BEFORE THE

FEDERAL MARITIME COMMISSION

ADVANCE NOTICE OF PROPOSED RULEMAKING –
DEMURRAGE AND DETENTION BILLING REQUIREMENTS

DOCKET NO. 22-04

COMMENTS OF THE OCEAN CARRIER

EQUIPMENT MANAGEMENT ASSOCIATION, INC.

On behalf of its members, the Ocean Carrier Equipment Management Association, Inc. (OCEMA) hereby submits the following comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) published by the Federal Maritime Commission (FMC or Commission) on February 15, 2022. 87 Fed. Reg. 8506.

I. INTRODUCTION

OCEMA is an association of 10 major international ocean common carriers that provides a forum for its members to discuss operational, safety, and related matters pertaining to the intermodal transportation of ocean freight within the U.S. Within its scope are equipment-related operational, safety, and regulatory activities such as participation in industry forums, educational sessions, regulatory proceedings and legislative matters. OCEMA members operate or utilize intermodal containers, chassis and other equipment from facilities located at ocean terminals, rail terminals, container yards, and container equipment pools. A list of OCEMA members is attached as Appendix 1.

OCEMA commends the FMC for its continued efforts to examine detention and demurrage practices within the industry and to consider ways to clarify and improve those practices. The FMC's Interpretative Rule on Demurrage and Detention provided guidance in a number of areas related to demurrage and detention. While OCEMA supports efforts to improve the transparency and accessibility of demurrage and detention practices, OCEMA urges caution with respect to any further rulemakings in this area. In particular, OCEMA believes it critical to any decision by the FMC to regulate issues with respect to detention and demurrage billing for the FMC to first consider technological feasibility, the scope and required time for systems

development work that would be required to support any new requirements, and whether the proposed change would burden the ability to resolve items as part of a pre-pay process rather than a post-pay transaction. Many of the items that appear to be contemplated based on the ANPRM would place significant informational burdens on carriers which could serve as impediments to the free-flow of cargo and commercial innovation. The cost/benefit of broad based requirements relative to the percentage of disputed invoices should be carefully weighed. Furthermore, in some instances, the automated flow of information required to include information on thousands of invoices would also involve data sharing with third parties, the feasibility of which should be understood prior to imposing any such requirement.

Thus, in light of the potential risks of regulation, any decision by the FMC to move forward should be made only after a careful and thorough weighing of a fully developed factual record that allows the FMC to consider factors such as the pervasiveness of the problem that will be addressed by a regulation as well as the tangible benefits that will accrue by addressing it, the technical feasibility of the FMC's proposed solution, and the ancillary effects on trade that will result. Furthermore, the FMC should not seek to right every perceived wrong or to balance every unfavorable commercial term in a contract by placing its thumb on the scales to balance the results of legitimate commercial negotiations.[1]

Having said this, OCEMA understands that this is an ANPRM and therefore submits these comments in the spirit of providing the FMC with insight into the aspects of the ANPRM that OCEMA believes may require further consideration or information prior to and as part of any further rulemaking process.

II. RESPONSES TO THE COMMISSION'S QUESTIONS

A. Scope.

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

OCEMA sees no reason that VOCCs and NVOCCs should be treated differently with respect to regulations regarding demurrage and detention billing practices. It would seem that any benefits derived from requirements with respect to VOCC billing practices would also apply with respect to NVOCCs.

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

[1]The FMC should be guided by the purposes set forth in the Shipping Act of 1984, as amended. See 46 U.S.C. §40101 setting out the purposes of the Shipping Act, including to "(1) establish a non-discriminatory regulatory process for the ocean common carriage of goods . . . with a minimum of government intervention and regulatory costs;" and "(2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;…and (4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.".

OCEMA has no position on this issue at this time. However, OCEMA stresses the importance of consistency and transparency throughout the supply chain with respect to any information requirements imposed on VOCCs. In other words, to the extent a VOCC is required to provide information to a third party that it receives from another party (such as an MTO), the Commission should ensure that the VOCC is entitled to receive such information as well.

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?**

OCEMA has no position on this at this time but reiterates its comment in response number 2. regarding transparency and the need to ensure VOCCs are entitled to receive any information that the Commission requires them to provide to third parties.

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

OCEMA does not have any data with respect to the requested information. However, with respect to the most frequently disputed information, OCEMA would suggest that the value of such information on its own is limited. Such data would not account for how many of the disputes ultimately have merit or whether the frequency of disputes may also simply reflect a business practice of disputing many or all charges.

