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**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 22 - 04

**Comments on Advanced Notice of Proposed Rulemaking regarding Demurrage
and Detention Billing Requirements**

Submitted by

**NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS & BROKERS
ASSOCIATION, INC.**

The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (“NYNJFFF&BA”) respectively submits some comments on the advanced notice of proposed rulemaking for demurrage and detention billing requirements by the Federal Maritime Commission (The Commission). Established in 1917, the NYNJFFF&BA is one of the oldest trade associations for licensed freight forwarders, NVOCCs, and Customs Brokers in the United States with over 100 regular members and 25 industry –related affiliates. We appreciate the Federal Maritime Commission following up the observations made in the Final Interpretive Rule (Doc. 19-05) concerning billing. Our members have been in a constant struggle to verify accuracy and dispute charges that have been unreasonably assessed or billed to the wrong party. The current shipping environment of unrelenting port congestion, equipment shortages, overwhelmed

truckers, lack of empty return locations has meant increased numbers of containers are being assessed demurrage and detention for longer days and higher amounts.

Scope of Demurrage / Detention Billing Requirements

Commission guidance or regulation on demurrage and detention should be limited to Vessel Operating Common Carriers (VOCCs) and Marine Terminal Operators (MTOs). It should not include Non-Vessel Operating Common Carriers (NVOCCs) for the following reasons:

Concerning Detention

- NVOCCs do not own or control containers and are not in a position to charge for their use. The entity providing the equipment has the right to charge for it. As part of its contract of carriage with a NVOCC, a VOCC provides the container as part of the ocean freight arrangement.
- Typically the NVOCC's obligation per its' ocean freight bill of lading will terminate or commence at the port or interior port provided by the VOCC.
- The return of the container is not the responsibility of the NVOCC, but the trucking company that has secured the right to remove the container from the port under the terms of the Uniform Interchange and Facilities Access Agreement (UIIA). This agreement holds the trucker accountable. A trucker who is handling port drayage is also best equipped to monitor when, how, and where containers can be picked up and returned and to know when the cargo has been unloaded for import or loaded for export. Usually the trucker has been engaged directly by the cargo owner, receiver, or custom broker or freight forwarder working on behalf of the importer or exporter and will know the responsible party from whom to seek reimbursement. In the event that the trucker is at fault for not returning the container his principal will be monitoring the facts and resolving any dispute between them. Elsewhere in the world where an agreement like the UIIA does not exist a bond is posted usually by the BCO / Importer to secure the return of the container and related charges.

Concerning Demurrage

- NVOCCs do not control the port terminal space, how it is worked, how containers are made available or loaded, and, thus, the right to charge for the use of the space in order to incentivize the movement of cargo. MTO's provide the space and can charge demurrage to recover the costs of using the terminal space. If the MTOs can not make the containers available for pickup, for example if no appointment times are provided or yard sections are not being worked, then free time should be extended. The MTOs should be accountable for this extra cost. To the extent that VOCCs have contracted with a terminal and offered different terms to its customers, then the VOCCs become responsible for the assessment and billing of the demurrage. The VOCCs have chosen the terminal to unload the cargo and are their customers. The NVOCCs have no say in the choice of the terminals and the cost structure under which their cargo is unloaded or subject to the prevailing rates for demurrage. The NVOCCs do not have direct client agreements with the terminals.

While NVOCCS share with VOCCs a common carrier definition in 46 CFR 515.2 (e) with “responsibility for the transportation from the port or point of receipt to the port or point of destination” they differ in that unforeseen extra charges on top of the underlying transportation, including demurrage and detention, are not in their control and are in practice largely treated as pass throughs.

Minimum Billing Information

The NYNJFF&BA supports the inclusion of minimum information on demurrage and detention invoices in order to enable verification of accuracy, minimize disputes, and speed the process of reconciliation and payment. The amount of information currently provided on detention and demurrage invoices varies widely among carriers. The Commission should require the industry to provide sufficient detail to identify and to

justify the charges. This should include points listed in the ANPRM Sec. B. 6. It is particularly important that the following information be included:

- Start/end of free time
- Start end of demurrage / detention / per diem
- Associated rates of the tiered time schedules.
- Location of the notice of the charge
- For import shipments: Vessel arrival and container availability date

The current environment of wildly inaccurate shipping schedules spotlights the importance of accurate arrival and availability notices in keeping the freight delivery system functioning.

