BEFORE THE
FEDERAL MARITIME COMMISSION

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

Docket No. 22-04; RIN 3072-AC90

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COMMENTS OF RICHARD J. ROCHE

I, Richard J. Roche, am employed as Senior Vice President at Mohawk Global Logistics Corp, OTI No. 00395NF, headquartered in North Syracuse, NY. We operate four branch locations across New York State, and five others in New Jersey, Ohio, Illinois, Massachusetts and Georgia

Mohawk Global Logistics is a member of the NCBFAA where I serve as the NVOCC Sub-Committee Chairman for the Transportation Committee. I am also a member for the National Shippers Advisory Committee where I serve as Chairman for the Ancillary Charges Sub-Committee. As such, I am quite familiar with Demurrage and Detention (D&D) practices and the problems and costs involved when they are applied inequitably.

While I do represent these groups, it is highly anticipated that each will be submitting comments under their name, so the comments recorded here are my own, and reflective of my opinions, and those of Mohawk Global Logistics.

I would like to commend the Commission for taking on this new rulemaking. I have participated on three of the Commission's Innovation Teams that helped bring about the Interpretive Rule of 2020. That rulemaking was a great step in the right direction from my view, but was largely ignored by ocean common carriers and marine terminal operators in practice. I also believe the Interpretive Rule did not go far enough, stopping short of mandating D&D should not be applicable in cases of government holds, and by not setting timing standards for invoicing, or an actual time frame for return of funds following successful disputes.

I begin my comments by stating for the record that D&D charges have a necessary place in ocean commerce. Demurrage serves to incentivize the rapid removal of cargo from marine or rail terminals and Detention helps ensure the timely return of equipment back to these terminals. Without a proper D&D schedule applied after the expiration of prescribed free time, cargo might otherwise linger at terminals, and empty equipment might not be returned in a timely fashion. This has the effect of slowing down flow through the terminals that reduces efficiency for all involved parties. It is therefore not the purpose of these comments to suggest that D&D charges

be wholly reduced or eliminated. Instead, it is the fair and equitable application of free time and D&D charges that is paramount to keeping our commerce flowing.

I will answer each of the numbered questions using the same number for the responses so as not to repeat each of the questions in my response:

Section A: Scope

1. The Commission should not include NVOCCs in the proposed regulations unless the NVOCC is marking up the D&D charges. Otherwise, NVOCCs do not generally file D&D schedules in their tariffs and do not generate D&D charges on their own. Instead, D&D charges originate with VOCCs and MTOs, and are merely passed through by NVOCCs as facilitators of the transaction.

2. The Commission should include MTOs in the proposed rulemaking because they are originators of demurrage charges and must be accountable for the accuracy of such charges. They are also keepers of the time and event schedule that determines when demurrage starts, any possible stops, and total amount to be collected based on gate-out time and date.

3. To the extent that demurrage charges are further passed to shippers (including consignees or their agents) the Commission should promulgate regulations that distinguish between

demurrage that MTOs charge to shippers and demurrage that MTOs charge to VOCCs. Not only should the Commission regulate this format, but the Commission should investigate the extent that VOCCs mark up MTO demurrage to profit from the charges when passing through to shippers. The practice of marking up such charges adds a greater punitive aspect when VOCCs are collecting demurrage, while creating a two-party system where neither claims ownership when disputes arise, citing the other party is the decision maker for mitigating or waiving the charges so that demurrage must be paid whether properly or improperly applied, forcing disputes after the fact.

4. In our experience, most D&D invoices are accurate, but may not contain all the information needed to describe the event that caused the charge, or what the charge is truly being issued for. We dispute less than ten percent of all demurrage charges received, mostly for charges that were improperly brought due to lack of availability, lack of appointments, or when charges were assessed for cargo on government hold.

5. There is a great variety of definitions between VOCCs, MTOs and Rail Terminals, even among their own ranks, regarding per diem, demurrage, detention and storage. Invariably it is the MTO that charges demurrage for containers that dwell on terminal, or railroads that charge storage for containers that dwell on their terminals. VOCCs charge detention, per diem, and even demurrage for the time that containers are held pre or post-delivery. These terms are confusing as to the actual event they are charging for. VOCCs may also charge demurrage in place of the MTO for container dwell time on dock, or may charge

demurrage for time containers were delayed outside the normal course of transit (more like pre-delivery detention) even when demurrage is being paid directly to the MTO. This is a confusing practice, that appears to be double invoicing of demurrage, rarely spelled out on the VOCC's invoice what the charges are truly for.

6. All the fields listed in Section 6A through 6L should be required on D&D invoices to give utmost clarity of the charges being assessed. One additional piece that should be required is a section that provides instruction on dispute resolution. Another is a certification that the invoice is in compliance with the Shipping Act, much like is currently proposed within OSRA21 and OSRA22 in the House and Senate respectively.

7. The billing practices of VOCCs today is appalling. Over the last several months we received mass D&D invoices from different VOCCs that were over one year old. We have little chance of collecting such long overdue add-bills from our clients, and little time, inclination, or resources to dispute such large slugs of overdue invoices. When we are asked to pay demurrage, payment is frequently required in advance of cargo release. When other D&D charges do not involve cargo release, there appears to be no real schedule for invoicing by the carriers. Most will invoice between thirty and sixty days. Some carriers consistently invoice longer than that, creating a great imposition on NVOs as middlemen whose clients may have already closed the books on that transaction. The longer the delay, the harder it is for NVOs to collect. The Commission should adopt a timeframe for D&D invoicing within fourteen days, with a cut-off of thirty days, after which the charges should be void. (Note: this may cause UIIA to improve their schedule).

