



**National Milk Producers Federation and U.S. Dairy Export Council
Comments Regarding
Advance Notice of Proposed Rulemaking by the Federal Maritime Commission
Detention and Demurrage Billing Requirements**

Docket No. 22-04

April 14, 2022

The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) are jointly filing these comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) issued by the Federal Maritime Commission regarding minimum information requirements related to ocean carrier billings for detention and demurrage charges.

NMPF develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies. NMPF provides a forum through which dairy farmers and their cooperatives formulate policy on national issues that affect milk production and marketing. NMPF's contribution to this policy is aimed at improving the economic interests of dairy farmers, thus assuring the nation's consumers an adequate supply of pure, wholesome, and nutritious milk and dairy products.

USDEC is a non-profit, independent membership organization that represents the global trade interests of U.S. dairy producers, proprietary processors and cooperatives, ingredient suppliers and export traders. The Council's mission is to build global demand for U.S. dairy products and assist the industry in increasing the volume and value of exports. U.S. dairy exports are critical to the economic health of America's 31 thousand dairy farmers and the thousands of American workers throughout the supply chain whose jobs are supported by the U.S. dairy industry.

Overview

Dairy exporters have experienced significant shipping challenges since late 2020, particularly with respect to international ocean carriers. Our members have reported sharp increases in cancelled or delayed vessel bookings, cancelled service contracts and shifts to spot market rates, significantly increased shipping rates, new ancillary fees, lack of available equipment (containers and chassis), as well as soaring detention and demurrage charges. In total, these impacts have been estimated to cost the American dairy industry more than \$1.3 billion in lost export value during the first three quarters of 2021. These losses are compounded by foreign customers seeking more reliable and less costly imports from suppliers in other nations, substituting for American goods.

The increases in assessments of detention and demurrage charges have been particularly vexing for our members. This is a widely acknowledged challenge that has impacted many forms of shippers. The Federal Maritime Commission has sought to assure the proper application of charges through the Interpretive Rule on Detention and Demurrage issued in May 2020, but problems have persisted and by most accounts have worsened. This was reportedly confirmed by the results of the FMC audit of carrier detention and demurrage practices. The FMC's Fact Finding Investigation 29 – Interim Recommendations also voiced “concerns about detention and demurrage billing practices.”

To address the increased and often inappropriate application of detention and demurrage charges, President Biden encouraged the Federal Maritime Commission to “vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act” in Executive Order 14036, “Executive Order on Promoting Competition in the American Economy,” issued on July 9, 2021. This executive order also sought for the FMC to “consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.”

While the NMPF and USDEC appreciate the FMC undertaking this proposed rulemaking, it is important to note that billing and information are just one aspect of our members' concerns about detention and demurrage. Unreasonable applications of these charges by carriers and the inconsistent nature of dispute processes are also significant issues that should be addressed by the FMC. Similarly, detention and demurrage charges are but one of the many issues our members have faced regarding ocean carrier practices and regulations. Other challenges outside the scope of this ANPRM include cancelled and delayed vessel bookings, lack of available containers and equipment, increased shipping fees and violations of service contracts. The FMC should continue to be mindful of the many Shipping Act enforcement needs that shippers are currently facing.

Finally, we urge the FMC to move expeditiously with this proposed regulation. It has been nearly two years since the Interpretive Rule has been issued, yet these follow-on regulations are still in their formative stages, and arguably the FMC should be further ahead in this regulatory process. Congress is considering and developing far-reaching legislation that would affect many parts of the Shipping Act, including detention and demurrage rules, which are likely to affect this rulemaking. We hope that the other rulemakings that the legislation will require of the FMC are not held up by this pending regulation, and that those rules can be developed and issued more expeditiously.

Dairy Exporters and Detention & Demurrage Charges

Our dairy exporter members are familiar with typical shipping practices and requirements. They understand the purpose of detention and demurrage charges to incentivize the efficient use, return and retrieval of containers. However, it is clear that the current situation is a significant deviation from normal shipping practices. Many have expressed concerns that the application of detention and demurrage is increasingly disconnected from the efficient use of equipment and that in some cases appears more intended as a means of carrier revenue. While limitations in the transparency of detention and demurrage billing practices preclude a full private sector

accounting, and the FMC has not made public the findings of its Vessel-Operating Common Carrier Audit Program, it is generally thought that the recent carrier detention and demurrage charges have levied hundreds of millions of dollars of unfair penalties on shippers, frequently for factors outside of the exporters' control.

The focus and intent of this ANPRM is to evaluate billing practices and minimum information requirements related to detention and demurrage charges. This is an important question - properly scoped regulations can increase transparency, promote uniformity of these charges and invoices, improve the appropriate application of these charges and deter spurious use of these charges by carriers.

Over the past two years, our members have experienced a range of questionable detention and demurrage charges. For instance:

- Dairy exporters have reported getting invoiced for demurrage charges when terminals were not open and appointments not available to return containers.
- Carriers have reportedly changed and reduced 'free time' and called containers back sooner than initially scheduled.
- Shippers have shared reports about being assessed detention charges after their vessel bookings were cancelled or delayed, thereby having containers wait extended periods at a port through no fault of the exporter.
- Detention charges have also occurred when drayage providers cannot access the port to retrieve the containers, again through no fault of the exporter.

The above are a few examples of cases where shippers can identify when and why a detention or demurrage charge was assessed – in many other occasions, the bills arrive without sufficient information or beyond a reasonable timeframe to determine the circumstances of the containers subject to those charges. These practices are unsustainable and urgently require FMC action to curtail.

