



April 8, 2022

Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

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

Dear Chairman Maffei and Commissioners Dye, Bentzel, Sola and Vekich:

On behalf of the National Industrial Transportation League (NITL), I want to thank you for your efforts in initiating the Advance Notice of Proposed Rulemaking (ANPRM) on Demurrage and Detention Billing Requirements.

The ANPRM focuses on whether the Commission should require common carriers and marine terminal operators to 1) include certain minimum information on or with demurrage and detention billings and 2) adhere to certain practices regarding the timing of demurrage and detention billings. It also solicited industry feedback on a series of questions regarding the scope and implementation of potential future demurrage/detention proposed rules. Attached are NITL's responses to those questions.

NITL further comments that demurrage and detention charges have skyrocketed during on-going port congestion and related supply chain disruptions and are a major concern for NITL members. Ensuring that demurrage and detention billing practices are fair and reasonable, including that demurrage/detention invoices contain sufficient information to assist the invoice recipient or payor with validating the charges is critical.

Additionally, another transportation agency, the Surface Transportation Board, recently adopted minimum requirements for rail demurrage invoices in response to rail customers' concerns over their lack of transparency and reasonableness. *See* STB Docket Ex Parte 759, *Demurrage Billing Requirements* (March 30, 2021); 49 C.F.R. §§ 1333.4 and 1333.5. Thus, there is precedent for the FMC to take a similar step for ocean demurrage billing practices.

Congress also has identified ocean demurrage/detention billing practices as an important issue warranting greater attention by the FMC in the *Ocean Shipping Reform Act* (OSRA). *See* H.R. 4996 and S. 3580. Both the House and Senate versions of OSRA address demurrage billing and both bills have now passed in their respective chambers and will need to be reconciled through the conference process. However, the FMC currently has the authority to address demurrage

billing requirements and there is no need to wait for Congress' final actions on OSRA. Accordingly, there is justification for the FMC to move forward expeditiously to develop proposed rules following its evaluation of the comments it receives in response to the ANPRM.

Again, NITL commends the FMC for taking steps to evaluate whether to establish rules governing demurrage/detention billing requirements and strongly believes that such action is warranted. NITL appreciates this opportunity to submit comments in response to Docket No. 22-04.

Sincerely,

A handwritten signature in black ink that reads "E. Nancy O'Liddy". The signature is written in a cursive, slightly slanted style.

E. Nancy O'Liddy
Executive Director

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

A. Scope.

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

Yes. BCO's are entitled to receive timely, accurate and explanatory billing from their contracted carrier whether the carriage is contracted pursuant to a bill of lading issued by an NVOCC or by a VOCC.

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

Yes, for those instances where a BCO and an MTO have, exceptionally, entered into a unique contractual agreement regarding the use of terminal space and the application of demurrage fees, or when the MTO imposes terminal storage fees on BCOs for the same purpose as demurrage, i.e. to incentivize the timely pickup of cargo, the MTO billing practices should meet defined standards. In all other instances, an MTO acts only as an agent of the VOCC and is therefore not directly accountable to the BCO. When acting as agents of a VOCC, MTO's do not typically issue invoices but display demurrage charge information on their website or digital portal on behalf of the carrier and the information included there should also comply if this data is meant to replace an invoice from the carrier as request for payment.

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 practices of MTO billing to VOCC's is dependent upon the nature of the particular arrangement between the two parties and largely this will not be based on the same factors that billing by a carrier to a BCO is based. It may also involve complex arrangements for collection of, retention of and turnover of demurrage fees. Further, the assessment of the terms and charges by MTO's on VOCC's has not so far been a part of the scope of Fact Finding Investigation 28. For these reasons, we do not find it necessary to include regulation of MTO billing practices toward VOCC's to be a part of the current Rulemaking.

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

The type of information most often disputed is identification of the days that are countable (with consideration of context such as changes to "ERD" or lack of opportunities available to return empties) for the consumption of free-time and application of fees. Currently, demurrage and detention invoices tend to be issued without consideration of the causes of the delays in cargo pick up or container return, frequently resulting in the accrual of charges even when the delays are beyond the control of the BCO. Insufficient data to comment on percentage of invoices that are inaccurate.

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

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?

Some invoices include only minimal information, for which demurrage might be shown as a lumpsum value or line item on an invoice for a bill of lading, making it extremely difficult for the invoice recipient to validate the charges. Invoices that include more explanatory information will identify charges by container number, together with relevant dates that identify container availability, movement, free time periods and billable days and rate per unit. However, very few, if any, invoices reflect an investigation into the factors causing the delays that result in the assessment of demurrage/detention charges. Notwithstanding, there is no uniform invoice format, such that every carrier invoice, whether issued by a VOCC or an NVOCC, is different. MTO's typically do not issue invoices but, as an agent of the carrier, display any demurrage amounts due on their websites or digital portals with varying levels of detail.

