March 18, 2022

VIA EMAIL (secretary@fmc.gov)
The Honorable Daniel B. Maffei
Chairman
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 ANPRM

Dear Chairman Maffei:

The National Association of Waterfront Employers ("NAWE") is grateful for the opportunity to provide comments to the Federal Maritime Commission ("FMC" or the "Commission") with regard to the Commission's Demurrage and Detention Billing Requirements Advanced Notice of Proposed Rulemaking (the "ANPRM") (Docket No. 22-04). NAWE specifically wishes to thank the FMC for engaging in a transparent, public process in developing regulations governing the assessment of demurrage and detention charges and looks forward to continued engagement with the Commission on this important topic.

By way of background, NAWE is a non-profit trade association whose member companies are privately-owned stevedores, marine terminal operators ("MTOs"), and other U.S. waterfront related employers. NAWE's member companies engage in business at major U.S. ports on the Atlantic and Pacific coasts, the Gulf of Mexico, the Great Lakes, and Puerto Rico. Accordingly, NAWE's members operate the critical connection between global commerce and our Nation's economy and, as such, are committed to keeping America's international trade and commerce flowing.

As noted in the ANPRM's preamble, in issuing the Interpretive Rule on Demurrage and Detention, 46 CFR § 545.5, (the "Interpretive Rule") the FMC declined to issue a legislative rule prescribing specific practices that regulated entities must adopt in assessment of demurrage and detention charges. *See* 85 FR 29638, 29644 (May 18, 2020). NAWE continues to believe that this is the correct course of action for the FMC to adopt and is consistent with the Shipping Act's general precept to establish a nondiscriminatory regulatory process for the common carriage of

goods by water in the foreign commerce of the U.S. with a minimum of government intervention and regulatory costs. *See* 46 U.S.C. § 40101(1) (emphasis added). In addition, NAWE notes that the Interpretive Rule expressly recognizes the multitude of varying factors that influence the reasonableness of demurrage and detention charges. *See* 46 CFR § 545.5(f) ("Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule."). As such, NAWE encourages the Commission to keep this general principle at the forefront throughout this rulemaking process. A "one size fits all" approach will inevitably disrupt existing commercial relationships and could impact the competitiveness of MTOs that continue to face competition from neighboring foreign ports.

With the above context, NAWE is pleased to provide the following responses to the ANPRM's information requests. Please note that NAWE has intentionally omitted certain requests for which its members either would not possess relevant information or could not legally provide potentially sensitive commercial information amongst competitors. Further, to assist the Commission's understanding of important marine terminal operational details and variations, we encourage the Commission to consider the detailed responses provided by MTOs and others to similar and related questions posed in connection with Fact Finding 28 and Fact Finding 29.

A. Scope.

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

NAWE's MTO members are not the direct target of this question concerning VOCCs and NVOCCs, and therefore NAWE does not have a specific response; however, as noted in responses to several questions below, FMC concerns with invoice timing, rebillling, and identification of payers may be issues arising in connection with VOCC, NVOCC, trucker, rail terminal, or chassis provider charges that are not within the knowledge of MTOs.

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

NAWE believes that to the extent the Commission includes MTOs in the proposed regulation at all, it should be only with regard to the circumstances wherein the MTO is directly billing shippers for the MTO's demurrage charges. As noted in the ANPRM preamble, the FMC's focus throughout Fact Finding 29 and the development of the Interpretive Rule has been "on practices related to charges imposed by regulated entities on shippers, intermediaries, and truckers, and not the contractual relationships between ocean carriers and marine terminal operators." 85 FR at 29650. Indeed, the stated impetus for the ANPRM is that since the issuance of the Interpretive Rule, "the Commission has continued to receive complaints about billing practices." 87 FR 8506, 8507 (Feb. 15, 2022).

As flagged in response to Question 1 above, and noted in responses below, when MTOs charge demurrage for their own account it is generally in connection with the time a container stays on a terminal past free time. An MTO's demurrage charges are generally set out in published, and publically available MTO schedules, and in some instances are set in port-wide tariff schedules. As set forth below, MTOs have practices and procedures for addressing problems and disputes.

