



April 15, 2022

William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

Re: Docket No. 22-04, *Comments on Demurrage and Detention Billing Requirements Advance Notice of Proposed Rulemaking*

The Meat Import Council of America (MICA), North American Meat Institute (NAMI or the Meat Institute), and U.S. Meat Export Federation (USMEF), as a collective group, appreciate the opportunity to provide comments in response to the Federal Maritime Commission's (FMC) Advance Notice of Proposed Rulemaking on demurrage and detention billing requirements.

MICA represents the U.S. industry that imports fresh, chilled, and frozen beef and sheep meat into the United States. MICA's members include importers and end users of these products as well as supporting organizations, such as port authorities, refrigerated warehouses, customhouse brokers, *etc.* that provide services in connection with imported meat products.

The Meat Institute is the United States' oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and NAMI member companies account for more than 95 percent of U.S. output of these products. The Meat Institute provides legislative, regulatory, international affairs, public relations, technical, scientific, and educational services to the meat and poultry packing and processing industry.

The U.S. Meat Export Federation (USMEF) is a non-profit trade association that represents the export interests of the U.S. beef, pork, and lamb industries through its network of offices and representatives in foreign markets. USMEF's membership includes producers; meat packers, processors, purveyors, and traders; agribusinesses with an interest in U.S. meat exports; and other agricultural organizations. In addition, USMEF also works closely with the United States Department of Agriculture and is a long-standing partner of the Foreign Agricultural Service through the Foreign Market Development and Market Access programs.

Over the past year, ocean freight transportation challenges have hampered U.S. agricultural trade, with devastating consequences for farmers, ranchers, truckers, manufacturers, food industry workers, and rural communities. In addition to contending with excessive delays and congestion at many U.S. marine terminals, U.S. agricultural exporters, importers, truckers, and

producers have experienced the near-constant predatory and unreasonable behavior of vessel-operating common carriers (called common carriers, VOCCs, or ocean carriers from this point forward). This behavior has exacerbated existing delays and congestion concerns, and has gone largely unchecked, with no sign of abating.

Ocean carriers have frequently declined to carry U.S. agricultural commodity exports, including meat and poultry exports, instead hastening empty containers to Asian markets to fill them with more lucrative consumer goods to export to the U.S. In some instances, common carriers are collecting freight rates ranging as high as \$12,000 to almost \$20,000 per container to carry U.S. agricultural exports. Because meat and poultry exports are perishable, with a relatively short shelf-life in the case of chilled meat products, the decision by ocean carriers to cancel export bookings or bypass carrying U.S. agriculture products altogether is consequential. These exports cannot withstand extensive disruptions or delays, and should not be forced to do so if there is sufficient space available on a vessel. In addition to container shortages that result from ocean carrier practices, onerous rules and anti-competitive business arrangements constrain many meat importers and exporters' access to chassis and other critical equipment. These cancellations, delays, and equipment shortages are costing U.S. meat and poultry companies millions of dollars, as they are forced to downgrade, discard, or divert product in the case of exports, and source from non-traditional suppliers at extremely high prices in the case of imports.

Failure to hold the ocean carriers accountable could have long-lasting, detrimental effects for the trade-dependent U.S. meat and poultry industry and agriculture sector. If current ocean carrier practices persist, and are not subject to oversight, then the U.S. meat and poultry industry, its workers, and the communities it supports will struggle to access these vital markets cultivated over decades. This threat is concerning because Asia accounts for a significant portion of U.S. meat and poultry trade, with China, Japan, and Korea among the top export markets for both beef and pork annually. The U.S. meat and poultry industry has earned the reputation of being a reliable supplier of safe, high-quality products to these export markets. But competitor countries are ready to fill the void left by the U.S.'s absence – an absence resulting directly from ocean carriers' nefarious actions. Once foreign competitors seize previously held U.S. market share, it becomes increasingly difficult, if not impossible, to recapture the same level of hard-earned access.

The aforementioned costs and challenges are compounded by excessive and unreasonable detention and demurrage fees assessed on U.S. importers and exporters by ocean carriers and marine terminal operators for the failure of these importers and exporters to either retrieve a container from a marine terminal or return one within a specified amount of time. The FMC has found that ocean carriers and marine terminal operators regularly issue these costly penalties even if delays in retrieving or returning containers are beyond the control of the importer or exporter. Although the FMC has deemed such charges to be "unreasonable," and in violation of the Shipping Act, ocean carriers and marine terminal operators have faced few, if any, consequences for imposing these exorbitant, punitive costs.

