FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION NO. 28

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

INTERIM REPORT
September 4, 2018

Table of Contents

I. SUMMARY

In December 2016, a coalition of trade associations representing American cargo interests petitioned the Commission to adopt an interpretative rule that would clarify what constitutes "just and reasonable rules and practices" with respect to the assessment of demurrage, detention, and per diem charges. The Commission received over 110 comments on the petition, and, in January 2018, held two days of public hearings.

At the January hearings, the Commission received testimony on the Petition of the Coalition for Fair Port Practices. The Coalition is comprised of 26 organizations representing thousands of American businesses, including large and small importers and exporters of retail, auto parts and accessories, food, meats, coffee, tea, chemicals, and other commodities. Motor carriers and drayage companies who operate at our nation's East, West, and Gulf Coast seaports are also represented. Finally, logistics providers, forwarders, and customs brokers are also part of the Coalition.

Coalition witnesses generally agreed with the findings detailed in the Commission report on detention, demurrage, and free time issued in 2013 and the broader Commission report concerning port congestion issued in 2015. One of the most important findings in the Commission reports is that there is not a clear or standard manner in which ocean carriers and terminal operators handle demurrage and detention issues, making it difficult for shippers to avoid charges.

An important issue regarding service contracting discussed by Coalition witnesses at the Commission hearing is that although large shippers may negotiate terminal and equipment free time with certain ocean carriers, small shippers generally lack that ability. Also, all shippers generally lack the ability to negotiate directly with marine terminals on demurrage charges.

Coalition witnesses further testified concerning many problems with demurrage and detention practices in the United States including: the lack of control over circumstances in which charges are imposed, the 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 in inland rail yards, certain labor issues, and unclear demurrage and detention billing and dispute resolution systems.

In addition, the Commission received testimony from ocean carrier and marine terminal witnesses concerning: 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 need for marketplace competition to address demurrage and detention problems, the approach among ocean carriers to

extend free days during weather disruptions, the ocean carrier preference for quicker turnaround for equipment over collecting detention charges and the MTO preference for moving cargo off terminal over collecting demurrage charges.

On March 5, 2018, the Commission initiated a non-adjudicatory fact finding investigation (Fact Finding Investigation No. 28 or FF28) into the conditions and practices relating to detention, demurrage, and free time in U.S. international ocean commerce. The Order of Investigation[1] directed Commissioner Dye 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.

Accordingly, Commissioner Dye, as Fact-Finding Officer, issues the following interim report updating the Commission on the ongoing investigation.

Beginning in March 2018, Commissioner Dye served orders comprising questions and document requests on twenty-three ocean carriers and forty-four marine terminal operators and operating ports, and solicited evidence concerning demurrage and detention practices from cargo interests (shippers and consignees), drayage providers, and ocean transportation intermediaries (OTIs). 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 resulting record strongly suggests that concerns about demurrage and detention in U.S. trades are not limited primarily to weather or labor-related port congestion in 2014-2015, a small subset of large ports, or episodic events unrelated to potentially systemic issues. Additionally, the record supports consideration of the benefits to the U.S. international freight delivery system of:

(1) Transparent, standardized language for demurrage, detention, and free time practices;

[1] Order of Investigation, Fact Finding Investigation No. 28, Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce (FMC Mar. 5, 2018), https://www.fmc.gov/assets/1/Documents/ff28_ord_invst2.pdf. The Commission's authority to investigate demurrage and detention practices derives from 46 U.S.C. § 40101 and 46 U.S.C. § 41102(c). The former sets forth the purposes of the Shipping Act of 1984, which guide the Commission's regulatory efforts, and which include providing an efficient and economic transportation system with a minimum of government intervention and regulatory cost and promoting the growth and development of U.S. exports by placing a greater reliance on the marketplace. The latter requires VOCCs and MTOs to adopt just and reasonable regulations and practices regarding the receiving, handling, storing, or delivery of cargo. The Commission's authority to proceed via a non-adjudicatory investigation is found in 46 C.F.R. §§ 502.281-502.291.

(2) Clarity, simplification, and accessibility regarding demurrage and detention (a) billing practices and (b) dispute resolution processes;

(3) Explicit guidance regarding types of evidence relevant to resolving demurrage and detention disputes;

(4) Consistent notice to shippers of container availability;

(5) An optional billing model wherein (a) MTOs bill shippers directly for demurrage; and (b) VOCCs bill shippers for detention; and

(6) An FMC Shipper Advisory or Innovation Team.

Going forward, the investigation will focus on these areas and any additional action with respect to each of them necessary to adequately address them.