- For export shipments: Earliest return date (ERD), including dates of any modifications
 - The date window for delivering containers for export should be noted. Containers picked up against a booking for a planned return within the initial window should not be charged detention if the ERD date is changed causing retention beyond the free time. One of our members recently expected to load 4 containers for export delivery to the port within a two-day April 6-7 window. On Wednesday April 6, the ERD was changed with final cut off April 6. Thus, only 2 containers could be loaded and delivered. One of the containers loaded on April 6 had to be rolled to the following sailing. Since the ERD date for that only opened April 12, detention is being charged.
 - Clock-stopping events, such as yards not open for retrieval, or terminals not accepting empties for certain size containers or not appointment times should automatically extend the free time for demurrage or detention. One of our members experienced two containers off the same vessel being prohibited from return of the empties due to receiving restrictions of the VOCC for 40' HCs. One of the containers had the LFD extended the other one with the same fact pattern, as of this submission, has not. A trucker should not have to be constantly documenting these issues to initiate a request for free time extension. If this could be made automatic,

it would free up a tremendous amount of labor hours spent in fighting demurrage and detention charges.

The following information should also be added:

- Indication if container was subject to government hold. In that event the portion of the demurrage /detention / per diem while under government hold should not be subjected to additional higher penalty rates. Clearly higher rates would not be incentivizing the faster return of the equipment or reduction in time at terminal. It could even be argued that the government should be accountable for some portion of these costs as it is in national security interests of the entire population that the cargo is examined. It should not just fall to one party, the cargo owner.
- Date when arrival notice is sent to notify parties. One of our customs broker members experienced receiving their first arrival notice two days after containers were available. Thus only 2 of 4 days remained to pick up import containers within the free time. When the line was asked to have the free time extended, they replied: *As we did not confirm an extension of LFD or responsibility of charges, and with the arrival notices being a courtesy on our end, we will not be covering these demurrage charges. As the ISF was filed and all, it seems on our end that your company was aware of these shipments coming in, as well.*
- Street turn date history should be transparent on detention invoices for the import and the export movements. One of our export members has complained about being charged the full detention from initial pickup of an import container until it was delivered to the port for export. Only four free days were allowed, when there should have been a standard four for the use of time to unload the import and four for the loading of the export.
- Just as notice of where to send payments are routinely provided on invoices, so too should Information on where to send dispute of charges. Some steamship lines include this, many do not.

Billing Practices

As stated in the NYNJFF&BA comments in response to Doc. 19-05 Interpretive Rule for Detention and Demurrage and to Doc. 20-16 Notice of Inquiry on carrier use of the term “Merchant”, the entity billing for demurrage and detention should be the correct party in control of the cargo with responsibility for the reason the charge is incurred. VOCCs have defaulted to the practice of automatically billing any entity that can be considered a “merchant” as defined in their bill of lading terms.

Correct Party for Billing

Our members routinely get billed and hunted for payment often with tremendous time lags when they are not the responsible party.

- One of our custom broker members recently reported that a carrier was holding them responsible for all charges as the notify party, even though the true shipper and consignee were indicated on the VOCC bill of lading. The carrier advised our member to be listed as a 2nd notify party going forward in order not to be billed.
- A NVOCC member complained about being billed for demurrage even though the carrier directly billed the ocean freight to the consignee holding the contract with them.
- Another NVOCC member was dragged in to a legal dispute approaching \$500,000 in detention charges despite having no responsibility or control of the return of containers once cargo was unloaded from the vessel. The importer who contracted the trucker failed to return the containers on time. The carrier failed to collect against the trucker under the UIIA or the importer so turned to the NVOCC, but well over a year later.
- In disputing demurrage charges last December, an NVOCC member, who was the consignee on a VOCC B/L for a door movement was advised by the carrier: *Cargo in demurrage due to availability of truckers is still correctly charged and due. This is even in cases of carrier’s haulage moves where cannot find a trucker.*

These examples illustrate a very casual attitude on the part of carriers seeking detention or demurrage payments while feeling secure that the impossibly broad definition of merchant has them covered.

