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# FEDERAL MARITIME COMMISSION

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## FACT FINDING INVESTIGATION NO. 28 FINAL REPORT

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### CONDITIONS AND PRACTICES RELATING TO DETENTION, DEMURRAGE, AND FREE TIME IN INTERNATIONAL OCEANBORNE COMMERCE

December 3, 2018

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## SUMMARY AND FINDINGS

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Over the past nine months, Federal Maritime Commission (FMC) Commissioner Rebecca F. Dye, as the designated Fact Finding Officer for Fact Finding Investigation No. 28 (FF28), has collected and analyzed substantial amounts of information about the demurrage and detention practices of U.S. liner shipping companies, ports, and marine terminals serving U.S. trades.<sup>1</sup> The Fact Finding Officer also personally interviewed large and small American importers and exporters, maritime attorneys, ocean transportation intermediaries, drayage trucking representatives, public port authorities, as well as executives from liner shipping companies and marine terminal executives.

As explained in the September 5, 2018, Interim Report,<sup>2</sup> the record developed from the Fact Finding's demand letters to carriers and marine terminal operators indicated that the concerns expressed in the original Coalition for Fair Port Practices<sup>3</sup> petition and at subsequent public hearings that preceded the investigation<sup>4</sup> go beyond a few severe episodes of inclement weather or labor-related port congestion problems. The record also shows that these concerns are relevant to more than just a small subset of major ports.

The Preliminary Observation of the Interim Report explained the challenges that existing demurrage and detention practices entail and focused on topics such as nonstandard terminology; trends and scope of demurrage and detention charges; tender of cargo and actual cargo availability; concerns about containers becoming unavailable; and impediments to container retrieval. The Interim Report also discussed specific issues related to billing practices, dispute

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<sup>1</sup> The information and data were provided in response to FF28 information demand letters. See [https://www.fmc.gov/fmc\\_issues\\_information\\_demands\\_in\\_detention\\_demurrage\\_investigation/](https://www.fmc.gov/fmc_issues_information_demands_in_detention_demurrage_investigation/)

<sup>2</sup> The Interim Report for FF28 was published on the Federal Maritime Commission's website and is available at [https://www.fmc.gov/assets/1/Documents/FF28\\_int\\_rpt2.pdf](https://www.fmc.gov/assets/1/Documents/FF28_int_rpt2.pdf). The investigation was conducted in two phases. The first phase analyzed information and data to develop the key topics to be addressed. The Interim Report covered Phase One activities and findings. The second phase involved field interviews at three locations across the country.

<sup>3</sup> The Coalition for Fair Port Practices is a group of trade associations representing a broad array of importers, exporters, drayage providers, freight forwarders, Customs brokers and third-party logistics providers that petitioned the Commission to provide guidance on what constitutes "just and reasonable practices" with respect to demurrage, detention and per diem charges. See [https://www.fmc.gov/assets/1/Documents/P4-16\\_Ptn\\_Lv\\_Supp.pdf](https://www.fmc.gov/assets/1/Documents/P4-16_Ptn_Lv_Supp.pdf).

<sup>4</sup> On March 5, 2018, the Commission ordered a formal investigation into demurrage and detention practices in U.S. container shipping trades. See [https://www.fmc.gov/formal\\_investigation\\_in\\_detention\\_demurrage\\_case/](https://www.fmc.gov/formal_investigation_in_detention_demurrage_case/).

resolution processes, demurrage charges related to government cargo inspections, and foreign demurrage and detention practices.

The information in the record developed in the first phase of Fact Finding 28 supported the view that significant benefits to the U.S. international ocean freight delivery system, and the American economy as a whole, would result from:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to cargo interests of container availability; and
- An FMC Shipper Advisory Board or Innovation Team.

The Interim Report explained that Phase Two of FF28 would solicit views from all interested parties on how to implement the above recommendations in ways that would improve the performance of the overall American freight delivery system.

In this regard, Phase Two of FF28, from early September through mid-November 2018, was devoted to conducting a series of field interviews with liner shipping companies, port officials, marine terminal operators, ocean transportation intermediaries, drayage truckers, and large and small American importers and exporters.<sup>5</sup> Those field interviews were held at ports in Southern California, New York and New Jersey, and Florida. In addition, carrier executives, marine terminal operators, drayage trucking representatives, and American cargo interests offered comments and ideas directly to the Fact Finding Officer in response to her call for industry leaders to participate in the FF28 process.

Based on the relevant data and information developed in Phase One of FF28, interviews conducted, and comments received during Phase Two of FF28, the Fact Finding Officer finds that:

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<sup>5</sup> This report refers to liner shipping companies as ocean common carriers or carriers, and it refers to shippers, importers, exporters, consignees, and any other beneficial cargo owners as “cargo interests.”

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

In light of these findings, the Fact Finding Officer recommends that the Commission organize FMC Innovation Teams composed of industry leaders to meet on a limited, short-term basis to refine commercially viable demurrage and detention approaches in the following areas:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and
- Consistent notice to cargo interests of container availability.

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## BACKGROUND

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### A. Coalition Petition and Public Hearing

On December 7, 2016, the Coalition for Fair Port Practices petitioned the Commission to adopt an *interpretative rule*<sup>6</sup> that would clarify what constitutes “just and reasonable rules and practices” with respect to the assessment of demurrage and detention charges.<sup>7</sup>

After reviewing the roughly 110 comments filed in response to the Coalition’s petition, the Commission conducted two days of public hearings to take testimony from the petitioners and other parties that would be affected (including carriers, marine terminal operators, and drayage trucking companies) concerning the need for and likely consequences of the petition’s proposal.

At these hearings, held on January 18 and 19, 2018, the Commission received testimony on the Coalition’s petition.<sup>8</sup> Testimony by Coalition witnesses generally agreed with the findings detailed in an April 2015 Commission report on demurrage and detention at selected U.S. ports and a May 2015 Commission report on the causes, consequences, and challenges of port congestion.<sup>9</sup> One of the most important findings was that there is no clear or standard manner in which ocean carriers and marine terminal operators handle demurrage and detention issues, making it difficult for shippers to avoid charges.

Coalition witnesses presented testimony on an array of problems they experienced with current demurrage and detention practices, including the lack of shipper control over

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<sup>6</sup> An interpretive rule is an agency rule that clarifies or explains existing laws or regulations. An interpretive rule does not need to satisfy the requirements set out in the Administrative Procedure Act for notice to the public and opportunity for comment.

