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**New York New Jersey Foreign Freight Forwarders & Brokers Association
Statement before
The Federal Maritime Commission
on the Coalition for Fair Port Practices' Petition for Rulemaking (P4-16)
January 16, 2018**

Acting Chairman Michael Khouri, Commissioner Rebecca Dye, Commissioner Daniel Maffei, and Federal Maritime Commission (FMC) Staff experts, good afternoon and thank you for allowing us the opportunity to comment on the rulemaking issue raised by the Fair Port Practices' Coalition. Charles Riley, chairman and Jeanette Gioia, vice president of the New York New Jersey Foreign Freight Forwarders and Brokers Association (NYNJFFF&BA) are representing our membership today. The NYNJFFF&BA celebrated its 100th anniversary last year and is one of the oldest U.S. trade associations for licensed ocean freight forwarders, NVOCCs, and Customs brokers. It has 100 regular and 25 industry-related affiliate members, ranging from the largest global logistics providers to the smallest. All of these companies operate on a daily basis facilitating the movement of imports and exports through any port in the United States.

Our comments today will largely focus on those issues in the Port of NY/NJ where our membership is located and their support for FMC guidance on what would constitute unreasonable practices in assessing demurrage, detention, or per diem. They are provided in the context of a strong belief in the role of competition and the effectiveness of commercial solutions to business problems. Our members' interest in having the FMC provide guidance on this issue stems from a deep frustration that a full market solution is not possible. The economic structure in the Port of NYNJ is more characteristic of an oligopoly rather than a competitive market. In an oligopoly barriers to entry are high thus

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restricting the number of companies providing services and limiting pricing flexibility. In NYNJ Port over 3.6 million general cargo containers are moved through 5 main terminal operators. The shipper / receiver does not have a choice of which terminal to use. This is determined by the steamship line. While there are 32 steamship lines calling NY/NJ port, this number is significantly reduced for any particular port pair. This structure supports an inflexibility in pricing and service options that allow the shipper or receiver to be assessed charges even in circumstances where they are not in control of the cargo. Our membership believes they should not be responsible for payment of demurrage and detention in situations when their ability to move the cargo is clearly outside of their control.

The NYNJFF&BA has polled its members and have found strong approval of the need to clarify what could be considered unreasonable assessments. We had over a 70% response rate from our regular membership. This would be on the high end of survey completion rates and indicative of the intense interest in this issue. Even some of our affiliated members answered.

First question asked was:

Should the FMC establish a rule with a policy statement clarifying when the assessment of demurrage and / or detention would be considered unreasonable in circumstances beyond the control of shippers, receivers, motor carriers and preventing them from picking up or delivering cargo to terminals at the ports?

Seventy-two (72) out of seventy-four (74) answered “yes.” Of the three (3) regular members that responded “no”, two of the companies had not been experiencing detention / demurrage issues. One of those two respondents works for a top-ten global logistics company and volunteered a revealing comment that the terminals are “cooperative.” We would like to bring to the attention of the Commission that the current system is inherently skewed against companies that do not have negotiating leverage with the ocean carriers and terminals to reduce or eliminate demurrage/ detention charges that are assessed per tariff rules and rates.

Second question asked was:

Have your company or your clients had to pay demurrage and or detention charges in the Port of NY/NJ when equipment could not be picked up or dropped off due to circumstances outside of your control?

a. Prior to 2017 ? Sixty-Three (63) responded Yes.

b. During 2017? Forty-Nine (49) responded Yes.

Among members that had not experienced problems with being unfairly charged demurrage / detention in the Port of NY/NJ, survey results indicated that there is still support for clarification on what would constitute unreasonable charges. Comments indicated that companies are experiencing unreasonable assessments at other U.S. ports. Survey results show that the problem of unreasonable assessment of demurrage / detention in the Port of NY/NJ has lessened in 2017. We believe in part that it is a direct reflection of the very existence of the petition submitted by the Coalition of Fair Port Practices. While members have commented that the terminals are showing more flexibility, they have also pointed to the ongoing challenges of moving cargo efficiently through the port as trade volumes and the size of the ships discharging cargo grow larger and larger.