As the FMC has previously explored in the *Interpretive Rule on Demurrage and Detention under the Shipping Act*, Docket No. 19-05, posted in April 2020, the purpose of detention/demurrage fees and penalty charges under the Incentive Principle is to provide efficiency in the supply chain

by promoting quick pick up and drop off of cargo, which is supported by the law and Shipping Act policies. The Interpretive Rule guidance issued by the FMC regarding these practices appropriately promoted the core purpose of these charges by also supporting the suspension of charges or the extension of free time where efficiency incentives are not able to be achieved due to extenuating circumstances beyond the control of the importer or exporter. It is appropriate for cargo interests, including third-party service providers, to fulfill their responsibilities to pick up and drop off cargo under the Incentive Principle.

However, when those fees are levied in circumstances when it is physically impossible to pick up or drop off containers within an allotted time period, and where there may be no actual knowledge of allotted free time by the entities involved, the efficiency purposes behind the penalty fees are lost. Further, to hold third-party service providers liable for those invoices even when they are being contested is unacceptable, and to “lock out” those entities from all future business with the VOCC until those fees have been paid is unconscionable. It is a clear abuse of market power by the VOCCs to require advance payment of all penalty charges from entities that may not even have actual knowledge of, much less be party to, the terms of the bill of lading in question.

For the above stated reasons, MICA, NAMI, and USMEF support the FMC’s efforts to address the reasonableness of detention and demurrage practices, including the Commission’s Interpretative Rule on Demurrage and Detention under the Shipping Act. However, it is clear that detention and demurrage charges and policies have not served their primary purpose of incentivizing the movement of cargo and promoting freight fluidity. The actions by ocean carriers and marine terminal operators described above demonstrate that detention and demurrage charges, along with other fees, have only burdened American agriculture shippers with unjustified costs, as cargo flows have slowed and access to equipment and timely sailing information have worsened.

To that end, our associations have surveyed our respective memberships and gathered the below responses to the questions specifically posed in the Notice by the FMC regarding detention and demurrage practices.

A. Scope

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

- Yes, any proposed or final regulation on detention and demurrage billing should apply uniformly to both VOCCs and NVOCCs. The current lack of conformity in rules, standards, and procedures is one of the major problems impacting the system.

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

- Yes, in addition to NVOCCs and VOCCs, the FMC should include MTOs in a proposed and final 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?*

- A proposed demurrage billing regulation should distinguish between the demurrage MTOs charge shippers and the demurrage MTOs charge VOCCs, as long as those charges are delineated in a clear, straightforward manner. This would improve transparency in billing practices by allowing U.S. agriculture shippers to better understand the demurrage expenses between MTOs and VOCCs. An overly complex scheme for regulating the format in which MTOs bill VOCCs, however, should be avoided.

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

- More than 50 percent, and as high as 80 percent, of bills U.S. agriculture shippers receive contain inaccurate information. Although U.S. meat exporters and importers expressed fewer concerns about the accuracy of demurrage charges, they indicated detention invoices are more frequently incorrect and disputed. U.S. meat and poultry shippers report they are often invoiced for detention charges more than two months after a container has been returned, and that the dates – and calculations used to determine the dates over which the charges are incurred – are often inaccurate.

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?*

- At a minimum, most common carriers, both VOCCs and NVOCCs, and MTOs provide consistent information on or with demurrage and detention billings that is needed to file disputes – namely, when a container is retrieved and returned. Some common carriers provide additional information, above the minimum, baseline details offered by all carriers and MTOs, such as daily detention rates.

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.*

- U.S. meat and poultry importers and exporters would benefit from the FMC requiring all of the above information to accompany invoices. Doing so puts the burden on the common carrier to ensure more accurate, timely billing, which should, in theory, minimize superfluous charges and improve business practices. The preponderance of disputes between U.S. agriculture shippers and common carriers primarily occurs due to concerns outlined under subpoint “*k - Any intervening clock-stopping events.*” Because of the potential issues emanating from the points covered under section “*k,*” our organizations request adding, or stating more explicitly in the rule, if and when a terminal closure would be considered an intervening, clock-stopping event. It is also important for the free time period before demurrage and detention charges begin to incur be clearly defined on the invoice or other communication, and that shippers are informed about whether the free time period is comprised of business or calendar days to enhance transparency and minimize billing disputes.

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?

- The Commission should require VOCCs and NVOCCs to issue timely demurrage and detention bills, and should allow invoiced parties to dispute those charges for the same time period. Invoicing outside of the set time period, especially for detention fees, should not be allowable by law. Our organizations suggest all detention bills should be received by the relevant party within at least 30 days of a container being returned, and any invoice received beyond that period should be considered void.

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, common carriers regularly invoice multiple parties in a transaction, creating confusion. An invoice should only be sent to one party, ideally with an importer receiving demurrage charges and a drayage company receiving invoices for detention charges. Sending invoices to multiple parties causes confusion, avoidable payment delays, and could yield additional costs when, for example, an importer must work with a drayage company to determine the accuracy of an invoice that should have only been received by the drayage company. If the carriers are permitted to continue issuing invoices to multiple parties, it should be made clear to all parties involved who has received the invoice.