II. INVESTIGATORY METHOD

To obtain information relevant to the investigation's goal, FF28 proceeded on two concurrent tracks: issuing questions and document requests to selected VOCCs and MTOs, and providing an email address for, and soliciting, detailed submissions by shippers, consignees, drayage providers, and other affected parties.

A. Submissions from Shippers, Consignees, and Drayage Providers

Although the investigation is aimed at the practices of VOCCs and MTOs, Commissioner Dye considered it important that shippers, dray truck companies, and other affected parties document specific allegations and provide supporting materials of unreasonable port detention and demurrage practices. To facilitate participation, the Commission created a dedicated email address, ff28@fmc.gov, to which correspondence and supporting documents could be sent.[2]

In addition, between 2014 and 2018, the Commission's Office of Consumer Affairs and Dispute Resolution handled hundreds of cases involving commercial cargo demurrage disputes. The most common demurrage complaints during that time period were congestion (driven by closed terminals, lack of available appointments, labor shortages, and backlogs); drayage issues (chassis shortages, 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 raised as Commissioner Dye discussed the investigation, and received significant cargo-interest inputs, at conferences such as the US-China Bilateral

[2] FMC internal access to the FF28 email inbox was limited to the Fact-Finding Officer and a few Commission staff.

Maritime Consultations, NCBFAA Annual Conference, Global Shippers Forum Annual Meeting, and Agriculture Transportation Coalition (AgTC) 30th Annual Meeting.

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 is closed due to weather; and lack of communication from VOCCs and MTOs 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 VOCCs and the freight forwarder. 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 to the Commission's efforts. They raised concerns about poor VOCC customer service; VOCC delays in correcting bills; lack of uniformity among dispute resolution procedures and free time policies; lack of advance notice or communication from MTOs about closures and terminal ability to receive returned equipment; large demurrage and detention bills due to government cargo examinations; decreased free time; OTIs are not part of the contractual arrangements between shippers and ocean carriers; and lack of drayage resources and chassis at inland ports and railyards.

III. PRELIMINARY OBSERVATIONS

Although Commission staff continues to review the investigatory submissions, certain patterns can be observed from the record thus far.

A. Terminology

Among VOCCs, the use of the term "demurrage" was not consistently applied. For investigatory purposes, FF28's questions and document requests made a distinction between charges for extended use of terminal space (identified as "demurrage") and for use of carrier-provided equipment (identified as "detention").[3] That distinction is not, however, applied by VOCCs and MTOs as a rule.

For example, one carrier defines "demurrage" as a charge applied for storage of laden containers while in its custody in a port, rail terminal, feeder terminal, inland depot or container yard. As used by this VOCC, "detention" is a charge applied for storage or holding of containers

[3] Consistent with prior Commission reports, the questions and document requests defined "demurrage" as "any charge assessed by a vessel operating common carrier, port, or marine terminal operator for the use of space, not including freight charges." "Detention" was defined as "any charge assessed by a vessel operating common carrier, port, or marine terminal operator for the use of equipment, including charges referred to as 'per diem,' not including freight charges."

while they are in their customer's custody outside a port. In this instance, the distinction seems to depend on where the container is located (within or outside the port) and who has custody.

Conversely, another carrier defines "demurrage" as the charge, related to use of equipment only, that the cargo interest pays for carrier's equipment kept beyond the agreed free time when taking delivery of goods at a port, terminal or depot. That is, this VOCC explicitly emphasizes that (carrier) "demurrage" is for equipment use. It also defines "storage costs" as those related but not limited to quay rent, charged to both carriers' equipment and shippers' equipment for containers staying on the ground," which seems to be describing a charge for use of terminal *space*.

A third carrier has recognized that its previous use of "demurrage" blurred the conceptual distinction between types of charges and now treats storage and demurrage separately to increase transparency. On its website, the carrier stated that, in an effort to increase transparency in its charges, it will separate "storage" from "demurrage." The point is to show "a clear distinction" between the compensation for using the port, terminal or depot facility (storage) and the compensation incurred from using equipment beyond the agreed free days inside terminals or depots (demurrage). But even while attempting to clarify the situation, this carrier is still using demurrage to represent a charge for equipment use. At the same time, in a major non-U.S. trade, that carrier charges for "combined demurrage and detention," which represents equipment use while in port and out of port.

It is apparent, then, that there are a number of different, often conflicting, and not always clear ways that demurrage and detention are used in the industry. Staff research indicates that, in broad strokes, there seem to be two main approaches to defining "demurrage" and "detention:"

1. Based on whether the container is (a) on-terminal (inside the gate) or (b) off-terminal (outside the gate). In this case:

    a. "Demurrage" is a charge for exceeding allotted free time on the terminal – i.e., between when cargo is off-loaded from a ship until it moves out the terminal gate. Such "demurrage" may represent use of terminal space (terminal demurrage) and the use of equipment (carrier demurrage – i.e., in-port detention).

    b. "Detention" is a charge for use of equipment (containers) beyond the allotted free time outside the port – i.e., after the full container has left the port and until the empty container is returned.