The NYNJFFF&BA membership has experienced unreasonable demurrage / detention in the following instances where it was beyond their or their customers' control to pick up or deliver the cargo:

- port congestion created by extraordinary events, e.g. weather, labor issues, computer failure;
- governmental action, e.g. Customs examinations related to both import and export shipments; It is particularly frustrating for our membership that steamship lines start charging for equipment usage when containers are moved off the NY/NJ Port terminals to one of the few Central Examination Sites (CES). Before the CES system was put in place and when the examinations were being done on the terminal , the steamship lines were not charging for equipment usage. Only after the government release did the equipment clock start. Substantial costs now quickly accrue. The importer has no control over when or where the cargo will be

examined and should not be a position to bear the extra punitive costs in this situation.

- lack of equipment (e.g., trucker not being able to pick up due to lack of terminal supplied gensets during free time. Cargo owner was still charged when cargo was finally able to be picked up but it was after the free time had expired);
- inability to obtain a terminal appointment for container pickup.
- steamship line delayed or changed action causing demurrage at inland rail yard or arrival terminal. One member described an incident where the steamship line could not release an import container at NY Port until an origin tariff rating issue had been clarified yet storage charges still had to be paid to the terminal.

The NYNJFF&BA favors the FMC providing additional clarification and interpretation of what would be considered an unjust and unreasonable practice and not allowable under Section 10 (d) of the Shipping Act of 1984. Thus, our membership is in agreement with the proposed statement of policy in the Fair Port Practices' Petition Exhibit A that ocean common carriers or marine terminal operators would be acting unreasonably if they are unable to tender cargo for delivery and/ or to receive equipment due to circumstances beyond the control of the shipper. This would mean that

1. free time should be extended if the occurrence preventing cargo delivery or equipment receipt happens within the free time.
2. free time should be granted for the period in which the occurrence happens, even if free time has expired.

In the most recent snow storm January 4, all NYNJ port terminals closed at 10:30 AM and announced that all containers within the free time window would be extended one (1) additional day. However, those containers already in demurrage would continue to accrue charges. Since the cargo receiver was prevented from picking up their containers the one – day free time should have been granted to all cargo owners. The reasonableness of granting relief should apply whether the cargo was within the free time or not. Just in the past few days, one of our members cited demurrage paid on 8 containers due to the unavailability of chassis and snow-related conditions that created a major back up in the

port at all locations, taking 10 hours on some loads from gate in to gate out. Drivers had to wait for chassis to be returned before they could go into the port for their move.

When the demurrage or detention clock starts, the most important consideration is to move the cargo as quickly as possible and thus stop the escalation in costs. This pressing need forces payment even if the cargo owner believes circumstance should not make him fully or partially responsible. When the charges are in dispute it is extremely burdensome for all parties, ocean carriers, terminals, and cargo owners to fight over mitigation or dismissal. The amount of resources expended by all parties add to the inefficiency of moving cargo through the ports. In addition, many times entities pay smaller invoices as it would cost more in personnel cost to contest them while the clock is ticking and the amount is growing,.

Once payment is made the opportunity to obtain a reduction is drastically curtailed. Smaller companies end up paying disproportionately more without the ability or resources for an extended fight to obtain relief. This leads to unfair treatment of some industry participants versus others. In theory, when demurrage or detention is wrongly assessed those paying it have tools to remedy this, either through commercial pressure on the line or terminal, appeal through CADRS, or costly legal action with uncertain results since regulatory guidance is lacking. The reality is that these options take time to produce results and daily demurrage is a punishing cost that must be resolved quickly for cargo release. Carriers/ terminals will not release freight unless they have been paid. This is a powerful tool that enables the collection of demurrage and inhibits incentives for carrier or terminal efficiency. As one of our members stated, these funds are extorted simply because they can be. This has fostered a business practice that appears to be uncontrollable and created an environment that can be susceptible to abuse.