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)**

All of the above and:

- . Vessel Voyage
- . Number of billable days (or specific billable dates) by fee level (fees typically increase by periods i.e. day 1-5 \$200/day, day 6-10 \$300/day).
- . A statement that the charges are consistent with the FMC's Interpretive Rule at 46 CFR § 545.5.

Note that "f. Start/end of demurrage/detention/per diem clock" should necessarily include, in addition to the dates of any other clock-triggering events, the dates of empty and loaded container interchange.

i. For import shipments:

- i. Vessel arrival date**
- ii. Container availability date**

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

“Vessel arrival date” is not relevant but “Container availability date” should be displayed (likely as per “e” above, “start of free time”) and should consider that a container is not available unless it is line released, customs released and physically available.

j. For export shipments:

i. Earliest return date, including identifying any modifications to the earliest return date

Earliest return date mentioned should be the last ERD communicated/published for the booked vessel voyage but communicated/published not later than the date of the empty container collection (or assignment) because changes to ERD made after that moment shall not be permitted to penalize the continuous movement of that containerload through the consumption of free time or assessment of fees.

Depending upon invoice timing, Bill of Lading may not be available for export shipments. For this reason, all billing for export shipments should also include Booking Number.

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**

Invoice should identify by date any “non-countable” days that neither consume free time nor incur demurrage or detention fees because of any known interrupting events such as unplanned terminal closures or those instances listed above. It may be reasonable to expect that processes will need to be implemented for the carrier to monitor and record specific transaction-level instances (such as specific appointment non-availability) at the time of those clock-stopping events. This will facilitate the carrier to fulfill their responsibility to bill demurrage and detention charges that meet the incentivizing principle and not that result from circumstances beyond the control of the BCO.

l. Please note if any portion of the charge is a pass-through of charges levied by the MTO or Port.

Based on the above, any pass-through charge from an MTO or Port would be identified based on the location of the notice of the charge mentioned under item “h” above (i.e., tariff, service contract number and section or MTO schedule). If necessary for clarity to the invoice recipient, this should also be expressly highlighted as a pass-through charge.

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?

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

BCO's are entitled to receive timely, accurate and explanatory billing from their contracted carrier whether the carriage is contracted pursuant to a bill of lading issued by an NVOCC or by a VOCC. There should be no difference in the information or timing of demurrage and detention billing where the carrier is billing the BCO. Because an NVOCC may choose to bill demurrage or detention charges as a pass-through of charges that they have been billed by the VOCC, it will be practical to require the VOCC to bill the NVOCC some amount of time earlier than the latest generally permitted date in order to allow the time for the NVOCC to meet its billing timing requirements.

In addition to the above and recognizing that a party may remit charges in advance of receiving an invoice (in particular, for import demurrage), any invoice that is subsequently issued for good order should clearly notate any prior received payment.

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?

While practices vary by location and by carrier (and may even be subject to further exceptional arrangements as may be agreed), it is typical that import demurrage charges are paid either against an invoice from the carrier or against charges as posted by the MTO on behalf of the carrier in advance of cargo release. Based on the urgency of the circumstance, any one of various parties may actually remit the payment (trucker, customs broker or BCO) for sake of expediency but the charge is typically assessed against (billed to) only the consignee as named on the bill of lading. That is, a VOCC will assess these charges on their customer, whether that is a BCO or an NVOCC and an NVOCC will assess these charges on their BCO customer.

Similarly, export demurrage charges are assessed against (billed to) only the Shipper as named on the bill of lading. That is, a VOCC will assess these charges on their Shipper customer, whether that is a BCO or an NVOCC and an NVOCC will assess these charges on their BCO Shipper customer.

Regarding detention charges, however, invoicing practices are a bit less standard. Traditionally, detention charges are billed to the trucker, in accordance with the UIIA and as referenced in carrier tariffs. However, it is becoming more common that VOCC's are billing detention fees to their Shipper or Consignee party. Sometimes this is by agreement with the BCO, sometimes it is pursuant to the VOCC tariff and sometimes, it is reported anecdotally, this is done in duplication of billing also made by the VOCC against the trucker. In cases where the trucker has received the initial detention invoice but the invoice is past due because of a pending dispute or another reason, it is not uncommon that the Shipper or Consignee then receive a duplicate invoice directly from the VOCC. Unless the BCO has made a specific agreement to be the bill to party for all detention, which is relatively uncommon, then each invoice that is received by the BCO will necessarily require the BCO to investigate the incident with their trucker in order to identify whether or not the invoice is a duplicate.

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

It never seems appropriate that a single charge should be invoiced simultaneously to multiple parties, however, transmission of a copy of an invoice to other involved parties (i.e. to both trucker and BCO, or from VOCC to the NVOCC customer and the underlying BCO consignee) seems to have benefit provided that the document is appropriately notated as a duplicate (or copy) invoice being shared only for awareness and identifying the specific party against whose account the charges have been raised.

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.)