<sup>7</sup> The petition, P4-16, and the public comments on its proposal are available on the Commission’s website at <https://www.fmc.gov/p4-16/>

<sup>8</sup> A summary of the hearing is available at [https://www.fmc.gov/commission\\_concludes\\_hearing\\_on\\_petition\\_p4-16/?F\\_All=y](https://www.fmc.gov/commission_concludes_hearing_on_petition_p4-16/?F_All=y). Moreover, the hearings can be viewed on the FMC’s YouTube channel: [https://www.youtube.com/channel/UCwKTAIGGHIA0xcN3bDt\\_Uqg](https://www.youtube.com/channel/UCwKTAIGGHIA0xcN3bDt_Uqg).

<sup>9</sup> The Commission’s April 2105 Demurrage and Detention report is available at <https://www.fmc.gov/assets/1/Page/reportdemurrage.pdf>. The May 2015 Commission port congestion report, which followed a series of four port forums, is available online at [https://www.fmc.gov/assets/1/Page/PortForumReport\\_FINALwebAll.pdf](https://www.fmc.gov/assets/1/Page/PortForumReport_FINALwebAll.pdf).

circumstances in which charges are imposed, delays involved with U.S. government holds, the effect on demurrage and detention charges of ocean carrier big ships, the lack of sufficient marine terminal appointments for drayage truckers, the lack of notice of partially-closed terminals to truckers, the influence of periodic port congestion caused by weather complications, the unavailability of chassis at inland rail yards, certain labor issues, and unclear demurrage and detention billing and dispute resolution procedures.

The Commission also received testimony from ocean carrier and marine terminal witnesses. The topics they addressed included: the purpose of demurrage in moving cargo through the terminal and the need to maintain terminal velocity, the purpose of detention charges in facilitating equipment velocity for an efficient supply chain, the expense of non-residential waterfront property housing marine terminal facilities and the need to discourage use of that property as cargo storage, the need for carriers to maintain a balanced equipment flow and a fluid network, the role of market competition in addressing demurrage and detention problems, the approach among ocean carriers to extending free days during weather disruptions, the ocean carrier preference for quicker turnaround for equipment over collecting detention charges, and the marine terminal operator preference for moving cargo off terminal over collecting demurrage charges.

Following the hearing, the Commission deliberated on what additional action it should take, if any, to address the issues raised in the petition and hearing testimony. Ultimately, it decided that a non-adjudicatory fact finding investigation offered the most effective way to determine the nature and full extent of demurrage and detention issues and to find a way to mitigate any problems that were identified.

## **B. Order of Investigation**

On March 5, 2018, the Commission initiated a non-adjudicatory fact finding investigation, Fact Finding Investigation No. 28, into the conditions and practices relating to detention, demurrage, and free time in U.S. international ocean commerce. The Order of

Investigation<sup>10</sup> designated Commissioner Dye the Fact Finding Officer and directed her to develop a record on:

- (a) Whether and how the alignment of commercial, contractual, and cargo interests enhance or aggravate the ability of cargo to move efficiently through United States ports;
- (b) Whether and when a vessel-operating common carrier (VOCC) or marine terminal operator (MTO) has tendered cargo to the shipper and consignee;
- (c) Billing practices for invoicing demurrage or detention;
- (d) Practices with respect to delays caused by various outside or intervening events;  
and
- (e) Practices for resolution of demurrage and detention disputes between VOCCs or MTOs and shippers.

The Order also required the issuance of an Interim Report no later than September 2, 2018, and a Final Report no later than December 2, 2018.

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<sup>10</sup> See [https://www.fmc.gov/assets/1/Documents/ff28\\_ord\\_invst2.pdf](https://www.fmc.gov/assets/1/Documents/ff28_ord_invst2.pdf).

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## INVESTIGATION PHASE ONE

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Beginning in March 2018, Commissioner Dye developed a record on these subjects by serving orders comprising questions and document requests on 23 ocean carriers and 44 marine terminal operators and operating ports, and solicited evidence concerning demurrage and detention practices from cargo interests, drayage providers, and ocean transportation intermediaries. These efforts resulted in thousands of pages of answers and documents, which Commission staff reviewed and categorized, including hundreds of emails and other documents from cargo interests and truckers. The responses and other evidence are summarized in the Interim Report.

Although the investigation focused on the practices of VOCCs and MTOs, the Fact Finding Officer also pressed shippers, dray truck companies, and other affected parties to document specific allegations and to provide supporting materials of unreasonable port detention and demurrage practices. To facilitate their participation, the Commission created a dedicated email address, ff28@fmc.gov, to which correspondence and supporting documents could be sent.<sup>11</sup> Hundreds of truckers, ocean transportation intermediaries, and cargo interests sent emails and supporting documents to this account. Issues ranged from container availability to Customs inspections to appointment availability to weather. The common theme was customer service and frustration with the amount of time and effort required to resolve problems with carriers and marine terminal operators. Those contacting the Fact Finding 28 through the dedicated email routinely expressed confusion over whom to contact and what documentation they needed to supply the marine terminal or carrier. They also described delayed responses that exacerbated problems and led to additional charges.

Phase One also included reviewing data compiled by the Commission's Office of Consumer Affairs and Dispute Resolution (CADRS). Between 2014 and 2018, CADRS handled hundreds of cases involving commercial cargo demurrage disputes. The most common demurrage problems during that period were congestion (driven by closed terminals, lack of available appointments, labor shortages, and backlogs); drayage issues (chassis shortages,

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<sup>11</sup> FMC access to the FF28 email inbox was limited to the Fact Finding Officer and a few Commission staff.

changes in the drayage provider, and overweight trucks); demurrage incurred as the parties disputed other issues; paperwork problems (late paperwork, system errors, incorrect destinations, cargo title issues); and Customs holds.

Many of these same issues were also raised in individual discussions that the Fact Finding Officer conducted with cargo interests during Phase One. The investigation received significant cargo interest information at various conferences such as the NCBFAA Annual Conference (May 2, 2018), the Global Shippers Forum Annual Meeting (May 10, 2018), and the Agriculture Transportation Coalition (AgTC) 30th Annual Meeting (June 14, 2018).

For example, at the AgTC meeting, representatives from multiple exporters, importers and drayage providers met with the Commissioner to discuss issues such as burdensome, time-consuming, and non-transparent dispute resolution processes; multiple, delayed or unexpected bills; delayed or nonexistent refunds; charges accruing when a port was closed due to weather; and lack of communication from carriers and marine terminal operators regarding vessel arrival delays or schedule changes; and other access limitations such as gate times. One drayage provider pointed out that small customers who use freight forwarders are at times unaware of free time because they are not privy to the terms of the agreements between carriers and the ocean transportation intermediary. Another drayage provider pointed out that truckers are not part of the contracts that determine free time, and container free time and chassis days do not align.