2. Based on whether the container is: (a) being charged for extended use of terminal space, or (b) for extended use of carrier equipment (container). In this case:

    a. "Demurrage" is the MTO's charge for exceeding allotted free time on the terminal (but not for carrier equipment use). If there is a carrier charge for use of the container while cargo is on the terminal, it would be labelled as some form of "detention" – e.g., in-port detention.

b. "Detention" is the charge for use of equipment (containers) beyond the allotted free time – whether at the terminal or outside the port.

Under the first approach, it might be less clear to a VOCC's customer what it is being charged for – *terminal space usage* or *container usage* or both. Moreover, because MTOs sometimes collect carrier demurrage on a VOCC's behalf, it might not be clear to a customer to whom their payment goes.

Under the second approach, it is clear that the MTO, which controls the terminal, is charging for extended use of its asset (terminal space), and the carrier, which controls the container, is charging for the use of its asset (the container).

B. Scope of Potential Demurrage and Detention Concerns

Participants in the Commission's demurrage and detention proceeding discussed the role of these charges as a method of incentivizing cargo velocity and as a source of revenue. VOCC and MTO commenters presented shipper complaints about unfair demurrage and detention as mainly limited to unique events at a limited number of ports, such as labor disruptions and weather, and did not see evidence supporting Commission action.

To better evaluate these arguments, the investigatory orders sought information from VOCCs and MTOs about demurrage and detention revenue and the percentage of containers on which demurrage and detention was charged at various ports over the relevant timeframe.[4]

Even factoring in terminology differences and incomplete responses, the results indicate that cargo interests' concerns about demurrage and detention cannot be explained solely by unique events in 2014-2015 or the conditions at a small subset of ports.

VOCCs' combined demurrage and detention income for 2013 was relatively low but increased 90% in 2014, followed by an additional year-on-year increase of 86% in 2015. In that year, total demurrage and detention income peaked for the twenty-two responding carriers. As expected, given the resolution of the West Coast labor issues by mid-2015, 2016 saw a year-on-year decline in VOCC total demurrage and detention income by 23%. But total 2016 demurrage and detention income was still roughly 2.7 times the 2013 figure. Put simply, demurrage and detention levels for carriers did not return to, or near to, their pre-2014-2015 levels.

In 2017, total VOCC demurrage and detention income rose again, virtually to the same as 2015's peak level, and a 30% increase compared to 2016.[5] The data on MTO demurrage income

[4] The Commission sought, and VOCCs and MTOs provided, annual data for 2013 through the date of service of the investigatory orders.

[5] It is important to note, however, that while a trend is visible in the combined demurrage and detention revenue of all twenty-two carriers surveyed, there is significant variation in demurrage and detention trends among individual lines. For example, one line increased its annual demurrage and detention income by 77% between 2016 and 2017 (more than double the 30% collective increase). And its total demurrage and detention income in 2017 was 34%

for 2013-2017 showed similar trends, though a less dramatic rise in 2017 as compared to that in the carrier data.

Although weather and labor-related congestion problems in 2014 and the first half of 2015 may account for some significant portion of the dramatic increases in demurrage and detention income in 2014 and 2015, the limited decline in 2016 and the substantial increase in 2017 suggests that weather and labor issues, important as they may have been, might not fully account for the ongoing demurrage and detention concerns expressed by shippers in the Coalition's petition. Nor is the collective 30% increase in demurrage and detention in 2017 fully accounted for by increased container volumes.

Unsurprisingly, VOCCs collected the most demurrage and detention at the ports handling the largest volumes (Long Beach, Los Angeles, New York/New Jersey). Carriers also collected significant amounts of demurrage and detention at state run ports (Savannah, Charleston and Norfolk) and the Port of Houston, which ranked among the top five ports for demurrage and detention collected by VOCCs, according to the available data.

But this does not support a contention that demurrage and detention concerns are primarily limited to the larger ports of Los Angeles, Long Beach, and New York-New Jersey. For example, in Baltimore, Charleston, Houston, Jacksonville, New Orleans, Norfolk, Port Everglades, Philadelphia, and Savannah, the amount of demurrage collected by carriers at those ports in 2017 surpassed that collected in 2015. Moreover, based on the year-over-year data provided by MTOs, it appears that the total number of containers on which demurrage is assessed has decreased at larger ports, whereas it has increased at smaller ports.