In conclusion, the NYNJFF&BA supports the Petition's comment that FMC guidance on detention / demurrage practices will ensure that ocean common carriers and marine terminal operators use these charges as intended: to provide an incentive for the efficient handling of cargo and equipment and not as an additional revenue source. Our membership supports the FMC establishing a rule or guidance to help clarify when the

assessment of demurrage and / or detention would be considered unreasonable in circumstances beyond the control of shippers, receivers, and motor carriers and preventing them from picking up or delivering cargo to terminals. The current system does not have sufficient checks and balances to ensure that demurrage and detention are properly assessed. FMC guidance on what is unreasonable would assist in providing such a check. The NYNJFFF&BA would like to thank the Commission for the opportunity to express the strong feelings of our membership on this issue and the hope that more reasonable practices will result. This can only help facilitate trade.

Additional Comments

Since the Commission's Hearing in mid-January, our members have continued to complain about instances when they are being forced to pay demurrage. For example:

- Importer had to pay \$270 in demurrage to Maher Terminal, Newark on a door movement. On 1/16/18 the customs broker sent delivery information to Hapag Lloyd on Container # UACU6030972 but delivery order was not issued to the trucker until 1/23/18. The last free day was 1/25/18. Container moved off the pier on 1/26/18.
- Demurrage on 4 containers for a total of \$2,000 that arrived in Charleston on 1/18/18, but MSC did not process receipt of original bill of lading in time to remove the B/L hold before the free time expired on 1/24/18. The containers were picked up 1/25/18.
- Importer paid \$3,400 due to lack of chassis at CSX rail in Chicago. Two containers picked up 1/12/18 (LFD 12/26/18) and one on 1/23/18 (LFD 1/20/18).

In the first example, Hapag Lloyd provided the broker with a section of their tariff that holds the cargo owner responsible if the carrier cannot execute delivery in situations beyond their control. See here the section cited:

(V) For Carrier Haulage Shipments Carrier shall make a good faith effort to coordinate delivery prior to expiration of free time applicable at any facility where the container is stored while in the custody and control of Carrier prior to delivery. However, in the event that Carrier is unable to execute delivery prior to expiration of free time for reasons beyond Carriers control, any Demurrage charges that are accrued including but not limited to, delays in documentation, delayed clearance, acts or omissions of governmental agencies, holds, exams, shortage of trucking power, tri-axle and/or chassis availability, volume surge, consignees delivery or acceptance windows, terminal congestion, vendor/subcontractor failure, or any other causes beyond the control of the Carrier, are to be billed for the account of the cargo. [If Demurrage charges are incurred with respect to cargo moving under carrier haulage due to circumstances that are beyond Carriers and / or Customers control, the Carrier shall make reasonable efforts to minimize such costs and, in the event Carrier is able to obtain concessions from the operator of the terminal or other facility that result in the assessment of charges that are lower than the Demurrage that would have otherwise been applicable hereunder Carrier shall, instead of the Demurrage otherwise applicable hereunder, assess the cargo a Demurrage charge equal to the lower amount the Carrier is assessed by the terminal or other facility, plus an administrative charge of \$50 per bill of lading.]

If the carrier had issued the delivery order sooner or used better practices to schedule the delivery, demurrage might have been avoided. At the very least the carrier is acknowledging that conditions exist which prevent cargo from being moved from the terminal. Those same conditions apply at times for the cargo owner. The risk should not all be borne by just one party when no one is at fault.

The fact that carrier s and terminals, whether or not at fault, can easily pass demurrage and detention charges to another party reduces the incentive to improve efficiency. The NYNJFF&BA submits that the problem is systemic and not just limited to extraordinary events. Guidance from the FMC will assist all parties to act reasonably.