Similarly, at the NCBFAA conference, multiple ocean transportation intermediaries contributed their views and experiences. They raised concerns about poor carrier customer service; carrier delays in correcting bills; lack of uniformity among dispute resolution procedures and free time policies; lack of advance notice or communication from marine terminal operators about closures and terminal ability to receive returned equipment; large demurrage and detention bills related to government cargo examinations; decreased free time; lack of ocean transportation intermediary involvement with shipper and ocean carrier arrangements; and congestion at rail yards in Dallas, Texas, and Memphis, Tennessee, due to drayage trucking and chassis unavailability.

Commissioner Dye continues to attend meetings and discussions of the FMC Memphis Supply Chain Innovation Team in Memphis, Tennessee, which was organized to respond to congestion in the rail yards caused by chassis unavailability on ocean carrier moves.

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## ISSUANCE OF INTERIM REPORT

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In September 2018, the Fact Finding Officer released an Interim Report summarizing the Phase One process and reporting on the issues set forth in the Order of Investigation. The record developed during Phase One strongly suggested that concerns about demurrage and detention in U.S. trades are not limited primarily to weather-related or labor-related port congestion in 2014-2015, a small subset of large ports, or episodic events unrelated to potentially systemic issues. The record also supported consideration of the benefits to the U.S. international freight delivery system of:

- Transparent, standardized language for demurrage, detention, and free time practices;
- Clarity, simplification, and accessibility regarding demurrage and detention billing practices, and dispute resolution processes;
- Explicit guidance regarding types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to shippers of container availability;
- An optional billing model wherein marine terminal operators bill shippers directly for demurrage, and carriers bill shippers for detention; and
- An FMC Shipper Advisory Board.

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## INVESTIGATION PHASE TWO

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Following the issuance of the Interim Report, the Fact Finding Officer met in-person and telephonically with representatives from over twenty-five ports and marine terminal operators, as well as numerous representatives of the shipper, carrier, marine terminal operator, ocean transportation intermediary, and drayage trucking segments of the ocean transportation supply chain. The first set of meetings were held at Port Everglades and the Port of Miami from October 31, 2018, to November 2, 2018. The following week, the Fact Finding Officer met with stakeholders over a three day period at the Port of New York and New Jersey. From November 14-16, 2018, the Fact Finding Officer held stakeholder meetings at the Port of Long Beach and Port of Los Angeles.<sup>12</sup>

The meetings and comments focused on the six areas outlined in the Interim Report, how stakeholders would implement those ideas, and what effect doing so likely would have on operations. The Phase Two record that resulted made clear that, at an operational level, there is a great deal of variety among and within ports and terminals and a diversity of views of how best to address ‘demurrage’ and ‘detention’ concerns. The record reinforced the importance of the following distillation of the areas from the Interim Report: (1) standardized and clarified language; (2) transparent and accessible demurrage and detention billing and dispute resolution practices; (3) evidentiary guidelines or corroboration of demurrage problems; and (4) actual container availability and reasonable notice thereof.<sup>13</sup>

### **A. Standardization and Clarification of Language**

The record at the end of Phase One demonstrated the “need for unambiguous, standard terminology, especially of the terms demurrage and detention, that accurately reflects the nature

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<sup>12</sup> The interview schedule was published online in advance, and interested parties were encouraged to request meetings, as time permitted.

<sup>13</sup> Although it was not discussed during the field interviews, there was also strong cargo interest and ocean transportation intermediary support for a shipper advisory board or some other mechanism for the Commission to receive regular input from U.S. cargo interests. The marine terminal operators did not object to this notion, so long as the resulting board or teams represented a cross-section of the industry and they did not address individual disputes between supply chain actors.

and source of the charges at issue.”<sup>14</sup> The information obtained in Phase Two bolstered the conclusion that standardized, transparent language is desirable. With few exceptions,<sup>15</sup> the Phase Two respondents acknowledged that the language used in the industry could be clarified or standardized and that doing so is “good common sense” and could enhance competition.

One marine terminal operator noted that miscommunications can arise when new people enter the industry and are not aware of the meanings terms have acquired over time. Another terminal operator conceded that terminology can be confusing even to those in the industry. Cargo interests asserted that, in some cases, carriers charge both demurrage and detention separately; in some cases, the rental fee for the equipment is included in demurrage; and in other cases, carriers charge demurrage fees that include equipment and then assess other equipment charges.

There was less consensus on how the relevant terms should be defined. Some Phase Two respondents agreed that, as described in the Interim Report,<sup>16</sup> demurrage should mean a charge for the use of terminal space, whereas detention should mean a charge for the use of a container. Ocean transportation intermediary representatives, for instance, advocated for those definitions. Others preferred the traditional approach where demurrage is anything charged inside the terminal, and detention is anything outside the terminal. Cargo interests suggested definitions for demurrage and detention that reflected this on-terminal/off-terminal approach.

Regardless of the definitions adopted, most Phase Two respondents indicated that clarifying and standardizing language would not be particularly difficult. A few cautioned, however, that systemwide changes could interfere with operating systems or existing service contract terms. One marine terminal operator advised that any Commission-sanctioned terminology should not conflict with or cause confusion with how similar terms are used by other government agencies or other industries, such as rail.

Importantly, almost every Phase Two respondent characterized demurrage as an incentive, to get containers out of the terminal. As one port official put it: “demurrage exists to

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<sup>14</sup> Interim Report at 17.

<sup>15</sup> One of the carriers argued against standardization because the whole world uses regional definitions, and terms can vary by service contract.

<sup>16</sup> Interim Report at 6-7.

facilitate expedited processing of equipment and cargo.” It is not intended, the marine terminal operators stated, to be a revenue stream. One marine terminal operator emphasized that demurrage is not related to the term, or concept, of storage, which should not be injected into the demurrage and detention lexicon. Carriers, too, pointed out that they do not want to charge demurrage or detention; they want their equipment back so that they can make more turns and more revenue.

## **B. Transparent and Accessible Demurrage and Detention Billing and Dispute Resolution Practices**

The Phase Two meetings also reinforced the value of making demurrage and detention billing and dispute resolution policies and practices more transparent and accessible to cargo interests and truckers. The Phase One record demonstrated the utility of: (1) having all of a carrier’s or marine terminal operator’s demurrage and detention policies at one, easily accessible website; and (2) more accessible, user-friendly information about how demurrage and detention disputes are resolved, whom one should contact about demurrage or detention problems, and how long the dispute resolution process should take.

Cargo interests supported these ideas, as one of the biggest issues they deal with is the propensity of carrier and marine terminal operators to pass the buck back and forth, leaving the cargo interests uncertain about who to contact or how precisely to dispute a charge. Few carriers or marine terminal operators disagreed with the Interim Report’s suggestions, as the industry was, some conceded, “past due” for some standardization and transparency.

