Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the matter of

Detention and Demurrage Requirements

Minimum Information on Detention and Demurrage Bills

Advance Notice of Proposed Rulemaking

Docket Number: 22-04 (86 Fed. Reg. 8506)

April 15, 2022

The World Shipping Council welcomes the Commission's ANPRM on detention and demurrage billing and dispute resolution practices. The Commission's Interpretive Rule issued in 2020 provides significant guidance to the industry about how the Commission will adjudicate disputes about these charges. That said, both ocean carriers and their customers would prefer to avoid disputes in the first place. To the extent disagreements do arise, all parties are best served if those disagreements can be resolved promptly and amicably by the parties involved without the need for an outside adjudicator such as the FMC or an arbitrator. WSC believes that further appropriate regulation of detention and demurrage billing procedures can provide certainty and transparency to all parties, and thus minimize disputes.

WSC provides answers to those Commission questions that affect carriers. Because some of the questions are quite broad, and the particulars of any final regulations will depend on how details are addressed, we plan to file more detailed comments in response to any notice of proposed rulemaking the Commission may publish, and we reserve our position on any proposed rule.

As we note in various places in the discussion that follows, there are several questions for which more information or better definitions are necessary in order either to understand the question or to provide an informed answer. We have tried to flag each instance where this is the case so that the Commission in any NPRM can provide additional detail about the scenarios that it has in mind and its proposed regulatory approach.

WSC takes this opportunity to make a note about the legal basis for this rulemaking. The Commission has substantial authority to conduct a rulemaking on this topic under 46 U.S.C. § 41102(c). However, that authority is not unlimited. Specifically, any regulations must be designed to prevent unreasonable practices. While the concept of reasonableness is not precise, the Commission has defined a reasonable practice as one that is "just, proper, ordinary or usual, not immoderate or excessive, equitable, or fit and appropriate to the end in view." *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525, 547 (1966).

It is important that the Commission focus on preventing what is unreasonable as opposed to seeking to re-make the waterfront in the image that it believes is most desirable. While existing practices should not necessarily be defended or retained simply because they are long-standing, it is important that the Commission recognize that existing business practices have arisen from market demand and the realities of matching financial and operational systems in a way that keeps cargo moving. If the Commission goes beyond preventing what is unreasonable – its stated statutory job – any such overreach can stifle innovation in the realm of customer service and operational efficiencies designed to improve supply chain fluidity. These innovations include not only initiatives from carriers and marine terminal operators (MTOs), but also innovative initiatives by technology applications and systems vendors who are offering new products every day to help shippers and truckers track and navigate operations at the nation's ports and improve interoperability of data.

Beyond the legal parameters, it is important that the Commission give serious consideration to the cost-benefit relationship of new regulations. Initiatives that provide information that will have real value in helping customers understand invoices and helping parties to avoid and resolve disputes are worth pursuing. Creating overly broad lists of required data elements that may be infeasible from a current technological systems perspective should be avoided. Notably, a fixed form and process for invoices could stifle digital innovation to include initiatives to do business electronically, including automated invoices, use of block chain technology, and more broadly efforts to digitize the supply chain. Adopting regulations that include specific requirements will in many cases also require significant changes in both business processes and information technology systems. Some of the business process changes and technical enhancements will involve transforming information flows between carriers and MTOs. In order for such transformation to be realized, all parties that must cooperate in relevant information flows must be obligated to share the required information.

Once the relevant data elements and information sharing requirements are determined, then the affected parties will need a reasonable amount of time to evaluate and map the new data requirements, identify data sources, design IT architecture and programing fixes, build and test those fixes, and take the new systems live. Every carrier and every MTO has its own systems, and to the extent that those systems must exchange information (as would be the case for many of the data elements/scenarios described in question 6 below), the complexity is multiplied by the required interactions between systems. Many of the billing systems involved are global systems, adding complexity to any required changes.