C. Tender and Notice of Container Availability

The Order of Investigation directed the Fact-Finding Officer to develop a record on "whether, and if so, when the carrier or MTO has tendered cargo to the shipper and consignee." More specifically, the Order directed inquiry into: (a) "[c]ommon practices for notification of when cargo is tendered;" and (b) "[i]mpediments to cargo pickup when notified of tender."[6] Given this guidance, the investigatory orders asked about possession of cargo, tender of cargo, cargo availability notification, and impediments to cargo retrieval.

1. Tender

Many VOCCs and MTOs objected that the questions about cargo possession and tender called for legal conclusions, that terms like "tender" were undefined, and that questions about "tender" and cargo possession were too fact-specific to be answered generally. Several carriers

higher than it was in the previous peak year of 2015. Another line increased its annual demurrage and detention income by 190% between 2016 and 2017. Looking at the pattern in income from demurrage alone, almost half, 10 of the 22 responsive VOCCs, collected higher amounts of demurrage in 2017 as compared to 2015.

[6] Order of Investigation, *supra* note 1, at 3.

argued that concepts like tender, while perhaps relevant to cargo liability, have no direct relationship to demurrage and detention.

Objections notwithstanding, most VOCCs referred to their duty not as one of tender, but as one of *delivery*. Almost every carrier stated that their obligations during a door move were complete when cargo was delivered to the location noted in the bill of lading. The answers were more varied regarding port moves. A plurality asserted that their obligations were met when cargo was discharged from a vessel.

Some respondents focused instead on "actual" and "constructive" delivery. They defined "constructive delivery" – for cargo liability purposes they insisted – as when goods are discharged from the ship upon a fit wharf and the consignee receives due and reasonable notice that the goods have been discharged and has a reasonable opportunity to remove the goods or put them under proper care and custody. Others stated that the relevant event was when cargo was available for pickup, or when it was delivered to the BCO trucker at the terminal, or when it was ready for dispatch from the terminal. The investigatory orders also asked carriers whether cargo is tendered if a cargo interest or drayage provider is unable to retrieve it within its free time due to a port or terminal closure. The responses were split fairly evenly between "yes," "no," and "cannot answer in the abstract."

Nevertheless, it appears from a preliminary review that there is general agreement that the duty to deliver is linked to the concepts of "reasonable notice" of cargo availability and "reasonable opportunity" to retrieve the cargo. As the investigation continues, staff will analyze further how these concepts apply at modern container ports, and the extent to which they relate to demurrage. While several VOCCs asserted that there was no direct relationship between tender (or alternatively, delivery) and demurrage, the investigation will consider whether it is reasonable for free time to begin before a container is available.

2. Notice of Container Availability

Regarding notification of container availability, roughly two-thirds of the respondent VOCCs indicated that they provide cargo interests with notice of vessel arrival but do not provide notice that a container is available for retrieval. One-third of carriers said that they provide both notice of vessel arrival and notice of availability for retrieval – usually via email.

Consequently, the responsibility for determining when a container is available often falls to the cargo interest in its dealing with MTOs. Based on their responses, MTOs make container status information available on websites, which cargo interests can access, and where they can sign up to retrieve status updates. Typically, however, MTOs do not otherwise provide cargo interests with notice that a container is available for retrieval.

3. Impediments to Container Retrieval

In accordance with the Order of Investigation, the investigatory orders also surveyed respondents regarding common impediments to container retrieval. Common impediments

identified included: government or customs holds on cargo, failure to pay freight and other charges, lack of trucking resources or drivers, lack of customer warehouse availability or capacity, vessel bunching, terminal congestion, congestion off-terminal, lack of documents or poor documentation procedures, lack of equipment (typically chassis or rail cars), weather, cargo-interest planning or scheduling problems, missed appointments, terminal error, lack of rail infrastructure, terminal or port closures, lack of available appointments, labor shortages, and container damage.

D. Demurrage and Detention Billing Practices

The Order of Investigation also directed the Fact Finding Officer to develop a record on "[b]illing practices for invoicing demurrage or detention," in particular: (a) "[b]illing relationships for VOCCs and MTOs, including which party bills for which services and charges relating to demurrage and detention;" (b) "[b]illing practices on describing or specifically identifying detention or demurrage charges imposed;" and (c) "[t]imeframes for issuance of demurrage or detention invoices."[7] Accordingly, the investigatory orders asked VOCCs and MTOs about the relationship between VOCCs, MTOs, cargo interests, and drayage providers regarding assessment, billing, and collection of demurrage and detention; billing practices; billing transparency; and billing timeframes.

1. Billing Relationships: Who Charges Whom for What

The responses to the billing-relationships questions (which party assesses, and which party collects, for which demurrage and detention charges) were marked with complexity, inconsistency, and variability (each VOCC usually having relationships with multiple MTOs and operating ports). But there appear to be three different types of billing arrangements for import demurrage.