### **1. Demurrage and Detention Billing Procedures**

Regarding increased transparency of demurrage and detention billing procedures, the Phase Two participants were generally not opposed to the idea, though some questioned its necessity. The chief comment of marine terminal operators was that they do not issue bills for demurrage or detention. While they may collect demurrage on behalf of carriers, they noted, cargo interests usually pay demurrage via online portals; they do not typically receive bills. According to some marine terminal operators, those portals show exactly what is being collected, with respect to the carrier’s tariff or service contract.

In contrast, cargo interests advocated for standardized billing practices by region. They claimed that they or their truckers often have to spend too much time and resources dealing with disparate billing arrangements. That said, cargo interests preferred one bill (or billing system) over receiving multiple bills from multiple sources, despite any lack of transparency associated with the former.

Truckers who participated in Phase Two advocated for more transparency and for a formal dispute resolution process. Ocean transportation intermediaries asserted that reasonable billing practices would include strictly defined time frames for invoice issuance and respect for the terms of the Uniform Intermodal Interchange and Facilities Access Agreement.

Finally, there were no particular objections by carriers or marine terminal operators to making more demurrage and detention information available on their websites. Some noted that they already provide this information. One marine terminal operator pointed out that the industry is already required to file tariffs and that cargo interests know the tariff rules for demurrage. But this terminal operator was not opposed to increased clarity and accessibility, and he did not challenge the idea that demurrage and detention tariffs and schedules can be difficult to navigate for the uninitiated.

## 2. Dispute Resolution Practices and Procedures

The existence, clarity, and accessibility of dispute resolution practices, procedures, and processes was a major topic of inquiry during Phase Two. Cargo interests stated that when dealing with demurrage, there was often no clear dispute resolution contact person, procedure, or escalation point. One representative stated that they typically just pay whatever demurrage is charged at the gate and dispute it later. Some cargo interests asserted that carriers should post their dispute settlement process, including step-by-step instructions, contact information, and the evidence required to dispute a charge. They focused on carriers' dispute resolution practices because, they asserted, cargo interests should deal exclusively with carriers when it comes to demurrage disputes, as opposed to the marine terminal operators who collect demurrage. These cargo interests reasoned that dealing with marine terminal operators, with whom cargo interests lack direct contractual relationships, robs cargo interests of the bargaining power they would have vis-à-vis carriers.

The ocean transportation intermediaries who provided information to FF28 in Phase Two also advocated for clear lines of authority and accessible dispute resolution policies. Like cargo interests, they stated that when demurrage or detention issues arise, carriers and marine terminal operators have a tendency to shift responsibility to each other. They also recommended that carriers and marine terminal operators maintain formal, publicly accessible dispute resolution processes, which ideally would include specially trained individuals, rather than general account managers.

Marine terminal operators and carriers generally acknowledged that developing demurrage and detention dispute resolution practices was something they could do and that such transparency was valuable, especially regarding whom a cargo interest should contact in the event of a problematic demurrage charge (or need for additional free time) and what a marine terminal operator's rules and regulations are. But they also stated that cargo interests and truckers "know whom to call" when there is a problem with demurrage at their respective terminals.

Most of the marine terminal operators stated that they handled most demurrage disputes, even when the carrier's demurrage or free time was at issue. For instance, most of the Southern California marine terminal operators said that they had the authority to waive the carrier's demurrage (or extend the associated free time) without necessarily needing approval from the carrier. They were quick to point out, however, that such practices varied by carrier, and that it might be different in other ports.

While agreeing that having demurrage and detention dispute resolution policies is important, several marine terminal operators asserted that they already have adequate processes, or standard operating procedures, or consumer service departments. But the detail and accessibility of these processes vary. Some MTO procedures are quite detailed and explain what can be waived (carrier or terminal demurrage) or extended (free time or last free day), by whom, under what circumstances, and when carriers need to be consulted. Others post contact information on their websites. A few terminal operators noted that they had changed or established dispute resolution practices since the Fact Finding 28 investigation started.<sup>17</sup> In one

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<sup>17</sup> Moreover, the Fact Finding spurred the International Federation of Freight Forwarders Associations (FIATA) to develop demurrage and detention best practices in September 2018.

case the terminal operator stated that it notified stakeholders of the proof required to substantiate demurrage and waivers or free time extensions. Another terminal operator stated that the Fact Finding 28 contributed to his starting to keep track of disputes at his terminal.

Although the stakeholders agreed in principle that carriers and marine terminal operators should have dispute resolution policies and practices and known points of contact, there was less agreement on the substance of those policies. Cargo interests asserted that carriers and marine terminal operators should be required to stop the free time or demurrage clocks if a container-not-available ticket is issued to a trucker,<sup>18</sup> when a marine terminal operator and carrier provide notification of a yard or terminal closure, and when a trucker cannot obtain an appointment within 48 hours of container availability. According to these cargo interests, stopping the clock in such situations was appropriate because the container could not be moved due to factors outside the cargo interest's control, and that such a process would induce marine terminal operators to ensure that appointment systems and yard operations are adequate for the volume of trade.

Marine terminal operators and carriers asserted in their Phase One responses that they do waive demurrage or extend free time in many of the situations the cargo interests raised. They reiterated this in Phase Two. The marine terminal emphasized that if a container is not available due to a verified issue within their control, such as when a container cannot be located, a terminal is closed, or a container is in a closed area,<sup>19</sup> they waive demurrage or extend free time. More than one terminal operator stated that they simply wanted to be fair.

Further, while there was no objection with providing cargo interests and truckers with appropriate contact information, marine terminal operators were opposed to making their internal processes public. One of the carriers pointed out that when disputes are not resolved at the local level, they must be referred up the management chain of command.

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<sup>18</sup> See *infra* Part 3.

<sup>19</sup> A container is in an open area when it is in an area from which it can be retrieved. In contrast, a closed area is a section of a container yard in which a ship is being worked. When a container is in a closed area, it cannot be retrieved for safety and labor reasons. Not all terminals have open and closed areas.

### C. Evidentiary Guidelines or Corroboration

A related issue was what sort of evidence, or corroborating documentation, should cargo interests submit to support their claims for demurrage or detention waivers or free time extension. The Phase One record suggested that all stakeholders could benefit from “external guidelines regarding the type of evidence relevant to resolving demurrage and detention disputes.”<sup>20</sup>

The Phase Two respondents generally agreed that cargo interests seeking a demurrage waiver or free time extension should substantiate their arguments with corroborating documentation and that having guidelines could resolve disputes more efficiently. The marine terminal operators identified a number of recurring issues that result in disputed demurrage charges, including:

- Trucker or shipper unable to get an appointment within free time;
- Trucker unable to get in the terminal due to closure;
- Trucker delayed due to congestion outside terminal gates;
- Insufficient equipment available;
- Buried containers; and
- Containers in closed terminal areas.