Based on discussions with members, even if only carriers' business processes and IT systems are involved, making required systems changes would likely require one year from the effective date of a final rule. If new information-sharing pathways between MTO and carrier systems are required, then the task becomes much more complex, with longer lead times. These business and information technology process realities must be considered as the Commission decides the scope of any regulations. There will be real value to both the producers and the recipients of minimum billing information if the Commission limits mandatory requirements to data elements that have substantial and demonstrable value to the parties and that can be implemented relatively quickly without undue cost. In contrast, if multiple new data elements are required that will involve long lead times, high cost, and minimal utility, such requirements would not rate favorably in a cost/benefit analysis. The perfect should not be made the enemy of the good.

With that introduction, WSC offers the following comments on the Commission's specific questions in the ANPRM. We show the Commission's questions in bold, with our responses in regular text.

A. Scope

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

Yes. The need for predictable and clear billing does not change on the basis of whether the billing entity does or does not operate ships – the distinction between VOCCs and NVOCCs. The customer benefits of transparent and timely billing apply equally in both instances, and it would be competitively disruptive not to regulate all common carriers equally. In particular, in the event that an NVOCC bills on the basis of adding charges to a VOCC invoice, it is important for purposes of transparency that there is a means to determine the origin of each part of the charge.

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

Yes. MTOs can and do bill for demurrage, and there are multiple business models at ports around the country under which carriers bill on behalf of MTOs and vice versa. It would be impractical if charges originating with MTOs, but potentially collected by common carriers, were not subject to the same minimum standards regarding included information. To the extent that a charge may be handled by multiple parties – whether on an agency basis or as a pass-through – it is critical that the relevant information be available to all parties in the chain.

As an example, recent demurrage charges adopted (but as yet uncollected) by the Ports of Los Angeles and Long Beach (LA/LB) emphasize the need to have any Commission regulations in this arena apply to all involved parties. The LA/LB charges, if applied, would raise many regulatory questions, most of them outside of this proceeding. Within the scope of this proceeding, however, the LA/LB tariff rule raises questions about the number of on-terminal dwell days for loaded imports bound for various types of inland transportation. Having clear information about how that formula applies and to which containers would be essential to handling disputes and evaluating claims regarding those charges in the event the charges were not deemed unlawful.

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 VOCCSs?

As discussed in response to Question 2, there are many different billing arrangements at different terminals. So long as there is the possibility that one party will bill a customer based on charges originating from another party, the information must be available at each stage in the chain in order for transparency to be maintained. So, yes, if the Commission decides to regulate, those regulations should be consistent across parties in order to achieve the objectives of transparency and clarity.

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

WSC does not have information on this question.

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?

WSC does not have information on this question.

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

Elements a-f represent reasonable elements that we understand are currently reflected in the billing practices of many parties today, and WSC supports regulatory clarity that these are minimum requirements.

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)

WSC does not generally object to a requirement that the source of the charge be indicated on the invoice. That said, while identifying the relevant service contract is reasonable, identifying the exact section of the service contract is likely infeasible given the high variability between negotiated service contract terms. For example, identifying the relevant term within a carrier's standard boilerplate should be feasible, but it is likely infeasible from a technological standpoint to identify the relevant term within each customer-specific boilerplate and/or boilerplate terms that vary from the carrier's standard. A manual review of each boilerplate would be required, which would only serve to slow down a carrier's invoicing process.

It is also important to avoid requirements that would undermine service contract confidentiality. Finally, it is unclear what the distinction is between elements g and h.

i. For import shipments

i. Vessel arrival date

This is a reasonable element.

ii. Container availability date

This element requires more explanation and definition in the context of a follow-on NPRM. Container availability is a function both of the unlading date and operational availability within the terminal. Additional factors impacting container availability include clearance by U.S. Customs and whether any required payments have been received by the carrier and/or the terminal. If the Commission moves forward with a requirement related to "container availability" it will be necessary to examine how realistic it is to define this term in a way that is practically implementable, as well as to understand and ensure feasibility of how necessary information would flow between the terminal and the carrier for ultimate presentation to the customer or trucker. Relevant practical implementation issues may differ notably for situations in which the cargo interest is responsible for picking up the cargo (merchant haulage) versus those situations which the carrier arranges inland transportation (carrier haulage).