Most commonly, the MTO agrees to bill for the VOCC's import demurrage from the cargo interest or drayage provider, and keeps an administrative fee, and, in some cases, its own wharf/terminal demurrage, from what is collected.

Alternatively, the MTO collects its own wharf/terminal demurrage from the cargo interest or drayage provider, and the VOCC collects its demurrage from the customer independently. These two arrangements are used by 34 of the MTOs surveyed, though an MTO's billing practices vary by carrier.

In the third arrangement, the MTO collects its wharf/terminal demurrage by billing the VOCC. The VOCC then bills its customer an amount to cover the wharf/terminal demurrage and the VOCC's own demurrage. As for detention, VOCCs typically bill consignees or drayage providers directly without MTO involvement.

[7] Order of Investigation, *supra* note 1 at 3.

2. Billing Transparency

Billing transparency varies depending on the type of billing arrangement employed. These arrangements often are not reflected when MTOs are collecting import demurrage though an electronic payment system. Although the electronic payment systems provide information regarding the demurrage calculations (rate multiplied by days), only a few MTOs disclose on these electronic "bills" what portion of the charge is their own demurrage as opposed to the VOCC's demurrage, or what the administrative fee is.

When VOCCs bill cargo interests directly, however, the invoices usually specify the general nature of the charge by either printing "demurrage" or "detention" (or an abbreviation thereof) on the invoice itself or by describing the charge by disclosing the method of how the charge is calculated. All but one of the VOCCs make their demurrage and detention policies publicly available, either on a website or tariff, the location of this information varies. One VOCC only makes such information available on request of a customer.

3. Demurrage and Detention Billing Timeframes

As for billing timeframes, the responses suggest a lack of uniformity in both demurrage and detention billing, although detention billing timeframes are ultimately governed by the Uniform Intermodal Interchange Agreement (UIIA), for those who are party to it. MTO collection of import demurrage is often accomplished via an electronic payment system hosted by an MTO or port, and payment is due at the time of pickup. In situations where the VOCC has guaranteed payment of MTO charges in advance, the MTO regularly invoices the VOCC for those charges (weekly or monthly). Many MTOs will bill the VOCC for import and export demurrage separately, sending invoices at regular intervals (monthly or weekly). VOCCs typically are allowed 30 days to submit payment.

When VOCCs bill for demurrage directly, there is broad variation in the timing of the billing and collection process. VOCCs issue bills anywhere from one day later, to within a day of sailing (for export demurrage), to forty-five days later. After bills are issued, VOCCs either request payment immediately, or allow a range of timeframes from three days up to thirty days for payment.

For detention, payment is frequently required at the time of equipment return and a bill is generated contemporaneously. If invoices are instead issued, this is generally done between four and eighteen days after equipment return (and in no event later than sixty days, as per the UIIA), and the time allowed to submit payment can span from immediately upon receipt, to sixty days. Except for one, all VOCCs use credit agreements with some of their customers, but generally did not disclose the details of those agreements in their responses.

E. Delays Caused by Outside Events

In addition, the Commission directed the Fact Finding Officer to look into "[p]ractices with respect to delays caused by various outside or intervening events," including "[w]hether and when an MTO or VOCC determines to waive or reduce demurrage or detention charges when access to the terminal is impacted by such events" and "[t]he role of truck and chassis issues in different types of container cargo movements (door-to-door versus port-to-port)."[8]

1. VOCC and MTO Practices Regarding Outside or Intervening Events

This subject – the mitigation of demurrage and detention when ports or terminals are inaccessible – was a key topic in the demurrage and detention proceeding. Most VOCCs and MTOs stated that they have a policy for extending free time or waiving or otherwise mitigating demurrage and detention caused by circumstances outside of the control of cargo interests or truckers. Thirteen of the VOCCs stated that they either automatically extend free time when a container is unavailable for retrieval or do not charge when a container is unavailable for retrieval, and ten provided tariffs reflecting such policies.

The circumstances that warrant the automatic extension of free time varied by carrier, but generally include labor strikes or weather events where the entire port or entire sections of a port are closed. The remaining VOCCs indicated that they either resolved demurrage and detention in such situations on a case-by-case basis or referred to language in their tariffs that granted them discretion to waive demurrage. Two VOCCs noted that while they have discretion to waive demurrage, they generally follow, and pass on, whatever relief is given by the terminal.

Although most MTOs indicated that they extend free time on a case-by-case basis, several produced tariffs that specifically state that free time is not automatically extended for events outside the terminal's control, including labor strikes or weather, and at least one said that in those circumstances free time would not be adjusted. Eight MTOs, however, stated that they would automatically extend free time when terminal access is impeded. The authority to do so was generally found in MTO schedules, port tariffs, or alliance tariffs.