8. We have found that VOCCs do invoice identical D&D charges to multiple parties in hopes of being paid by one of them. We never know if they collect from more than one party, which would be an unreasonable practice. Therefore, if VOCCs invoice more than one party, they should at the very least, be compelled to list all others who were invoiced at the same time, or prior.
9. The billing party should be required to identify who is/are the proper party(ies) for collection, and disclose if they are issuing the invoice to other parties, and if so, under what pretense. The merchant clause is too broadly defined so that anyone in connection with the transaction can be held liable for the charges. As a result of the merchant language, carriers have at times claimed – and collected – freight, charges, surcharges and other costs from third parties that have no interest in the underlying transaction and/or cargo being shipped. In particular, transportation intermediaries (e.g., Customs brokers, freight forwarders, non-vessel-operating common carriers), that are key actors in the supply chain, assisting shippers and others, but which have no interest in the goods, have been held accountable for charges, when the actual parties (e.g., shipper, consignee) do not satisfy their obligations to the carrier. It would therefore be best practice to list shipper and/or consignee as true liable parties for D&D charges in case secondary parties (listed as payees under merchant clause only) make or decline payment as appropriate, thereby pushing ultimate responsibility back to the true parties to the contract of carriage when the extension of merchant does not facilitate payment.. This would turn the use of merchant into the passive role it should be rather than the collections tool of last resort that it is today.

10. It is preferable that MTOs invoice demurrage and VOCCs invoice detention, thereby eliminating the mark-up previously referred to in response No. 3 above. We have found that demurrage tariffs posted by MTO's such as Baltimore or Savannah vary greatly in both daily and escalating charges, and in duration of free time offered. Baltimore port demurrage charges may be only twenty to thirty percent of what the VOCCs charge for the same time on dock if billing is shifted to them. Savannah's tariff free time is seven days, whereas ocean carriers generally start charging on the 5th day in Savannah even when they are not being invoiced until the eighth day by the port. In both cases, VOCCs generate revenue well beyond their costs just for taking over the billing. This process could be regulated to the benefit the shipping public.

11. Most of the time demand for demurrage payment is in advance of freight release, which works against importers if there is a dispute because they end up paying to stop the bleeding, and can only hope to argue the case after the fact through dispute resolution. Detention on the other hand might take as long as thirty to sixty days, with some carriers also batch grouping audit results a year or more later as we have been seeing lately.

12. The Commission should require D&D invoicing to be more timely. Fourteen days would be optimal. Anything after thirty days should be void and not chargeable.

13. The Commission should require that every invoice lists a dispute email address or web address, including links to any form(s) that must be filled out. It would be nice to have a

dispute hotline number to call for review of case specifics so immediate determination can be made for cargo in motion, thereby avoiding payment in advance only to go to battle later. It would also be beneficial if the Commission would require demurrage not be payable for cases in dispute, until such time as the case can be resolved, and then compel payment (within 5 business days) if dispute fails and charges are found to be due. A rulebook to identify circumstances for when a charge may be waived or identify the billing parties' evidentiary requirements sufficient to support mitigation or waiver of the charges would be welcomed.

14. Refunds are notoriously difficult to collect or have credited, even when the dispute has been approved. Typically, two to six months is not uncommon, with outliers up to a year. The Commission should require that dispute refunds be paid with five business days. In cases of demurrage, payment was generally paid in advance of freight release, therefore a quick timeframe for refund or credit should be required. Instead, we see the same disputed charges carried from one month to the next, even after dispute has been resolved. In the case of some carriers, this may end up as a hold on credit for other parts of the business, such as exports, which we see far too often.

15. Most shippers and NVOs are not part of the UIIA, so while it would be nice to have that agreement run on synch with FMC regulations, revamped, or possibly extended to include shippers and NVOs, it may be better to keep that commercial arrangement, and this proposed rulemaking separate.
16. Current D&D billing practices are pathetic at best. Many are computer generated invoices that do not consider special circumstances. It is very difficult to overturn D&D

charges once they have been invoiced. Some VOCCs require executive level sign-off, making it nearly impossible without filing a complaint. Nomenclature is purposefully misleading and inconsistent across VOCCs, resulting in much confusion. Dispute resolution protocol is difficult to pin down, and complaints to CADRS can be frustrating when the carrier states their case and walks away with no adjudication or arbitration available. A revamp of the dispute and complaint processes would be welcomed.

Additionally, the Commission should take a deeper dive into regulating the application of D&D charges during periods of government hold. These holds support national security, and are done in the interest of all, at the expense of a few. Some holds are particularly costly when multiple containers are moved on the same lading, yet all are penalized for dwell time while only one may be the target of the inspection. Holiday periods and CBP or other government agency staffing issues may further exacerbate inspection delays that pile on the costs. The Commission should consider regulation that follows the Long Beach, CA model, where containers that undergo certain government inspections do not incur D&D charges.

Respectfully Submitted,

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