Should not be necessary.

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.

Unless they have exceptionally contracted a unique arrangement for usage of terminal space with the MTO, BCO's have no commercial relationship with MTO's. On the other hand, carrier's BCO customers are bound by the demurrage free time and fees that are either set forth in the carrier's tariff or uniquely agreed in confidential contracts between the parties. The carrier is the party responsible for the correct billing of those charges in accordance with those terms and is also the party with whom their BCO or NVOCC customer is able to address any disputes to those invoices.

While it may be tempting to consider breaking the existing standards and to instead have MTO's manage free time arrangements and bill demurrage directly to the BCO, this is a significant change to the commercial relationships that should only be approached after significant consideration. To think that BCO's would benefit from the much lower demurrage rates that are published in MTO public tariffs is a naïve expectation. Similarly, to think that MTO's will be any more receptive than VOCC's to BCO requests for extended free time periods for loaded import containers on the pier is also a false expectation. With regard to free time allowed for export loaded containers on the pier, this is greatly dependent upon not only terminal but also inland operations as well as the determined receiving windows at the pier, the responsible management of which are an integral part of the service commitment by the VOCC to their BCO customer.

During the past year, it has become undeniably clear that improved co-ordination is necessary between VOCC's and MTO's regarding certain commercial arrangements like extensive, high-volume free time allowances. In many cases, these arrangements have been factored into supply chains after years of accommodation. On dock storage is but one component of many that is managed within the typical relationship between VOCC's and their MTO partners to safeguard satisfactory terminal operations that serves supply chain efficiency and one should not assume that it would be preferable to remove VOCC's from their responsibilities to negotiate and work

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

with their chosen service providers to deliver an overall efficient and beneficial ocean transportation experience for their BCO customers. The commercial relationship between VOCC's and their MTO partners should be valued for its ability to bring benefit to the ocean delivery system and, by extension, to the shipping public in a way that the transactional relationship between BCO's and MTO's cannot.

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?

Import demurrage is typically "billed" before cargo can be released, whether through an invoice from the carrier or as displayed by the MTO, on behalf of the carrier, on its website or portal. Export demurrage may sometimes be required to be paid prior to cargo release at destination and billing is done therefore to meet that timing, however it is not uncommon for invoices to be issued at a much later time. Far too often, invoices for import or export detention charges arrive many months after return of the equipment. While the systems or processes may not be in place yet to facilitate, it should be a goal for carriers to generate an accurate invoice immediately upon return of the equipment. When an empty or loaded container is released by the carrier, the known last free day to return the container should be communicated by the carrier, subject to intervening exceptions that may cause that last free day to change (i.e. unexpected terminal closures). With that type of baseline, it should also then be possible for the free-time consumed, remaining and any accruing charges to be available to the party in possession of a container upon request, a helpful piece of planning information to improve efficiency and manage costs. This would emulate the current best practice for import demurrage, which communicates last free day before that day arrives and similarly allows for lookup of demurrage charges that will accrue by specified collection dates. Further, this would give parties the opportunity to raise any exceptions that may impact the free-time period in real-time, allowing the carrier to respond by extending the free time period (by identifying non-countable days) before the eventual final calculation and billing of any charges.

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, invoices should be generated upon completion of the triggering event. That is, demurrage charges should be invoiced at the moment the container leaves the terminal, either loaded to the exporting vessel or retrieved by the importing party and detention charges should be invoiced upon receipt by carrier of the returned container. In general, import demurrage already follows this timeline. Until such time as systems and processes can accommodate the same also for export demurrage and for import and export detention, invoices should be generated no more than 30 days after the event but 5-15 days would be preferred, in line with general industry standards for trucking fees.

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?

NITL Responses to FMC ANPRM Questions on Demurrage/Detention Billing

It would be helpful to have contact information available directly on the invoice to enable the recipient to dispute or question the billed charges. Considering the obligation of carriers to provide accurate invoices, it would be inappropriate for the carrier to burden the recipient with specific obligations beyond a communication of the disputed facts should they receive an invoice for charges that are seen to have been incorrectly billed.

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?

Any refund of inappropriately billed and paid charges should be refunded "immediately". Based on customary accounting processes, this should practically translate to the issuance of a check or EFT within a two-week period. Some carriers decline to issue refunds in favor of issuing a credit against the account that can be applied to future balances but this is not necessarily agreeable to the party awaiting the refund and denial to issue a refund should be prohibited. Further, it has been encountered where carriers decline to issue a refund or a credit so long as the account carries a balance, and this should also be prohibited since it is quite natural that an ongoing business relationship with the carrier means continuously carrying a balance.

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)?

No invoice requirements implemented by FMC regulation should be otherwise prohibited by Sarbanes-Oxley or other mandatory financial obligations of the parties. In the event of any conflicts between FMC regulations and arrangements like UIIA, those arrangements will need to be modified to be in compliance with FMC regulations.

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.

Nothing to add.