Despite nearly all surveyed having policies for mitigating demurrage or detention when terminal access is impeded, it is not clear how cargo interests are informed of these policies or when they take effect. Few VOCCs or MTOs indicated that they affirmatively notify cargo interests that an event triggering such policies has occurred.

2. Mitigation of Demurrage Due to Government Inspections

One of the circumstances listed in the questions as "outside the control of those retrieving cargo or returning equipment" is "government inspection of cargo." Few VOCCs or MTOs were able to provide data on the extent to which containers subjected to inspection accrued demurrage.

[8] Order of Investigation, *supra* note 1, at 3.

As for mitigating demurrage and detention due to customs holds, some VOCCs indicated that they do not charge demurrage for the time during which a container was taken off-terminal for an inspection.

3. Chassis

The Order of Investigation also referred to the role of chassis in various types of cargo moves. To develop a record on this topic, the investigatory orders asked VOCCs and MTOs about their roles and relationships regarding chassis provision, whether they mitigate demurrage or detention due to unavailability of chassis, and what efforts they make to ensure adequate chassis supply.

According to the responses, the primary difference between door moves and port moves with respect to chassis is that carriers generally do not provide chassis for port moves (with some exceptions in service contracts). They often assume responsibility however, for the cost of chassis for door moves (the chassis costs are either absorbed by carrier or built into the rate quote).

Given their contractual relationship regarding chassis supply, carriers were asked what they do to ensure that the supply at ports is adequate. Nearly everyone responded that they provide forecasts to chassis providers to assist in planning. Several added that they encourage prompt container return. And two carriers have an arrangement where a provider guarantees chassis supply in exchange for being made a preferred provider.

The investigatory orders also asked whether demurrage is mitigated due to chassis unavailability. Half the VOCCs stated that if they were responsible for providing chassis (carrier haulage), and they did not do so, they would waive any resultant demurrage, but that they would not do so otherwise (merchant haulage). MTOs stated that they either did not mitigate demurrage due to chassis unavailability, that they referred all such requests for mitigation to the VOCCs, or that the issue was not applicable to them because they do not provide chassis. Only one terminal operating company indicated that it had ever mitigated demurrage due to chassis unavailability – when there was a port-wide chassis shortage in Los Angeles/Long Beach.

F. Dispute Resolution Practices

The Commission also sought to develop a record on "[p]ractices for resolution of demurrage and detention disputes between carriers or MTOs and shippers," specifically: (a) existing processes for reviewing or mitigating demurrage or detention charges; (b) timeframes for the resolution of demurrage or detention disputes; and (c) practices relating to the cancellation or mitigation of demurrage or detention invoices.[9]

[9] Order of Investigation, *supra* note 1, at 3.

1. Dispute Resolution Data

Few VOCCs and MTOs provided meaningful statistical data regarding the number of demurrage disputes they receive and how those disputes are resolved. Most said they do not track complaints or disputed charges. Despite the limited data, a few trends emerged. First, it appears that detention is more often disputed than demurrage. Second, among both VOCCs and MTOs, refunds are a rare method of resolving disputes. Third, those who responded stated that resolving demurrage and detention disputes via the terms of future contracts is extremely rare.

2. Dispute Resolution Policies and Procedures

Overall, VOCC and MTO practices for resolving demurrage and detention disputes are varied, and many are informal. Slightly more than half of the VOCCs surveyed, and one MTO, indicated that they have a written policy for reviewing disputed invoices. But many of those policies were limited to describing how to enter a waiver into the invoicing system, and few provided guidance on how a disputed charge should be evaluated or what evidence should be considered. Most of the respondents indicated simply that disputes are handled on a case-by-case basis or at the discretion of the official involved.

This informality and variety extended not only to the method of reviewing disputes, but also who parties wishing to challenge a charge should contact. Authority to resolve disputes is vested in different departments in different companies, and in some instances, dispute resolution authority depends on the dollar amount disputed.

It was also not immediately clear who cargo interests are supposed to contact in the event that they wish to challenge demurrage or detention: the majority of VOCCs did not indicate whether (or how) they notified customers about how to contact them when disputing charges. Other VOCCs and MTOs put dispute information in invoices or payment systems, others on websites, and others in arrival notices.

3. Dispute Resolution Timing and Processes

As with data regarding the total number of disputes, the respondent VOCCs and MTOs did not provide significant data on the length of time it takes to resolve disputed demurrage and detention. Most VOCCs asserted that disputes were typically resolved within two weeks. Few MTOs provided any timing information, but of those that did, most claimed that disputes were generally resolved within a day.