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?**

It is the experience of OCEMA members that, on the whole, VOCC billing tends to be more detailed than that of MTOs or NVOCCs. With respect to differences between entities of the same type, there are many different billing models and arrangements employed by MTOs (including payment through online portals rather than invoicing) and therefore the information and level of detail included can vary significantly.

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.

Imposition of requirements relating to information that must be included on invoices poses a significant risk of unintended consequences and could place substantial technological burdens on carriers. OCEMA would urge caution in this regard as requirements to include increasing amounts of information (and the potential for significant development and data interchange with third parties that would be required to support same) could serve to decrease cargo fluidity and slow the invoicing process – the very opposite of the results all stakeholders have an interest in.

Particularly concerning elements from the above list would include:

- a. Bill of lading number: This is not information that is provided to all payees (and should not be) as the payee is not always party to the transportation contract/legally entitled to this information. In some instances, disclosure by carrier may even present a risk of violating legal and contractual non-disclosure requirements.

- g. and h. Demurrage/detention/per diem rate schedules and location of the notice of the charge: While this is certainly information a carrier should be able to provide, providing this information can sometimes require a manual review of contractual documents. Such analysis is ill-suited to a pre-programmed and automated response as would be required to automate the provision of this information (which can vary across trades, commodities, locations, and customers) as part of the billing process. As such, such a requirement would not appear to be feasible.

- i.ii. Container availability: This is not data that is available or stored within all carrier systems or even made available by all MTOs. A broad requirement in this respect would therefore pose very significant technological challenges and in some instances, may simply be impossible for the carrier to comply with.

- j. For export shipments, earliest return dates (and modifications thereto): Retention of change history and the ability to include this information is not currently a functionality in all OCEMA members' systems and it is not clear that their present systems could support this functionality. As such, estimated development times to implement the automated inclusion of this information on invoices ranges from over a year to significantly more (if more substantial system changes are required).

- k. Identification of clock-stopping events: This is information is not always known at the time of invoicing/payment. A requirement to include it on invoices/payment portals would therefore pose a risk of delaying the payment process (and the free flow of cargo). Furthermore, as noted above, information such as container availability and appointment availability is information that would need to be sourced from third party systems. It is not presently known how long the required development to support such an undertaking would take or even that such information would be available from all MTOs.

In sum, while some of the information listed by the Commission may be appropriate to require the carrier to provide or make accessible in some way to certain relevant parties, requiring this same information to be included specifically as part of an automated invoicing process for detention and/or demurrage raises many very serious concerns.

C. Billing practices.

7. <u>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?</u>

While OCEMA believes that it is beneficial for commercial arrangements between carriers and other actors in the supply chain to contain clear information and billing timelines, OCEMA does not believe it necessary for the Commission to dictate the substance of those billing timelines. This is a matter that is a traditional subject of negotiation in almost every type of commercial contract entered into in the United States. Beyond "anecdotal examples of delays",[2] OCEMA does not believe it to be the case nor has it seen evidence produced that unreasonable delays in the receipt of demurrage or detention bills is such a large scale issue across the industry so as to necessitate government intervention.

8. <u>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?</u>

OCEMA members are not aware of instances in which common carriers invoice multiple parties for demurrage and/or detention charges and, in fact, many of their invoicing systems are specifically programmed to prevent this.

[2] ANPRM at 8.

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.)**

OCEMA does not believe provision of this information on an automatically generated invoice is feasible or likely to result in a tangible benefit to the invoiced party. Questions of this type are sometimes quite complex and can involve overlapping contractual documents. Certainly, OCEMA would agree that a party issuing an invoice should be able to explain the basis for issuance of the invoice when asked by the recipient. However, to be meaningful, such analysis and explanation would likely require a manual review of the relevant contractual documents and would therefore appear to be extremely burdensome and ill-suited to a large scale pre-programmed automated response required to be included on an invoice.

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.**

OCEMA notes that practices and trade customs vary significantly across MTOs at different ports and inland. Simply confirming that either approach is feasible as long as consistent with the Act should suffice and avoid unintended adverse impacts of mandating who the billing party should be.

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?**

OCEMA questions the premise that there is a "typical" practice across carriers, contractual counterparties, and transaction types or that it is necessary or advantageous to require uniformity in such practices. As is the case in any commercial negotiation, the parties, services, goods, and other relevant factors involved can all lead to variance in the timelines the parties deem acceptable with respect to a particular transaction.