In addition, many MTOs also act as agents for ocean carriers to collect demurrage (and sometimes detention) charges that are assessed by ocean carriers (via their agreements with shippers, NVOCC or Beneficial Cargo Owners ("BCO") customers, and/or via ocean carrier published tariffs). Because final demurrage and detention charges are not known until containers leave marine terminals, and because the charges are generally collected at the point of cargo release, collection of both MTO and ocean carrier charges from the party taking possession of the cargo can be efficient. However, some ocean carriers charge ocean carrier demurrage and/or detention separately from MTOs, in which case two payments are required to release cargo.

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?

The unique commercial relationships negotiated between VOCCs and MTOs have not been the source of demurrage complaints. Consistent with the answer to Question 2 above, NAWE supports the transparency of MTO demurrage charges, which are generally the subject of published and publically-available MTO schedules. Accordingly, consistent with the foundational Shipping Act concept that the FMC should act with a minimum of government intervention and regulatory costs, the Commission should not regulate the format in which MTOs bill and otherwise manage payments and credits with VOCCs.

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

NAWE does not possess (nor could it possess) aggregated information on demurrage and detention charges or disputes; however, as a general matter NAWE understands that with regard to MTO demurrage charges, there are very few – if any – instances in which it has been alleged that demurrage charge information provided by MTOs has been disputed as inaccurate. As noted above, MTO charges assessed on cargo are based on published and publically available tariff schedules.

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?

NAWE does not possess adequate information to be in a position to respond with respect to variations, especially as to other types of FMC regulated entities; however, as noted in response to Question 6 below, specific information can vary depending on terminal and operational specific factors, such as the nature of the terminal operations and the data management/IT systems in place.

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.

As a preliminary matter, there are only limited circumstances in which a "billing" or "invoice" is sent by an MTO. Many MTOs, whether billing demurrage charges directly or indirectly as an agent of the VOCC, employ digital cargo retrieval platforms such as eModal or their own electronic payment portals. Information is provided to these digital platforms and portals via electronic data interchange ("EDI") based on information provided by the VOCC tariff and/or port tariff in the terminal operating system.

General information on rates and charges, policies, and information on addressing problems and disputes, and contact information, is usually provided on MTO websites, and/or in connection with portal access. The beneficial cargo owner, agent, or representative responsible for arranging pickup of the cargo pays demurrage charges in the digital platform in connection with releasing the cargo.

The specific information currently provided may vary by MTO or digital platform. In general, it appears that the information in (a) through (g) is already provided or may be achievable with limited administrative burden. However, the ability to provide the additional listed information may be impossible, or at a minimum extremely burdensome and costly due to system limitations. In particular, there is no clear manner in which MTOs could implement providing information on "clock-stopping" events without significant additional staff monitoring each container. In addition, some of the above-listed information would require integration with MTO financial systems, which raises additional data security concerns, as discussed in response to Question 15.

Finally, for the limited circumstances in which an MTO is issuing a demurrage "bill" or "invoice", NAWE encourages the FMC to adopt a flexible approach to allow required information to accompany or to be attached to the invoice, in lieu of being included on the invoice itself.

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?

As noted above, in most cases the beneficial cargo owner or its representative responsible for arranging pickup of the cargo is "billed" by the MTO, in the sense that the party obtaining release of the cargo from the terminal pays the charges that are due on the MTO's payment portal. NAWE is not aware that the timeliness of MTO demurrage billing has been the focus of any complaints, accordingly this is an area that does not appear to require further regulation.

8. [Intentionally omitted]

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.)

NAWE believes that this is not an area in which further regulation is required. MTOs do not necessarily have any privity with the shipper or beneficial cargo owner, nor does the MTO necessarily know the ultimate contractual responsibilities of the party paying the charges in connection with the cargo. As noted above, when MTOs employ digital cargo availability platforms for the payment of demurrage charges, the MTO is not dictating the party that is responsible to pay the charge. Ultimately, it is at the discretion of the shipper, consignee, motor carrier, and their agents to allocate the charges in accordance with their contractual relationships and responsibilities.