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 why the invoiced party is the appropriate party responsible for the charges. As a result, U.S. meat and poultry exporters and importers would likely receive fewer invoices that are the responsibility of another party, which could, as stated in the previous response, minimize payment delays and disruptions in moving cargo.

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.

- To minimize the number of invoices U.S. meat and poultry shippers receive, MTOs should bill demurrage to the VOCCs, which would then bill the shipper directly with demurrage charges from both the MTO and the common carrier. This invoice sent to the shipper should, however, include separate line items identifying the demurrage charges levied from the MTO and the common carrier in order to improve the transparency of charges for the shipper.

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?

- Demurrage charges are often billed more immediately as shippers must pay demurrage fees to retrieve containers from the terminal, whereas detention invoices are often received between two weeks and 45 days after the date that a container is returned. Timely detention billings are imperative, and invoices should be received by the appropriate party within two weeks of returning a container, not several months later. Demurrage and detention charges are also often either inaccurate or not transparent. Shippers should receive notification of their free time period from the common carrier, including when that period lapses, and the amount of demurrage that will be charged daily outside this window. As previously stated in these comments, shippers should not be charged demurrage or detention if a container is not available for pickup or if a container cannot be returned due to circumstances beyond a shipper's control.

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?

- Ideally, the FMC should require demurrage and detention invoices to be issued within 14 days, though most U.S. meat and poultry shippers agree that invoices should at a minimum be issued within 30 days. The majority of meat and poultry shippers reported that 60 days is too long to receive an invoice. Shippers should also be granted the same number of days to file a dispute as it takes to an inaccurate invoice before payment is required to be made.

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?

- The FMC should require invoices to bear mandatory information about the process for filing a dispute. In addition to an email address or phone number, full contact information should be provided to a party interested in disputing a charge(s), along with a step-by-step process for filing a dispute. This process should detail all information that is necessary to submit a claim, and the Commission should ensure that the shipper has access to this information as part of the invoice, or billing documentation, it receives from the common carrier. Shippers should not be required to produce documentation or submit evidence that is not readily available to them from the invoice. Furthermore, all disputes should be logged by the common carrier such that all offices and staff within the carrier are aware that the invoice is being disputed.

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 U.S. meat and poultry importers and exporters our organizations surveyed reported never receiving a refund, demonstrating the challenges associated with the costly, lengthy, cumbersome process of disputing common carrier charges, particularly for small and medium sized companies. A majority of U.S. meat and poultry shippers have also refrained from filing disputes over unfair and unwarranted charges out of fear of retaliation from VOCCs. Though none of the companies surveyed report ever receiving a refund, there is broad agreement that refunds should be approved and issued within 30 days from the time a dispute is initiated.

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)?

- Because a regulation on demurrage and detention billing requirements would be promulgated by the federal government, and in turn preempt state law, states, like California, would be required to amend existing laws that potentially conflict with a new federal regulation. The UIIA would also have to be revised to comply with the

Commission's ruling. Existing conflict with state and local regulations or private arrangements like the UIIA should not be an impediment to federal action on this issue given the wide-ranging, economy-wide impacts it will have.

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.

- Our organizations discussed the issue of free time in response to several questions posed by the Commission. In addition to our previously stated answers, it is imperative that all relevant parties involved in the transport and shipment of meat and poultry imports and exports clearly understand when detention and demurrage charges begin to apply. As such, free time periods for detention and demurrage, including their start and end dates, should be readily communicated to all relevant parties involved, in particular, to drayage companies and importers, to prevent the avoidable accrual of excessive fees due, provided containers can actually be retrieved and returned.
- In instances of port congestion (or ship “bunching”), as most U.S. ports are currently experiencing, additional free time should automatically be provided to U.S. agriculture shippers to return or retrieve containers before demurrage or detention charges begin to accrue. This is particularly urgent as VOCCs, over the past year, have accumulated record profits by exacerbating congestion and imposing punitive, excessive demurrage and other fees on American shippers, who, due to these congestion challenges, have not been able to retrieve or return containers within the allotted free days. There must be no incentive for the common carriers to profit from circumstances surrounding port congestions, which often times is created by their own operational problems.
- VOCCs should be restricted from levying new and novel fees related to their own business operating expenses, such as “container maintenance” charges, which are often unjustifiably passed costs to the shipper. These practices and fees must be reviewed and challenged by the FMC, as they are worsening port congestion and causing undue economic pain for U.S. shippers, at a time when rising costs and increasing supply chain disruptions are already wreaking havoc.

Thank you once again for the opportunity to comment on this extremely important and timely issue for the entire U.S. meat and poultry industry.

Sincerely,

Meat Import Council of America

North American Meat Institute

U.S. Meat Export Federation