Recommendations for Rulemaking

While our members have many concerns about how detention and demurrage charges are applied, we offer the following recommendations and responses related to the discrete topic of this ANPRM regarding billing practices and minimum information requirements. An important consideration in evaluating regulations on this topic is the information and control imbalance that exists between carriers and shippers. By virtue of their corporate size and industrial focus, as well as the captive nature of their service, carriers have an information advantage relative to shippers. They control what information they release, and to the extent this affects charges, it can make understanding and disputing charges challenging for shippers. Increasing transparency requirements and demanding that more information be provided in invoices will be an important step to balancing these relationships and assuring that information isn't used toward anti-competitive or unfair profit-seeking purposes.

- 1.) **We urge the creation of regulations that require carriers to invoice and report detention and demurrage charges in a consistent way given the far-reaching benefits this would offer for shippers' ability to reliably and efficiently decipher charges.**

One of the most important factors to consider in evaluating this topic is the uniformity of charge-related information. Our members, individually and collectively, use a range of carriers and intermediaries, for vessels sailing out of various ports to facilitate the export of our goods. Each carrier often has its own approach to invoicing these charges, using different terminology and parameters, timeframes, and details. This complicates analysis of these charges by shippers' logistics staff and makes it more difficult to challenge questionable charges across the range of carriers each shipper may use. It has also complicated our and our members' efforts to account for the totality of detention and demurrage charges they have been assessed.

- 2.) Similarly, **these rules should apply to the type and purpose of charges**, beyond just those stipulated as “detention” and “demurrage” – calling something a “dwell fee” or other semantically different term should not be permitted to avoid any minimum information requirements.
- 3.) We believe that in evaluating and constructing regulations on minimum information requirements, **the Commission should take the broadest approach to include all entities that may issue detention and demurrage bills, and for there to be regulatory uniformity** among these stakeholders. Both Vessel-Operating Common Carriers (VOCCs) and Non-Vessel-Operating Common Carriers (NVOCCs) should be subject to the same minimum billing information requirements. Similarly, any bills issued by marine terminals operators (MTOs) should be covered by the same rules. While shippers do not contract with MTOs, carriers may pass any demurrage invoices received by MTOs along to shippers and assuring that there is a common set of information requirements for these bills will help shippers be able to understand and reconcile those bills, as with those originated by the carriers.
- 4.) As the Commission considers minimum billing requirements, we encourage it to **assure that all related information shall be included or made accessible**. Shippers need a full set of details about the containers subject to detention or demurrage charges to effectively assure they are properly assessed charges. This must include container tracking numbers, bills of lading, dates, the vessel(s) that the cargo was accommodated on or scheduled to travel on, the schedules for that vessel (both what was initially scheduled/announced and, if modified, the actual arrival/departure schedule), drayage contractors, and terminal and port details. This minimum information should also include details related to terminal and appointment availability, details related to force majeure-related or other intervening events.
- 5.) The minimum billing information should also include **transparent details on how the detention or demurrage charge is assessed**, including per-day charges and any ‘clock-stopping’ periods, what constituted ‘free time’, the underlying charge rate and any other related factors. As discussed in recommendation #7, this could be augmented with graphical representations using a calendar or other visual demonstration of a container’s status and movements relative to the charges.

- 6.) As is contemplated in legislation moving through Congress currently, requiring carriers to certify the accuracy of information in an invoice for detention or demurrage charges should also be considered. As a general matter, invoicing and billing practices put the onus for accuracy on the invoicing party. The Ocean Shipping Reform Act that has passed the House of Representatives and is pending in the Senate would prohibit carriers from issuing detention and demurrage charges unless they certify their accuracy, and to face penalties for false or inaccurate charges. The FMC would be required to issue regulations swiftly should this legislation become law, so it would be prudent to contemplate such certification standards in this current rulemaking.
- 7.) The **format of the billing** should also be a consideration for the Commission. These invoices should be clear and concise and presented in a way that is easy for a shipper representative to understand. Shippers should be given the option to receive the invoices in paper and/or electronic formats. It may also be beneficial for the Commission to consider graphical representations of container ‘calendar flows’ to demonstrate when containers were available for retrieval or return, when free-time starts and eclipses, terminal and appointment availability, when charges were first assessed and when a charge period terminates. In any cases where an invoice may be sent to more than one party, such as a drayage provider and a shipper, then those details should also be included in an invoice. This will help assure communication between those stakeholders to evaluate the appropriateness of the charge, and to determine which party may be responsible for payment of the invoice.
- 8.) Invoices should include **clear information about how to dispute or contest charges, and the window of time for submitting any disputes**. This may include step-by-step processes, what information a shipper may need to submit to demonstrate that a charge may be incorrect and means of contacting the carrier to discuss both the submission process and the dispute resolution process. The Commission may want to evaluate requirements for the dispute process, including electronic interfaces to submit disputes and corresponding information, which may facilitate more shippers to file disputes when there are questions about their accuracy.
- 9.) Consistent with our view that uniformity of invoicing procedures is beneficial, we believe that **utilizing the timeframe requirements for billing and disputes used in the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA)** would make sense. A carrier should be able to issue detention or demurrage invoices within 60 days. That is a reasonable period for a shipper to conduct a look-back review of the shipment and corresponding charges. Any charges invoiced beyond that 60-day window should be rendered moot and shippers should have no responsibility to pay charges issued so late. The UIIA’s 30-day period for shippers to submit disputes would be reasonable for the Commission to adopt. Refunds from carriers to shippers should also be required to be issued within a finite period, and a 30-day period would be reasonable.

Conclusion

We appreciate the Federal Maritime Commission's consideration of these views. Minimum information requirements for the billing of detention and demurrage charges, and any similarly intended but differently named charge, would be a helpful step to addressing spurious charges and permit shippers to better dispute those charges that they may feel were not appropriately issued. Information availability between carriers and shippers, transparency and uniformity of invoicing are all important considerations for shippers that we hope the Commission will fully consider.

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