Improving Billing Practices

Some suggestions to improve billing practices could include:

- Requiring that only the correct party responsible to pay the demurrage or detention be billed. This party should be identified as the beneficial cargo owner or agent accepting the responsibility of the charges on behalf of the BCO. Just as the Customs Broker can be identified to the carrier for purposes of entry, so too could a party responsible for the guarantee of detention or demurrage.
- Disallowing the practice of simultaneously billing multiple parties for the same charge.
- Respecting the terms of the UIIA. It is the truckers picking up or delivering the containers that are working for the principal in control of the port cargo movement. This would clearly remove the NVOCC from being wrongly billed when their liability has terminated with the unloading of the cargo from the vessel. This would also hold the carrier responsible when door moves are involved.
- Requiring time frames for billing of detention. These are defined in the UIIA and should be incorporated in FMC regulation. This would help control exaggerated detention damage claims. Billing should not only be triggered by the date when the detention stops but also when it begins. It is possible for long-term detention to accrue that with early notice of commencement could have been addressed and resolved sooner. It becomes impossible for an intermediary to recover charges from customers if billed long after the fact. There are also instances of detention bills only being identified after showing up on carrier statements six to twelve months later.
- Requiring carriers to issue timely detention notices.

Who Should Bill Demurrage?

In previous comments to The Commission, the NYNJFF&BA has taken the position that the terminals are a subcontractor of the carrier, with whom the OTIs have a relationship. The issue of the billing model bears more study. Some of our members are arguing to continue with the one billing model to the carrier. Others are arguing that the carriers are not intervening to have terminals adjust the free time and leaving the decision to grant any extensions to the terminals. Thus, Customs Brokers and OTIs more and more are appealing their case directly to the terminals. This suggests that where the carriers have not negotiated special terms in contracts for BCOs payment is determined and charged by the MTOs. Demurrage paid to a VOCC traditionally comprised the cost for the terminal space, the rental cost for the use of the container after the free time, and the opportunity cost of not being able to use the container to generate revenue. If demurrage is paid directly to the terminal, it could reduce the cost for the storage component but still leave the cargo owner responsible for payment of some portion of the container usage. It is clear that payment directly to the terminal can help avoid unnecessary delays in obtaining freight release. There are times when a carrier's free time differs from that at a terminal or exam site. Truckers attempt a pickup when the terminal or exam website shows no holds, but upon arrival find that the carrier has placed a hold. It can take 3-4 plus hours to obtain the invoice from the carrier to arrange payment. Once payment has been made it is necessary to follow up to ensure the carrier posts the release at the terminal. Even then it can take hours and delay cargo release, often leading to additional demurrage charges.

Conclusion

It is the view of the NYNJFF&BA that The Commission's focus should be on helping streamline the process by reducing the disputes surrounding demurrage and detention invoices. The tracking, verification, disputes have taken a severe toll on productivity for all industry participants. Additional information on invoices and correct and timely billing will benefit the shipper and the flow of cargo.

The Incentive Principle, so elegantly defined in The Interpretive Rule should work hand-in-hand with the Principle of Accountability. If the terminal, for

example, cannot make a location available for return of empties this cost should not be borne by the BCO. If the NVOCC is not responsible for the removal of the container from the port, they should not be invoiced for demurrage or detention even if they are the consignee on the carrier's bill of lading. Parties responsible for detention and demurrage should be the ones held accountable to pay these costs.

Respectively submitted April 16, 2021

On Behalf of the NYNJ Foreign Freight Forwarders & Brokers Association, Inc

A handwritten signature in cursive script that reads "Jeanette R. Gioia".

Jeanette R. Gioia

President

NYNJ Foreign Freight Forwarders & Brokers Association, Inc.