

FEDERAL MARITIME COMMISSION

Fact Finding Investigation No. 28

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

ORDER OF INVESTIGATION

Pursuant to the Shipping Act of 1984, 46 U.S.C. 40101 et seq. (“Shipping Act”), the Federal Maritime Commission (“FMC” or “Commission”) is charged with regulating the common carriage of goods by water in the foreign commerce of the United States (“liner service”). In doing so, the Commission must be mindful of the statutory purposes of its regulation. Those purposes include an efficient and economic transportation system with a minimum of government intervention and regulatory costs, promotion of the growth and development of U.S. exports by placing a greater reliance on the marketplace. 46 U.S.C. § 40101.

On December 17, 2016, the Coalition for Fair Port Practices filed a petition with the Commission. This petition argued, among other things, that the current practices of demurrage, detention, and per diem, i.e., charges by ocean common carriers and marine terminal operators (MTOs) for the use of space and equipment, is unjust and unreasonable. Shippers, consignees, drayage providers, and others described the alleged practices of MTOs and ocean common carriers (OCCs) that came about as a result of federal government inspection requirements, truck shortages, chassis shortages, discrete weather events, labor disputes, lack of effective appointment systems, and general conditions in and surrounding port areas. These stakeholders also aver that they lack control over such events and have incurred significant demurrage and detention charges in connection with these events.

The Commission oversees 255 marine terminals across the East, Gulf, and Pacific coasts, in addition to Alaska. Policies on free time practices vary, even among terminals at the same port. Although some MTOs and ports have tariffs that allow for additional free time or lesser rates where the terminal or port is unable to tender cargo for delivery during free time, these practices do not appear to be universal. There are also several models of how the MTOs collect the charges from shippers, consignees, drayage providers, or carriers. These varying models may generate

uncertainty among shippers, consignees, and drayage providers about how demurrage and detention will be assessed when access to ports is restricted or ports are congested.

Collectively, these reports of demurrage practices, and the lack of visibility surrounding those practices, have raised questions over whether the current practices allow for a competitive and reliable American freight delivery system. Under 46 U.S.C. § 41102, carriers and MTOs must adopt just and reasonable regulations and practices governing free time and demurrage and detention charges. The test of reasonableness as applied to terminal practices “is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.” *W. Gulf Mar. Ass’n v. Port of Houston*, 18 S.R.R 784, 790 (FMC 1978), *aff’d without opinion sub nom. W. Gulf Mar. Ass’n v. Fed. Mar. Comm’n*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980). Demurrage and detention practices are encompassed within § 41102(c) because they relate to the handling, storing, and delivery of property at terminals. *See, e.g., California v. United States*, 320 U.S. 577, 584-85 (1944) (interpreting the analogous provision in the Shipping Act of 1916 as applying to demurrage); *Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm’n*, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting the analogous provision in the Shipping Act of 1916 as applying to detention).

The international ocean liner trade has changed dramatically over the last fifty years, driven in large part by the advent of containerization. Unloading a 10,000 TEU vessel in a modern terminal is a very different operation than the unloading of a relatively small breakbulk vessel seventy-five years ago. A related issue to consider is whether the legal duty to tender and its relationship to free time and the imposition of demurrage, detention, and per diem fees have kept up with the changes in port practices unloading vessels, moving cargo off the dock, and delivering it to consignees. Also fundamental to the issue of free time and detention and demurrage charges is the question of who bears the economic burden of delay resulting in detention and demurrage, which involves the allocation of risk and can vary greatly depending on the circumstances.

Therefore, consistent with its statutory duty, pursuant to 46 C.F.R. § 502.281 *et seq.*, the Commission hereby **ORDERS** an investigation into current conditions and practices of vessel operating common carriers and marine terminal operators, and U.S. demurrage, detention, and per diem charges. The Commission will use the information obtained in this investigation and recommendations of the Fact-Finding Officer (FFO) to determine its policies with respect to detention, demurrage, and free time practices of regulated entities.

Specifically, the FFO named herein may develop a record on the following:

1. 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.
 - a. Whether the commercial and contractual conditions in the United States are similar to the conditions in other maritime nations; and
 - b. Whether 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.
2. Whether, and if so, when, the carrier or MTO has tendered cargo to the shipper and consignee.

- a. Common practices for notification of when cargo is tendered; and
 - b. Impediments to cargo pickup when notified of tender.
3. Billing practices for invoicing demurrage or detention, specifically:
 - a. Billing relationships for VOCCs and MTOs, including which party bills for which services and charges relating to demurrage and detention;
 - b. Billing practices on describing or specifically identifying detention or demurrage charges imposed; and
 - c. Timeframes for issuance of demurrage or detention invoices.
4. Practices with respect to delays caused by various outside or intervening events;
 - a. Whether 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
 - b. The role of truck and chassis issues in different types of container cargo movements (door-to-door versus port-to-port).
5. Practices for resolution of demurrage and detention disputes between carriers or MTOs and shippers.
 - 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 cancelation or mitigation of demurrage or detention invoices.

The FFO is directed to report to the Commission on these issues and any recommendations for further Commission action, including any investigations of prohibited acts, enforcement priorities, policies, rulemaking proceedings, or other actions warranted by the factual record developed in this proceeding.

IT IS FURTHER ORDERED, That, pursuant to 46 C.F.R. §§ 502.284 and 502.25, Commissioner Dye is designated as the FFO. The FFO shall have, pursuant to 46 C.F.R. §§ 502.281 to 502.291, full authority to hold public or nonpublic sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission. The FFO shall be assisted by staff members as may be assigned by the Commission's Managing Director and other officials, and the FFO is authorized to delegate any authority enumerated herein to any assigned staff member that the FFO determines to be necessary.

IT IS FURTHER ORDERED, That the Investigative Officer shall issue an interim report of findings and recommendations no later than September 2, 2018, a final report of findings and recommendations no later than December 2, 2018, and provide further interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

IT IS FURTHER ORDERED, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register.

By the Commission.

Rachel E. Dickon

Secretary