specific D&D issue, only seeing it weeks/months later when it shows up on a statement. At such point in time we seek clarification on an extra charge appearing on the invoice (e.g., \$100 charge) and the carrier ties it to a D&D from an earlier period (e.g. 3 months ago). At that point, they produce an invoice and advise it is now past due... usually without any detail of why/what is being billed. At such point MODE engages its dray carrier separately to get in/out gate receipts to prove or disprove validity of the charges. If we find the charges are invalid, we are required to dispute the invoice(s) in question, with backup, to some nameless email address (ex - D&Ddisputes@carrier.com). Days/weeks later we perhaps find out the charges are waived. It

is a rare occasion that we are billed timely AND accurately by a VOCC. By delaying billing, the VOCC puts the NVOCC at a distinct disadvantage because the cargo, upon which the NVOCC will have a lien, is no longer in the NVOCC's possession. The VOCCs are not placed in such a bind. They know that the NVOCCs are reliant on their services and will need to keep using the VOCCs even if the VOCC puts the NVOCC in an untenable position with respect to D&D.

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?

We would respectfully suggest 30 days. A period greater than 30 days may result in wasted time trying to secure records to confirm or dispute.

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, there should be very clear instruction noted on the invoice with specifically "how" to dispute these types of charges. Some carriers have a brief note on invoices to "see the website" on dispute instructions. But there should be a clear email or contact info on who/how to start the dispute process. There should also be clear instruction on what documents or backup will be required to satisfy the dispute. There should also be a required minimum response time once all process steps have been submitted (ex. something like an IT "service ticket" process). Currently there is zero accountability for disputes to get resolved (accepted or declined).

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?

It is our understanding that the approval and refund process can take several months for a single invoice. There are many instances where a carrier will not issue a cash refund if a freight account is past due. The carrier will demand that all past dues are paid in full before they will issue a cash refund. Sometimes the refund is issued as a credit back to the AP freight account. But to actually use that credit, one needs to request a different group within the carrier accounting team to apply that specific credit to open freight charges. That is often very difficult to accomplish and not an efficient process.

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 UIIA)?

MODE is unable to offer a legal opinion to the commission. We are not aware of any reason why such a regulation would be preempted, though have not conducted legal research on the point and reserve any and all legal rights. As for the UIIA, VOCCs already invoice charges to motor carriers pursuant to the UIIA, which is part of the problem. VOCCs invoice multiple parties for the same charges, which creates confusion and results in inefficiencies.

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.

D&D is real problem that requires careful consideration. VOCCs and MTOs have no accountability to other commercial interests and are able to assess charges, delay invoicing, provide inaccurate or unsupported invoices, ignore requests for detail, impose roadblocks to obtaining refunds, and otherwise act as oligopolies. Imposing obligations that would require timely invoicing and additional information will not solve these problems, but would certainly be a step in the right direction of providing accountability and a more even playing field between industry participants.

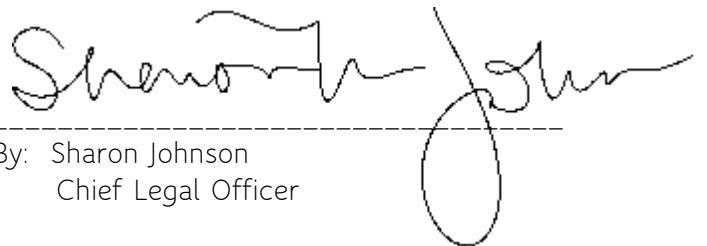
CONCLUSION

In conclusion, MODE respectfully requests the FMC take the information provided above into consideration as it moves forward with this proposed rulemaking process.

Thank you for allowing MODE to comment and for your time in reviewing our response.

Respectfully submitted,

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