The marine terminal operators stated that the type of problem determined what sort of evidence would be helpful, and that much of it was in the possession of the marine terminal operators themselves, at least at technologically advanced terminals. Some marine terminals have systems that can verify terminal closures. Some have real-time location systems or automatic locating systems that can track containers and vehicles. Many marine terminals with appointment systems can determine how many appointments were available on a given day, whether and when a trucker attempted to make an appointment or cancelled an appointment, and whether a trucker arrived outside an appointment window.

According to marine terminal operators, this sort of information often would demonstrate that while an appointment on the last free day might not have been available, there were plenty

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<sup>20</sup> Interim Report at 18.

of appointments at other times during free time. The marine terminal operators asserted that the last free day problems resulted from shippers using terminals as storage, truckers overcommitting, and poor communication between shippers and consignees and shippers and truckers. They nevertheless acknowledged that it would be helpful if truckers took pictures to verify situations such as lines of trucks outside a gate. Also, if cargo interests simply place a phone call if they are aware of issues with a container, these phone calls could be considered as evidence.

Cargo interests and ocean transportation intermediaries did not dispute the need to corroborate requests for waivers or extensions but believed that marine terminals or carriers should provide the evidence to them. Some cargo interests asserted that if a trucker arrives at a terminal to retrieve a container that a carrier has indicated is available, and the container is not available, the terminal operator should provide the trucker with a special trouble ticket that provides the container number, the time and date, the location within the terminal, and a description of the reason the container is not available. They reasoned that this ticket would serve as evidence to efficiently resolve disputes.

Cargo interests also urged that marine terminals provide cargo interests and truckers with appointment log records that could show a trucker's attempts to make appointments for specific containers. Similarly, ocean transportation intermediaries noted that there should be a way for a trucker to notify a terminal electronically that he attempted to make an appointment, but none was available. Both cargo interests and ocean transportation intermediaries stated that the only way a trucker could corroborate a lack of available appointments was to take a screenshot with a mobile phone.

#### **D. Notice of Actual Container Availability**

The issue most frequently discussed during Phase Two was notice of container availability and the relationship between container availability and demurrage free time. Most Phase Two participants acknowledged that notice of container availability was important. The sticking point was what "availability" means.

## 1. Appropriate Notice to Cargo Interests

As noted in the Interim Report, most carriers provide cargo interests with notice of vessel arrival but not notice of container availability. In Phase Two, carriers explained that they also send cargo interests numerous other notices that allow cargo interests to plan for container retrieval, such as notices regarding Customs holds, Customs releases, and carrier releases.

When asked about arrival notices, some marine terminal operators believed that notice of vessel arrival is sufficient, whereas other terminal operators, as well as cargo interests, believed that vessel arrival is a poor proxy for notice that a container is available. As one marine terminal operator noted, as vessels grow larger, a container might not be discharged (and reach a point of rest) until days after vessel arrival, depending on where the container is stowed and when the vessel arrives, due to factors such as labor shifts, weekends, and holidays.

Most marine terminal operators fill this gap between vessel arrival and container availability by making container information available on terminal websites. Usually, these terminal information systems are passive, requiring cargo interests and truckers to check on a container's availability. Cargo interests stated that they, and their truckers, spend a great deal of time scouring carrier and marine terminal webpages for basic container information.

Some marine terminal operators were amenable to the idea of "push notifications" that affirmatively notify a cargo interest or trucker that a container is available. But others stated that there was nothing unreasonable about relying on cargo interests to track their own cargo. One marine terminal operator suggested that it could be useful if a system could automatically generate a notification when the availability clock started, similar to how airline passengers receive an email notifying them that they can check in for a flight. Another terminal operator pointed out that it provides advanced availability functionality that allows cargo interests to determine the future availability of a container, and make an appointment, five days prior to the arrival of a vessel.

The problem, according to some marine terminal operators, was that cargo interests and truckers do not use available information to their advantage and often wait until the last free day to attempt to retrieve containers. In other words, the terminal operators stated, they are being asked to create tools that are not effective for the market.

Cargo interests stated that the Commission should require carrier websites to uniformly provide information about container availability, free time, and holds. They also believed that marine terminal operators should notify carriers about, and post on their webpages, any yard closures. Cargo interests also advocated a push notification system wherein carriers would send notification of container availability to cargo interests via email or other electronic means. Ocean transportation intermediaries asserted that vessel arrival notices should be updated after vessel arrival to provide information about the last free day and the free time window for container return.

## 2. Definition of Availability

During FF28 interviews, it became apparent that stakeholders have very different ideas concerning what it means for a container to be “available.” Some cargo interests would define availability in terms of accessibility of a container for pickup and would not consider a container available if access to it is inhibited by congestion; port, terminal, or yard closures; lack of appointments; or similar circumstances. They would further require that once a government hold is released, any remaining free time period be suspended until the container becomes available, or if the container is in demurrage, the demurrage would cease until the container becomes available.

Among marine terminal operators, there was a diversity of approaches to container availability. Some marine terminal operators were of the opinion that a container is available the moment it arrives at its first place of rest, subject to some contingencies, such as holds. Others described a number of elements that factor into whether a container is available for retrieval. To be available, they indicated, at a minimum a container: (1) must be discharged from a vessel, (2) assigned a location, (3) in an open area, (4) released from Customs and other government holds, and (5) have relevant freight and fees paid. In addition to this “core” availability, a trucker must have access to the marine terminal and a chassis (to the extent truckers do not provide their own). Other marine terminals described availability similarly as when a container is off the vessel, has no holds, and has a yard spot (i.e., the marine terminal operator knows the location of the container). A major ocean carrier indicated that cargo is not available if under hold by a regulatory authority, if not in a clearly accessible location, or if an appointment is made and a trucker arrives but cannot retrieve the cargo due to a terminal issue.

Based on the information obtained in Phase Two, it appears that stakeholders' definition of availability often depends on the concept of control. Cargo interests, for instance, proposed building into their definition of container availability the notion that access to a container is not inhibited by congestion, terminal closures, or lack of appointments, i.e., circumstances purportedly outside a shipper's or trucker's control. Several marine terminal operators also imported notions of control into their definitions of availability. According to these marine terminal operators, requirements such as payment of freight, Customs clearance,<sup>21</sup> and making appointments do not render a container unavailable because those requirements are within the control of the cargo interest or trucker. From the view of many marine terminal operators, when their job was done – a container was off a vessel and in an open area -- it was available.