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.

NAWE strongly discourages the Commission from attempting to mandate that MTOs bill parties with whom they have no contractual privity. First, for MTOs that do directly collect MTO demurrage from the party that is responsible for arranging release of the cargo, that party may not be the "shipper," but could be a consignee, a BCO, an NVOCC, the VOCC, a trucker, or an agent of any of the foregoing. Second, the party that is responsible for arranging release of the cargo—who could be the "shipper" or any of the above—is not necessarily the party that is ultimately contractually-responsible for demurrage in a given shipment. For example, in a port-to-port merchant haulage move the responsibility might fall on a shipper, the consignee, or an NVOCC, while in a store-door carrier haulage move the responsibility might fall on a VOCC, a shipper, or a BCO with a preferred trucker arrangement, and in any of these situations the contracts of the parties might further allocate different charges or portions of charges resulting from different contract terms, such as different free time periods.

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?

As noted above, whether billing their own demurrage charges directly and/or also indirectly collecting ocean carrier demurrage and detention as an agent of an ocean carrier, MTOs typically employ digital cargo retrieval platforms such as eModal or their own electronic payment portal to "invoice" or "bill" for the charges. The information is provided in these digital platforms and portals via electronic data interchange that is generally dynamic and finalized at the same time that the party responsible for arranging release of the cargo pays the charges. In these modern electronic systems there is in effect no time between accrual of charges and availability of "invoices" for payment.

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?

As noted above, the party responsible for arranging release of the cargo generally pays the MTO's charges in connection with release of the cargo. As such, the "invoices" for most MTOs utilizing EDI and electronic payment systems are available immediately when the charges MTOs are assessing stop accruing. NAWE is not in a position to comment on when or under what circumstances other entities may "rebill" or handle contractual allocation of financial responsibility among themselves during or after completion of the transportation at issue. Accordingly, this is an area that does not require further regulation with regard MTO charges.

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?

NAWE supports the concept that MTO should provide specific information to inform parties as to how and where they can submit questions regarding requests for extensions, waivers, and/or dispute demurrage charges. Most, if not all, MTOs provide such information on their public websites and/or electronic appointment and payment portals.

Moreover, the reason that most MTOs focus on providing such information on publically available websites and platforms is because in many circumstances the information and opportunity to address problems is best utilized *before* charges are incurred. For example, if a cargo agent believes that there is an issue with access or appointment availability during free time, the best time to raise the problem, and potentially request an extension of free time, is at the time of the perceived problem, which may be before any demurrage charges are incurred, let alone invoiced.

Finally, given the variety of circumstances that underlie the imposition of reasonable demurrage charges, it would be impossible to establish a single uniform list of evidence that would be required to dispute every demurrage charge since a one size fits all approach is not useful. Some

MTOs have suggestions for helpful information or "evidence" that can be useful in more common situations, such as a screen shot or picture of claimed lack of appointments or unscheduled gate unavailability. But the circumstances are unique to terminals and terminal users, and ultimately it is up to the party claiming that a charge is improper or unreasonable to adequately demonstrate that position considering the facts, circumstances, and evidence of each situation. As the Commission is aware, these and related questions were specifically posed to MTOs and others in connection with Fact Finding 28 and Fact Finding 29, detailed responses were provided in response, and the subject of "evidence" and "corroboration" was discussed in the Final Interpretive Rule and is included in 46 CFR 545.5(d).

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?

NAWE is not in a position to provide specific information on individual circumstances of an MTO member refunding or reversing a charge previously paid to the MTO for demurrage. However, we do not believe that there is a "typical" time for unique events, nor a typical manner in how refunds or adjustments are handled among various parties and various systems and contractual arrangements. Notably, given the importance of the commercial relationship between the MTOs, cargo representatives, and VOCCs, it is in the strong interest of MTOs to resolve disputes as efficiently as possible. Further, like all policies and practices, despite the different facts and circumstances, the time periods for such refunds must be reasonable. Accordingly, the timing of MTO demurrage charge adjustments do not appear to be an area that requires further regulation.