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?**

While OCEMA takes no issue with the sixty (60) day requirement contained in the UIIA cited by the Commission in the ANPRM,[3] OCEMA does not believe it necessary for the Commission to impose a similar deadline for invoices governed by the UIIA or otherwise. The Commission stated that it was seeking comments on the "the effectiveness of that UIIA timeframe and if a longer or shorter timeline would be appropriate". Respectfully, in the context of the UIIA, those are issues best dealt with by the parties to the UIIA. There is a defined process for consideration of changes to the UIIA which was agreed by industry representatives

[3] ANPRM at 9.

for all stakeholders that are party to the agreement. The agreement is regularly amended as a result of that process. To OCEMA's knowledge, the issue of amending the sixty (60) day requirement has never been raised. Nor is OCEMA aware of widespread claims by participants in the UIIA that the agreement does not provide them with sufficient recourse in the case of delayed invoicing.[4]

With respect to invoicing not governed by the UIIA (either because the entity is not party to the UIIA or because the charge is not governed by the UIIA), OCEMA does not believe such action is necessary or appropriate. OCEMA is not aware of any evidence that this is an issue that has not been adequately addressed on a large scale in carrier agreements with the relevant stakeholders. To the extent the Commission deems it necessary to involve itself in this aspect of contractual relationships, such involvement should be limited to requiring that such terms be dealt with in the contract rather than dictating the substance of the terms.

In the event a deadline is nonetheless imposed, it certainly should be no shorter than the UIIA deadline. Any such deadline should also allow nuance in the application of the deadline for factors that may justify a delay (for example, billing timelines for third-party charges that are passed through by the carrier, force-majeure events, etc.).

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?

OCEMA does not believe there is a substantial benefit associated with an entity providing information of this type on the invoice itself (as compared to, for example, the entity's website). Such a requirement may also prove impractical with respect to charges that are paid through online portals or invoiced by third parties. Rather, without speaking to the substance of any such requirements, OCEMA believes it sufficient for the Commission to require that such information to be made reasonably available by the entity.

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?

Notwithstanding the "anecdotal examples of refunds of demurrage and detention billings taking several months to be issued" cited in the ANPRM,[5] OCEMA fails to see how such reports necessitate direct Commission intervention. First, it is unclear that even a period of several

[4] As noted by the Commission in the ANPRM, if the sixty (60) day requirement is not met by the equipment provider, the equipment provider forfeits the right to recover the charges. ANPRM at 9. However, it bears emphasizing that this is a private sector contract arrangement not one mandated by government fiat.

[5] ANPRM at 9.

months for the issuance of a refund is unreasonable or even abnormal when compared to other comparable commercial relationships (for example, refunds issued by cargo interests or motor carriers to their customers). Second, OCEMA sees no link between the timing for issuance of a refund and the purposes of the Shipping Act, nor does there appear to be any indication that (to the extent such a link exists) presently available mechanisms at the Commission are insufficient to address the concerns of an aggrieved party.

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)?**

The potential for conflict ultimately will depend on the substance of the regulation. OCEMA would expect to provide more detailed comments in this regard as part of any future rulemaking once the nature of the proposed regulation is clearer.

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.**

OCEMA commends the efforts undertaken by the FMC with regard to the issues set out in the ANPRM. It is in the interest of all within the intermodal industry to create efficient and effective processes to promote equitable demurrage and detention practices. However, as the Commission knows, such efforts require a thoughtful review of how changes to the present system will affect commercial and operational processes. The Commission should act where it has credible and extensive data that shows the practices of regulated entities are contrary to the purposes of the Shipping Act. It should exercise caution in doing so where the prevalence of a particular problem is unknown or where the only available evidence or data is anecdotal. Further, in all instances, the potential negative impacts on the fluidity of cargo and the costs and feasibility of compliance must be carefully considered. In that regard, OCEMA looks forward to participation in any future proposed rulemaking on these issues.

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Respectfully submitted,

Joshua P. Stein
Counsel
Ocean Carrier Equipment Management Association
1200 19th Street, N.W., Suite 300
Washington, D.C. 20036
202-463-2534

Appendix 1

OCEAN CARRIER EQUIPMENT
MANAGEMENT ASSOCIATION

MEMBERS

CMA CGM, S.A.

COSCO SHIPPING Lines Company Ltd.

Evergreen Line Joint Service Agreement

Hapag-Lloyd AG

HMM Company Limited

Maersk A/S

MSC Mediterranean Shipping Company S.A.

Ocean Network Express Pte. Ltd.

Wan Hai Lines Ltd.

Zim Integrated Shipping Services