### 3. Availability and Demurrage Free Time

Phase Two of the Fact Finding also focused on the relationship between container availability and demurrage free time. As part of field interviews, the Fact Finding Officer asked the Phase Two respondents what would happen if free time did not start until a container was available. Cargo interests strongly supported this notion, asserting that having the free time clock start when a container actually becomes available would reduce congestion because truckers would not be dispatched until they can actually retrieve the container.

Marine terminal operator responses to this question depended in part on a terminal operator's definition of availability. For those who said that a container was "available" once it had a yard location, and a yard location was known shortly after discharge (due to real time location technology), starting free time upon availability as opposed to a predetermined time after discharge would not make a large amount of difference. For example, one marine terminal operator stated that because it does not take more than eight hours to get a container from the discharge area to the pickup area, starting free time upon availability would extend free time by eight hours. Others stated that most holds on containers are cleared by the time a vessel arrives, and they suggested that, to the extent availability depended clearing these holds, free time might

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<sup>21</sup> This was true even for "random" Customs inspections because, according to terminal operators, such inspections are not truly random. Some terminals, however, do not charge demurrage if a container is removed from the terminal for a government inspection. When asked about situations where a marine terminal operator delayed transporting a container to Customs, one marine terminal: (a) questioned how often that occurred, given a terminal operator's business incentive to move containers off the terminal; and (b) agreed that there should be some mechanism whereby a marine terminal operator has to get a container to Customs in reasonable amount of time.

not be affected in the majority of cases. In contrast, some marine terminal operators were concerned that starting demurrage free time once a container was available might interfere with the deterrent effect of demurrage, especially if a container was not available until an appointment was made.

Still other marine terminal operators acknowledged that free time should not start before a cargo interest can get its container. Moreover, the respondents made clear that port practices, conditions, and technology may affect how long after discharge a container can be made available. One marine terminal, for instance, pointed out that because it does not stack containers, a container is available as soon as it is off the vessel. Another idea involved the difference between days and labor shifts: a day at a terminal that operates night gates differs substantially from a day at a terminal that does not. According to one marine terminal operator, citing rail free time as an example, if demurrage free time started on availability, lasted for two shifts, and demurrage was high, there would be no problem with cargo interests timely retrieving their cargo.

Several marine terminal operators questioned whether free time still makes sense. They asserted that shippers once needed free time to get Customs approval and funding to release containers. Now, over ninety percent of containers are cleared prior to arrival, undermining this rationale for free time. In sharp contrast, cargo interests argued that they need more free time because vessels are larger, and containers are not always actually available when terminals say they are.

#### 4. Appointment Systems

The ubiquity of appointment systems made them a major topic of discussion in Phase Two by cargo interests, truckers, and marine terminal operators. At terminals with appointment systems, a trucker must make an appointment in order to retrieve a container. Of particular concern was how these systems affect container availability.

One appointment issue was the availability of appointments. Many marine terminal operators stated that there were usually adequate appointments available; the problem was that too many cargo interests and their truckers waited until the last free day. One terminal operator suggested that instead of the current pull system, wherein marine terminal operators wait on

cargo interests to retrieve cargo at their convenience, it would be preferable to have a push system, wherein the terminal tells the cargo interests when to retrieve a container. Another pointed out that the number of appointments were limited by equipment speed and available labor. Conversely, cargo interests asserted that if a terminal can only handle a certain number of containers in a day, it should adjust the appointments or free days accordingly.

Another issue was whether cargo interests and truckers should be eligible to make appointments before a container is available. The responses were mixed. Some marine terminal operators preferred that no appointments be available until a container was available – this would, they asserted, solve a number of problems and prevent a trucker from making a dry run. As noted by one of the ocean carriers, currently cargo interests make appointments hoping their containers will be available, which takes appointments from others whose containers might already be available. Others agreed with the idea that one should not be able to make an appointment if a container is not deliverable but felt that this is a rare occurrence. Some marine terminal operators disagreed with the concept. Under their view, limiting appointments until after all the availability boxes are checked reduces flexibility, and cargo interests are more motivated to clear Customs and freight holds once an appointment is booked.

Cargo interests recommended several procedures for appointment systems, asserting that terminal appointment systems should: (1) guarantee the availability of an appointment within 48 hours of notice of container availability; (2) provide cargo interests and truckers with access to log records that track attempts to make appointments; and (3) give priority appointments to containers that were previously issued a container-not-available trouble ticket. As justification, cargo interests maintained that it is difficult to obtain appointments, and even more so after a failed pickup attempt.

#### **E. Other Phase Two Topics**

During the course of Phase Two of the investigation, the respondents raised a number of other issues. One was free flow.<sup>22</sup> Many marine terminal operators wanted to promote free flow but suggested that it was difficult to implement because, while helpful for large shippers, it was

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<sup>22</sup> Free flow or peel off refers to a system where a trucker retrieves the first available container from a terminal (or pile of containers within a terminal) rather than retrieving a particular container.

less helpful to smaller shippers or those who use ocean transportation intermediaries. Moreover, they suggested that free flow must be done systemwide rather than on a shipper-by-shipper basis to be successful.

Another frequently discussed topic was the benefits and problems with technology. Some cargo interests and ports were strong advocates of the benefits of technology, such as the upgraded dashboard at the Port of New York and New Jersey, known as TIPS. Ideally, according to many truckers, there would be one reservation system for all stakeholders so that everyone is using the same system. But another port official pointed out that to be truly effective, technology has to be adopted systemwide. If different entities have different operating systems, different portals, etc., it will actually reinforce silos among marine terminal operators and between them and their customers.

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## OBSERVATIONS AND ANALYSIS

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### A. Scope and Complexity of Demurrage and Detention Concerns

As pointed out in the Interim Report, the information obtained in Phase One of Fact Finding 28 indicated that cargo interest and trucker concerns about demurrage and detention cannot be explained solely by unique events in 2014-2015. The information obtained also indicated that these concerns are not limited to larger ports such as those in Southern California or New York/New Jersey.<sup>23</sup> In fact, information obtained during Phase One suggested that numerous non-U.S. ports also wrestle with demurrage and detention concerns, despite foreign operating environments and differing procedures.

The Phase Two respondents reported an ongoing surge in cargo in the post-holiday shipping season in 2018, with as many as 150,000 additional containers expected in Southern California ports alone, as cargo interests seek to avoid impending tariffs. In light of these figures, carriers warned that the Commission may be hearing about port congestion as a result. Moreover, increasing diversity of business models in the terminal industry may disrupt previous relationships, business methods, and incentives.