With respect to this data element, and probably others, we understand that the current situation is that arrival information may be provided separately from a detention or demurrage invoice. Accordingly, in order to more quickly and efficiently implement any new requirements that the Commission may adopt, the FMC should allow flexibility in the timing and methodology of providing required information. From a practical standpoint, container availability dates are most useful as soon as the container becomes available so that pick-up can be arranged before the end of free time. Waiting until free time expires and demurrage is invoiced would defeat the purpose of the requirement.

A business-process-based analysis should generally be used to identify customary and logical timing and documentation of required information. While the rulemaking's focus centers on detention and demurrage ("D & D") invoicing, that does not necessarily mean an invoice is the best or most logical means of providing certain information.

j. For export shipments

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

Earliest return date is a reasonable element, to the extent this data field is available within the technology applications and/or systems that generate invoices. However, there are at least two issues that would require additional consideration. First, all modifications in the form of date changes are not captured today as data fields that are feasible to map and add to a carrier invoice. This challenge not only implicates the system change complexities discussed above, but means that including all modifications to the ERD would involve large amounts of manual work that – as a practical impact – would undermine supply chain fluidity by slowing down the invoicing process. Second, the earliest return date is another data element that by definition is first conveyed to the customer before any D&D bill is generated (and again in the hopes that D&D charges are avoided). Earliest return date notifications are most useful, and best serve their intended purpose, prior to the invoicing stage – and thus are another example for which it is necessary to consider acceptable data transfer methods other than a D&D invoice.

k. Any intervening clock-stopping events, for example:

i. Unavailability of container

ii. Unavailability of pick-up or return locations

iii. Unavailability of appointments (where applicable)

iv. Restrictions on chassis accepted

v. Force majeure-related events

All of the above elements were identified in the Commission's 2020 Interpretive Rule on detention and demurrage as elements that will be considered in any reasonableness determination arising from a dispute. That is unobjectionable and already decided. The current exercise, in contrast, focuses on information to be mandatorily included in invoices, and thus presents significantly greater technical challenges related to both data element definition and information availability. From a practical standpoint, a carrier does not have visibility in its system to data fields reflecting most of the "clock-stopping events" referred to above as examples. For example, if a customer or motor carrier was unable to obtain an empty container from a certain location on a particular day when a carrier's system had indicated a container should be available, then while the carrier's system may include notes that were entered manually if the customer/motor

carrier contacted the carrier to advise of this concern and seek an alternate solution, the carrier depends on the customer/motor carrier to alert it of a such an unexpected concern. Similarly, if a customer/motor carrier experiences challenges with securing a pick-up or return location for a particular shipment then the customer/motor carrier is best positioned to know of those challenges. The same applies to challenges encountered by a customer or motor carrier for obtaining appointments or due to chassis-related restrictions. These elements are vital considerations for disputes since they involve information that a carrier likely did not have visibility to prior to invoicing; that said, the same inherent limited visibility to these type of "intervening clock-stopping" events renders them inappropriate required fields for invoicing.

The examples above are described as "clock-stopping" events, with the suggestion that even transient disruptions that may have no impact on when a customer ultimately picks up a shipment or returns equipment would have to be tracked and included on an invoice. The question of whether to include these elements therefore implicates the concerns stated in the introductory section of these comments about situations in which the complexities of defining terms and capturing necessary information may outweigh the benefits of doing so. This is likely to be a case in which those complexities and nuances argue against including this information as mandatory data elements.