Once the parties to a dispute reach a resolution, additional time is needed to amend, cancel, or refund a demurrage or detention charge. Seven of the ten VOCCs who provided information indicated that it takes less than ten days to amend an invoice. The other three VOCCs stated that it could take up to a month. The majority of responding MTOs (a small number of the MTOs served) said that most invoices are corrected within a day, and many said that they were corrected immediately. Both VOCCs and MTOs indicated that refunds take longer to process.

G. Comparative Commercial and Regulatory Environments

The Commission also sought information on "whether, and if so, how, the alignment of commercial, contractual, and cargo interests enhance or aggravate the ability of cargo to move efficiently through United States ports." The Order of Investigation more specifically sought information about: (a) "[w]hether the commercial and contractual conditions in the United States are similar to the conditions in other maritime nations;" and (b) "[w]hether other maritime nations have practices to address detention or demurrage charges imposed due to conditions beyond carriers,' MTOs,' or shippers' control, and if so, whether they are effective."[10] Accordingly, the investigatory orders sought information from VOCCs and MTOs regarding how contractual relationships, policies, and practices regarding demurrage, detention, and chassis in the United States differ from those in European and Asian ports, and other maritime nations' laws regarding mitigation demurrage or detention when terminal access is impeded.

1. Comparative Demurrage and Detention Practices

As was pointed out in the Final Report of the Supply Chain Innovation Team Initiative, the "United States international supply chain is a complex, dynamic ecosystem" and the "lack of direct customer relationships between actors in this system (such as shippers and terminals) impedes cooperative problem-solving, exacerbates disruptions . . . and makes recovering from disruptions more difficult . . . ."[11] The responses to the investigatory orders in Fact-Finding Investigation No. 28 reflected similar issues. VOCCs have customer relationships with MTOs, shippers, and chassis providers, but the latter three (with some exceptions) lack customer relationships with each other. Moreover, one carrier pointed out that carriers negotiate service contracts with shippers, not consignees, and it suggested that the former are more concerned with freight rates than with demurrage and detention that may ultimately be borne by consignees.

As to the contractual alignments and commercial relationships overseas, the VOCCs generally noted few differences from U.S. conditions, and the MTOs largely disclaimed knowledge about non-U.S. demurrage and detention practices, arguing that they did not operate outside the country. But there were some common responses. Several carriers noted terminology differences, namely, that in Europe and Asia, demurrage and detention are combined, and there is a combined free time for use of a container on and off a terminal. Several respondents also pointed out that what is referred to as demurrage in the U.S. is referred to as "port storage" in other countries.

Another distinction was in who charges whom for what. Many VOCCs noted that in Europe and Asia, MTOs often bill terminal storage charges directly to cargo interests. Two VOCCs pointed out that in other nations, VOCCs collect demurrage and detention (often combined), directly from customers rather than drayage providers. And one VOCC noted that the United States

[10] Order of Investigation, *supra* note 1, at 2.
[11] Supply Chain Innovation Initiative: Final Report at 3, Fed. Mar. Comm'n (Dec. 5, 2017), https://www.fmc.gov/assets/1/Page/SCITFinalReport-reduced.pdf.

is the only country in which it contacts its customers and reminds them when free time is about to expire; in other countries, it provides customers with a notice of arrival, and the customer is expected to manage its own free time without reminder.

The responses were more consistent across the board regarding chassis. Almost every VOCC surveyed that calls on Europe and Asia pointed out that in those trades, drayage providers provided their own chassis; carriers were not involved in chassis procurement. The MTO responses were mostly silent as to foreign chassis practices, but those that did respond confirmed that the drayage providers handle chassis outside the United States and that the United States is the only location where chassis are stored on-terminal.

2. Regulatory Environments

The second question posed by the Commission regarding comparative practices was whether other maritime nations have practices to address the imposition of demurrage and detention due to circumstances beyond the control of cargo interests and drayage providers. Only two carriers identified any such practices. First, two VOCCs noted that the Brazilian National Agency for Waterway Transportation (Agencia Nacional de Transportes Aquaviarios or ANTAQ) has a regulation that provides that (a) demurrage and detention rules and rates must be disclosed to the shipper, consignee, and other bill-of-lading entities before booking confirmation; (b) free time counting shall be interrupted in the case of events imputable to the ocean carrier or Acts of God or force majeure; and (c) demurrage that has already started will be interrupted in the case of events imputable to ocean carrier but not for Acts of God or force majeure. Additionally, one carrier noted that under Mexican customs law, an MTO "shall not charge demurrage to companies in case of cargo held or seized by the customs authorities."

Many carriers opined on the difference between the United States regulatory atmosphere and those of other countries. They insisted that other nations granted them more flexibility in their operations than they had in the United States, e.g., elsewhere they were not required to maintain publicly filed tariffs or file service contracts. Some carriers noted that they had more freedom to waive or mitigate demurrage or detention outside the United States.