The prevalence of demurrage and detention problems, and the difficulty in resolving them, is not surprising. The U.S. international ocean supply chain is a complex system of cargo delivery. As noted in the Order of Investigation,<sup>24</sup> contractual and operational relationships are not always aligned. Cargo interests usually have contractual relationships with carriers and truckers, but not with marine terminal operators. Marine terminal operators have contractual relationships with carriers but typically not cargo interests or truckers. But terminals, cargo interests, and truckers interact with each other on a daily basis, and in many cases, terminals collect demurrage (i.e. line or carrier demurrage) from cargo interests or truckers on carriers' behalf.

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<sup>23</sup> Interim Report at 7-8.

<sup>24</sup> Order of Investigation at 2.

The nature of these relationships has a number of consequences. Marine terminal operators, for instance, are concerned that shippers and carriers negotiate extensive free time, which turns their terminals into *de facto* warehouses.<sup>25</sup> Truckers have also pointed out that they lack any leverage with carriers or the marine terminal operators with whom they interact on an everyday basis. Similarly, a lack of communication among truckers, carriers and marine terminal operators can result in problems. One such problem involves a trucker arriving at a terminal with his own chassis, only to find that his container has already been placed upon a chassis, resulting in a flip fee.

These arrangements are unlikely to change. Cargo interests, ocean transportation intermediaries, and marine terminal operators generally expressed a preference for dealing with carriers when possible.<sup>26</sup> Alliances among carriers may contribute to complexity rather than reduce it. For instance, in Southern California, both truckers and marine terminal operators pointed out that because alliance carriers call at multiple terminals, empty container return locations sometimes change without adequate notice to truckers.

Moreover, while truckers are encouraged to perform dual transactions (returning an empty container and picking up a loaded container on the same trip to a terminal), carrier alliance operations can result in triangle moves, wherein a trucker is asked to return a container to a different terminal than that from which it was picked up, and then must go to another terminal to get an import container. The need for empty containers at a particular terminal can result in chassis misalignment, as every empty container comes with a chassis.

## **B. Notice of Cargo Availability**

The full investigatory record also demonstrated that while free time is derived from a carrier's obligation to tender cargo for delivery, carriers and marine terminals focus less on tender and more on operational concepts such as vessel arrival, container discharge, first point of

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<sup>25</sup> Although ports and terminals do not control the contractual relationships between cargo interests and shippers, and thus the free time a carrier offers its customers, they can negotiate with carriers about the demurrage and free time policies of the ports and terminals vis-à-vis carriers. One port, for instance, created an ancillary fee approach where miscellaneous charges, including demurrage for the first 30 days on dry containers, were rolled into one ancillary fee per container. The port would then adjust the ancillary fee as needed based on the carriers actual utilization of the port.

<sup>26</sup> The Phase Two respondents exhibited little appetite for the optional billing model described in the Interim Report.

rest, yard location, and open and closed areas. Similarly, for the purposes of day-to-day operations, cargo interests and truckers are primarily interested in cargo availability.

For background, a carrier is obligated, as part of its contract of carriage, to tender for delivery<sup>27</sup> cargo to a consignee.<sup>28</sup> Tender requires more than depositing cargo on a “reasonable pier.”<sup>29</sup> To tender for delivery, unless the Customs or regulations of the port require otherwise, a carrier must: (1) unload cargo onto a dock or pier, (2) place it at a location where it is accessible to the consignee, (3) segregate it by bill of lading and count, (4) give the notice to the consignee, and (5) afford the consignee a reasonable opportunity to come and get it.<sup>30</sup> In discharging this duty, the carrier is also required to provide, directly or through an agent, adequate terminal facilities.<sup>31</sup>

This reasonable opportunity to pick up cargo is what the industry refers to as free time for demurrage.<sup>32</sup> Because it is part of a carrier’s transportation obligation, free time is not a gratuity; the carrier or its agents or contractors (e.g. terminals) must provide it.<sup>33</sup> Thus tender and demurrage are related: a carrier cannot charge demurrage unless it has tendered cargo for delivery.<sup>34</sup>

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<sup>27</sup> The “tender” cases tend to involve port-to-port moves (i.e., merchant haulage) rather than door-to-door moves (carrier haulage), where actual delivery is more likely to occur.

<sup>28</sup> See, e.g., *Boston Shipping Ass’n v. Port of Boston Marine Terminal Ass’n*, 10 F.M.C. 409, 415 (FMC 1967).

<sup>29</sup> *Boston Shipping Ass’n*, 10 F.M.C. at 415.

<sup>30</sup> *Am. President Lines, Ltd. v. Fed. Mar. Bd.*, 317 F.2d 887, 887, 888 (D.C. Cir. 1962); *Boston Shipping Ass’n*, 10 F.M.C. at 415. The COGSA and Harter Act cases cited by the Phase One respondents in their written responses use the terms “actual delivery” and “constructive delivery” rather than “tender for delivery.” But “constructive delivery” and “tender for delivery” appear to be similar, as both are defined in terms of cargo discharged from a vessel, made accessible to a consignee for a reasonable time, with notice to the consignee. Compare *B Elliott (Canada), Ltd. v. John T. Clark & Sons, Inc.*, 704 F.2d 1305, 1308 (4th Cir. 1983), with *Am. President Lines*, 317 F.2d at 887-88.

<sup>31</sup> *Boston Shipping Ass’n*, 10 F.M.C. at 415; *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 524, 539 (FMC 1966).

<sup>32</sup> *Port of San Diego*, 9 F.M.C. at 539 (“This allowance by the carrier to the consignee of ‘a reasonable opportunity to come and get’ his cargo is what is known in the industry as free time.”).

<sup>33</sup> *Port of San Diego*, 9 F.M.C. at 539; *id.* at 540 (“Free time is not a gratuity, but it is required as a necessary part of the carrier’s transportation obligation which includes a duty on the carrier to ‘tender for delivery’ all cargo carried by it absent a special contract to the contrary.”); *id.* at 540 (noting that the port, as agent of the carrier, was required to provide reasonable free time).

<sup>34</sup> *In re Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 9 S.R.R. 860, 874 (FMC 1967) (noting that the carrier has an obligation to tender for delivery “free of assessments of any demurrage”); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89, 101 (U.S.M.C. 1948) (“[C]onsignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties.”).

Although much of the caselaw pre-dates, or does not address, containerization, and arose in a different regulatory environment, it nonetheless highlights points of significance to the Fact Finding. First, the duties owed cargo interests are owed by the *carrier*. Carriers are responsible for tendering cargo for delivery, and thus carriers are responsible for giving the requisite notice regarding cargo, making terminal facilities available, ensuring that cargo is accessible for retrieval, and giving cargo interests adequate time for retrieval. They may rely on marine terminal operators and others to meet these obligations on their behalf, but carriers cannot disclaim responsibility until delivery is tendered. Second, while there may be good reason to reconsider some of the older “tender” caselaw in light of the current shipping operations, the cases demonstrate that free time turns on *notice* to cargo interests, *accessibility* of cargo to consignees, and *reasonable opportunity* to pick cargo up.<sup>35</sup>

Viewing the record with these general principles in mind, it is evident that some of the demurrage problems complained of may benefit from a focus on container availability. Presently, although demurrage and detention practices differ among ports and even among terminals at the same port, in general it appears that the start of allotted free time typically begins either when cargo is off-loaded from a vessel or when the container is moved to the terminal yard. In some cases, free time reportedly begins with vessel arrival.