It may be more productive, if the Commission wishes to pursue this element, to focus on events such as port-wide weather closures or other events that are broadly recognized as stopping D&D clocks.

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

This question would seem to be addressed by the source of charge element described in subsection h, above.

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?

With respect to consistency of information across entity types, our initial reaction is that there must be such consistency in order to achieve the objectives of the potential regulations (see items A.1-3 above).

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?

WSC does not have information on this question.

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 charge? (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.)

This is an example of adding complexity to a billing function that is highly disproportionate to any potential benefits. Which party or parties are billed is based on information often provided by the customer in various data fields (shipper, consignee, notify party, etc.) on transportation documents, and the MTO or common carrier is not in a position to look behind those designations. As a practical matter, creating a detention or demurrage invoice cannot become a law school exam. The triggers for who receives an invoice are tied to the programming in billing systems, which are in turn linked to other documentation systems. It is neither practical nor feasible to turn those determinations into a case-by-case, manual process. Such a requirement would slow down rather than speed up billing, resulting in a negative impact to supply chain fluidity, and would introduce a level of variability and exception-handling that is inconsistent with what we understand to be the purpose of the regulations.

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.

This question implicates two points raised in the introduction section of these comments. First, for the Commission to provide by regulation that parties are prohibited from providing billing functions on behalf of other parties goes well beyond prevention of unreasonable practices. This kind of overreach is something that the Commission should avoid both as a legal matter and a policy matter. Second, and related, different billing practices have arisen in different ports and among different parties in response to different local needs and capabilities of the parties involved. Those commercial relationships should not be disturbed by regulation without a compelling reason, which is not provided in the ANPRM.

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?

WSC does not have this information.

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?

Limitations on any timeframe within which D & D invoices must be issued are generally set by relevant contractual terms and commercial negotiations between the parties,

which a rulemaking should not interfere with. If the Commission is set on putting a rule in place with a set number of days, then it should consider doing so in a manner where 60-days is the default but allow carriers and merchants to negotiate a time period other than the default.

One question that would have to be addressed with respect to pass-through charges is the relationship between when the originating party issues an invoice versus when the party that passes through that charge must issue its invoice. It would not be reasonable or practical to say that the second invoice must be issued within 60 days of original accrual, because the party that passes the charge through may only receive the initial invoice on the 60th day.

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?

Basic information about whom to contact and documentation that the billing party needs in order to evaluate a dispute or request for adjustment is a reasonable requirement. Many carriers already provide this information through websites or customer portals, and reference on the invoice to those existing sources of information should be recognized as meeting the requirement.

As to the third question, standard recitations of when charges may be waived are unlikely to be useful and may actually increase disputes by inviting requests for adjustment that might not be applicable in any given case. The Commission's Interpretive Rule is the proper source of such guidance, both because it is more comprehensive than any summary that could be included on an invoice and also because it recognizes that the facts of each case will determine reasonableness and therefore the basis for any adjustments to billed amounts. It is also important as a practical matter not to create a situation in which parties are encouraged to introduce substantial amounts of boilerplate language into invoices in response to regulatory requirements. More words are not the same thing as more transparency and more clarity.

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 and what should that timeframe be?

WSC does not have information on the base question, and thus does not state a view on the follow-on question.

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).

A regulation on D & D billing requirements risks conflicting with commercially negotiated contractual terms, such as a timeframe expressly agreed between parties for invoicing.

16. Please provide any other views or data that you believe would help inform the Commission's decision whether to issue a proposed regulation on demurrage and detention billing information and practices.

WSC welcomes this initiative and plans to provide additional comments in the event that the Commission issues a notice of proposed rulemaking to further address detention and demurrage billing and dispute resolution practices. We end where we began, which is to encourage the Commission to focus on the core data elements that will provide the greatest value to supply chain participants and that can be implemented within a reasonable time without the need for extensive changes to information technology systems that are used to process D&D invoices.

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