Because few carriers identified any relevant practices by other maritime nations regarding impeded terminal access, there were no carrier opinions on the efficacy of any such practices, and no appetite to adopt them. Even the carriers who identified Mexican and Brazilian policies on the subject of demurrage and detention did not advocate for their adoption in the United States. Rather, almost half the VOCCs surveyed (and almost all of those who responded to the "efficacy-of-foreign-practices" question posed) argued in favor of fewer regulations. Similarly, the six MTOs who answered the question all opposed additional regulation of demurrage and detention. In addition, three carriers stated that they would prefer that drayage providers in the United States provide their own chassis, and one said that it would prefer if BCOs dealt directly with ports or terminals regarding demurrage so that VOCCs would not have to.

H. Shipper Responsibility for Improved Port Operations

The final question in the investigatory orders asked VOCCs and MTOs to "explain what you believe shippers could do to improve port operations." The most common VOCC responses, in decreasing order of frequency, were that cargo interests should: have proper, complete, accurate, and timely documentation; not use terminal space and carrier equipment as storage; not wait until the last free day to retrieve a container; extend warehouse hours, maintain adequate warehouse space and labor, and be more flexible in taking deliveries at warehouses; engage in better advance planning; give advance notice of delivery requirements; pay freight and other charges timely to avoid holds; better forecast volume and avoid cancellations and ghost bookings; pre-clear cargo; have an adequate supply of truckers; for exports, deliver cargo before cutoff.

The most prevalent answers given by MTOs, in decreasing order of frequency, were that cargo interests should: not wait until the last free day to retrieve cargo, or, be prepared to retrieve cargo on arrival; use MTO appointment systems and other technology offered by the terminal; not use terminal space as storage; better plan with drayage providers; support free flow or peel-off piles; better forecast volumes; extend warehouse hours; help drayage providers procure chassis; clear cargo holds in advance; provide accurate documentation and information; and better manage cargo flow or modify the supply chain to eliminate seasonal peaks.

IV. NEXT STEPS

Going forward, Commission staff will continue to mine the VOCC and MTO responses and, also, the shipper, consignee, drayage provider, and OTI submissions. Meanwhile, to further develop the investigatory record, Commissioner Dye intends to meet with industry leaders to obtain additional information and their views regarding:

1. Standardization of Language: The record demonstrates the need for unambiguous, standard terminology, especially of the terms "demurrage" and "detention," that accurately reflects the nature and source of the charges at issue.

2a. Billing Clarity and Accessibility: The record demonstrates the utility and feasibility of having all of a carrier's or marine terminal operator's demurrage and detention policies in one, easily accessible website. *Cf.* Demurrage Liability, Surface Transportation Board, Docket No. EP 707 (Apr. 11, 2014) (discussing requirement of actual notice (in written or electronic form) of rail demurrage tariff); and

2b. Dispute Resolution Transparency: The record demonstrates a need for more transparency into demurrage and detention dispute resolution procedures: more accessible, user-friendly information about who a cargo interest or drayage provider should contact in the event of a dispute about a particular charge, how a dispute is resolved by a VOCC or MTO, and how long the process can be expected to take.

3. Evidentiary Guidelines: The record supports the development of external guidance regarding the type of evidence relevant to resolving demurrage and detention disputes. Cargo interests, drayage providers, VOCCs, and MTOs would benefit from guidelines in this regard.

4. Tender and Notice of Container Availability: The record suggests that reasonable notice of container availability and reasonable opportunity to retrieve cargo would resolve many demurrage and detention disputes at U.S. container ports, as well as enhance the ability of MTOs to move cargo.

5. Optional Billing Model: Given the variety and complexity of the demurrage and detention billing approaches in the industry, the record suggests that there are advantages (such as transparency, alignment of stakeholder interests, and international consistency) to a billing model wherein:
    a. MTOs bill cargo interests directly for cargo storage on terminal; and
    b. VOCCs bill cargo interests directly for use of container (whether on or off terminal); and

6. An FMC Shipper Advisory Board or Innovation Team: The record supports the need for continual input from U.S. shippers into issues affecting the international freight delivery system, including the potential future formation of a Shipper Advisory Board or Innovation Team after the close of the investigation. The Commission will also consider Advisory Boards or Innovation Teams comprised of Ports and FMC stakeholders as well.

V. CONCLUSION

Based on the volume of valuable information provided by VOCCs, MTOs, shippers, OTIs, drayage providers, and others in the industry, it is apparent the industry's demurrage and detention practices can be improved with the involvement of industry leaders. Commissioner Dye is prepared to move forward with the next steps outlined above and will issue a final report by December 2, 2018.