The respondents in both phases of the investigation generally indicated that the primary purpose of demurrage and detention is to establish a financial incentive to encourage the productive use of assets (containers and terminal space) and promote optimal velocity of cargo flow across the terminal and out of the port.<sup>36</sup> For demurrage and detention to be effective, and for demurrage and detention practices to be reasonable, they must be tailored (and limited) to those situations in which the container is actually available.<sup>37</sup>

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<sup>35</sup> Notice, at least for the purposes of delivery in the Harter Act context, typically refers to “notice that goods have been discharged” from a vessel. *See, e.g., B. Elliott*, 704 F.2d at 1308 (quoting *Orient Overseas Line, Inc. v. Globemaster Baltimore, Inc.*, 365 A.2d 325, 335-36 (Md. App. 1976)).

<sup>36</sup> Some cases refer to demurrage also serving a compensatory purpose. *New York Harbor*, 9 S.R.R. at 864 (FMC 1967) (noting that demurrage has both a penal purpose and “is the charge assessed for the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time.”); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. at 107.

<sup>37</sup> *See, e.g. Free Time and Demurrage Charges at New York*, 3 U.S.M.C. at 107 (“When property lies at rest on a pier after free time has expired and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier.”). Moreover, it is well-established that just and reasonable practices under 46 U.S.C. § 41102(c) must be

In considering whether a carrier’s or marine terminal operator’s demurrage practices adequately address container availability, accessibility, and notice thereof, a number of considerations should be taken into account, given the principle that demurrage and detention are, in the first instance, incentive-creating charges:

- Where appointment systems are used, whether carrier and marine terminal operator demurrage practices take into consideration a cargo interest or trucker’s reasonable opportunity to make an appointment following notice that cargo was available;
- Whether carrier and marine terminal operator demurrage practices extend free time to mitigate for any delay in moving a container to an examination facility for government inspections or holds; and
- Whether carrier and marine terminal operator demurrage practices take into account terminal closures that occur after notice of availability is given, and provide for notice of terminal closures or revised notice of container availability.<sup>38</sup>

### C. Demurrage and Detention Billing Practices

As mentioned in the investigation’s Interim Report, the lack of uniformity of billing practices, timeframes, and transparency can cause confusion about the demurrage and detention charges that are imposed. For that reason, ocean carriers and marine terminals should have clear billing processes and procedures, and clear avenues for shippers to pursue billing questions or disputes with officials empowered to resolve them.

Based on discussions with carriers, cargo interests and marine terminal operators, it appears that public webpages which explain demurrage and detention billing practices are the most effective way to meet this need.

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“otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *Distribution Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan & Its Member Lines*, 24 S.R.R. 714, 721 (FMC 1988) (quoting *Port of San Diego*, 9 F.M.C. 525 ( FMC 1966)).

<sup>38</sup> In cases where the shipper has not exceeded the allotted free time, typically free time is suspended when terminal facilities are closed. But it is unclear why, if a shipper is outside free time, demurrage would continue to run where terminal facilities are closed, since an incentive cannot be effective if the shipper cannot access its cargo.

#### **D. Dispute Resolution Processes and Procedures**

As with billing practices, it is important to the smooth operation of the cargo delivery system that shippers and their drayage providers understand and have easy access to information concerning a marine terminal's or carrier's dispute resolution process and procedures.

Consequently, the Fact Finding Officer believes that, as with billing practices, it is important that dispute resolution process and procedures be: (a) clearly established; (b) made available on public webpages; and (c) include information about who – which person or organizational unit – should be contacted to discuss and resolve any demurrage and detention disputes that arise.

#### **E. Standard Terminology**

As the Interim Report explained in some detail, industry terminology is not used consistently by carriers and marine terminal operators, which may cause confusion. There was a general consensus that standardization and clarification of language would be useful. The only question going forward is how to define the terms at issue and how to implement standardization.

Some respondents in both phases of FF28 preferred the traditional definitions of demurrage and detention, where demurrage refers to any charge for use of terminal space or a carrier's container within the terminal, and detention refers to the carrier's charge for use of a container outside the terminal. In some instances, this may lead to two types of demurrage: the demurrage imposed on cargo interests by carriers via tariffs and service contracts, and the demurrage imposed on carriers by marine terminal operators, as set forth in terminal services agreements.

Several respondents favored the approach described in the Interim Report, which defined demurrage and detention in terms of the source of the charge. Under that approach, demurrage is a charge for the use of terminal land or space, and detention is a charge for the use of a container. This would result in one kind of demurrage, charged by the marine terminal operators or ports that control terminal land. As for detention, carriers could still distinguish between on-terminal and off-terminal use of a container, which could be reflected in the type of detention: on-terminal or off-terminal.

## **F. FMC Shipper Advisory Board**

During the course of the investigation, it was found that the complexity of port operations and the wide variation in port procedures and practices supported the conclusion that the Commission could benefit from the establishment of a Shipper Advisory Board for the Federal Maritime Commission. The Fact Finding Officer also supports advisory boards for other Commission stakeholders and those involved in the U.S. international freight delivery system.

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## CONCLUSIONS AND RECOMMENDATIONS

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Having developed a record on the issues identified in the Order of Investigation and reporting on them in the Interim Report, and having explored these and related issues and potential solutions in the second phase of the investigation, the Fact Finding Officer finds that:

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

The Fact Finding Officer further finds, based on the FF28 record, that significant benefits to the U.S. international ocean freight delivery system, and the American economy as a whole, would result from:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to cargo interests of container availability; and
- An FMC Shipper Advisory Board.

In light of these Findings, the Fact Finding Officer recommends that the Commission organize FMC Innovation Teams composed of industry leaders who will meet on a limited,

short-term basis to refine commercially viable demurrage and detention approaches in the above areas.

Finally, Commissioner Dye also recommends the establishment of a Shipper Advisory Board to offer information and insights to the Commission on emerging maritime issues. Commissioner Dye also supports advisory boards for other stakeholders and those involved in the U.S. international freight delivery system.

*On December 7, 2019, the Federal Maritime Commission voted to accept this report and to approve the recommendations contained herein.*