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)?

As explained above, certain questions ask about potential regulatory intervention that would, if resulting in regulation, clearly impact and conflict with other arrangements. We provide some illustrative but not exclusive examples with respect to MTOs: (i) the proposals would impact and conflict with the current arrangement common to most MTOs wherein the party responsible for arranging release arranges payment of accrued charges; (ii) the proposals would impact and conflict with the private, negotiated, bilateral contracts setting forth the rights and responsibilities for demurrage and detention charges among multiple parties in the supply chain, most of whom MTOs have no involvement or knowledge, including parties that are not regulated by the FMC (e.g., arrangements among truckers, rail ramps, and chassis providers, including payment and reimbursement terms in agreements such as the UIIA); and (iii) the proposals would impact and conflict with MTO's rights and obligations under its contracts with ocean carriers, and implied contracts with users of terminal services, and potentially rights under applicable law by

mandating that MTOs assess charges against entities with which it has no contractual privity or legal authority to charge.

The breadth of this question, and the potentially wide-ranging implications of the proposed regulations, highlights the need for any regulation on MTOs to be specific to MTO charges, be mindful of the rights and obligations of MTOs in the supply chain and among the disparate contractual relationships, and be narrowly tailored to achieve its purpose of promoting access to useful and appropriate information, as well as reducing disputes.

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.

NAWE encourages the FMC to take this opportunity and the Commission's ongoing engagement with various stakeholder groups to evaluate opportunities and challenges to improving freight movement. While the FMC's rulemaking is focused on information provided in connection with demurrage charges and reducing disputes, the FMC must also consider the related causes of increasing dwell times underlying such charges. Simply put, marine terminals are not storage facilities and the timely removal of cargo by beneficial cargo owners is critical reestablishing normalcy in the U.S. supply chain.

NAWE encourages the FMC to engage with the National Shipper Advisory Committee ("NSAC") on the topic of warehouse investment and the steps that NSAC's members are taking to reduce dwell times. NAWE is also interested in engaging with the FMC and NSAC to explore other actions that MTOs could take, consistent with the general "incentive principle," to incentivize beneficial cargo owners to reduce dwell times and remove cargo from marine terminals during provided free time.

NAWE would also encourage the FMC to consider the port security aspects of its intended rulemaking. Based on the ANPRM's information requests, it appears that the FMC's potential rule could require the collection (by VOCCs, MTOs, and the FMC) of voluminous information about cargo moving through U.S. ports. Making information on dwell times and other data points public – intentionally or unintentionally – risks not only the release of business-sensitive, proprietary information but also creates national security risks to the supply chain. Care needs to be taken in how this data is collected, aggregated, and stored. Accordingly, NAWE encourages the FMC to consider these national security aspects and to coordinate with stakeholders and the U.S. Coast Guard, Transportation Security Administration, and Cybersecurity & Infrastructure Security Agency to ensure that these risks are given appropriate consideration in the Commission's rulemaking and to further ensure consistency with, inter alia, the Maritime Transportation Security Act of 2002, 46 USC § 70101 et seq.

In addition, NAWE encourages the Commission to expand its use of its authorities under the Federal Advisory Committee Act, 5 U.S.C. App., and 46 U.S.C. ch. 425 to establish additional advisory committees. An advisory committee similar to NSAC focused on marine terminal operations could provide invaluable insights on, for example, the costs that MTOs incur when storing cargo at marine terminals. NAWE believes that these direct MTO insights would greatly improve the FMC's rulemaking process.

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NAWE again wishes to thank the FMC for engaging in a public process and giving careful consideration to the structure and content of a potential demurrage and detention rulemaking. We look forward to our continued engagement with you throughout this process and please do not hesitate to contact the undersigned with any questions.

Sincerely,

Lauren K. Brand
President