

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. P4-16

**COMMENT ON PETITION NO. P4-16
SUBMITTED BY
PACIFIC MERCHANT SHIPPING ASSOCIATION**

By Its Attorneys

Erich P. Wise/California State Bar No. 63219
FLYNN, DELICH & WISE LLP
One World Trade Center, Suite 1800
Long Beach, CA 90831-1800
(562) 435 2626

Michael C. Jacob/California State Bar No. 232214
PACIFIC MERCHANT SHIPPING ASSOCIATION
70 Washington Street, Suite 305
Oakland, CA 94607
(510) 987-5000

Dated: February 24, 2017

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. P4-16

**COMMENT ON PETITION NO. P4-16
SUBMITTED BY
PACIFIC MERCHANT SHIPPING ASSOCIATION**

INTRODUCTION

These comments are submitted on behalf of the Pacific Merchant Shipping Association (“PMSA”), a U.S. West Coast trade association representing ocean carriers and marine terminal operators, in response to the Notice of Filing and Request for Comments regarding Petition No. P4-16. The Petition should be denied.

PMSA opposes Petition No. P4-16 because it proposes a rule that would eliminate competition and override the private contracts that are the bedrock of the market for ocean and intermodal cargo transportation of goods to, from, and within the United States. The current scope of federal regulation of the ocean carriage marketplace is established by the Shipping Act of 1984 and the Ocean Shipping Reform Act. These statutes protect competition and have superseded the older authorities, approaches, and legal theories relied on by the Petition.

The anecdotes offered by the Petition do not support a fundamental change in the form and substance of FMC oversight of maritime transportation. While there are undoubtedly cases where shippers and motor carriers have valid grievances against individual ocean carriers, terminals, or equipment providers, the remedies for these grievances are negotiation, contract, and, as a last resort, individual dispute resolution; not the substantial governmental intrusion into the marketplace and new broad anti-competitive regulation of intermodal transportation across the country sought by the Petition. There is no demonstrated need for a blunderbuss, one-size-fits-all rule to address these grievances.

Any regulation that the Commission might consider under this Petition would inevitably limit competition and restrict the parties' ability to negotiate competitive contract terms. It would likely affect the pricing and services provided, not just in the limited number of anomalous cases about which the Petition complains but all the way back through the supply chain to the foreign origin ports. These changes would impact all transactions, not just the cases about which the Petition complains. Any such regulation would be detrimental to the American consumers of the goods transported under the contracts subject to the Shipping Act and Amendments.

The sections below outline the legal and policy reasons why the arguments presented by the Petition do not support its request for rulemaking, highlight the Petition's own evidence and the FMC research which demonstrate that no rule is necessary or desirable, and provide additional information regarding the experience on the U.S. West Coast that helps to show that no new rule is needed and would, in fact, be counterproductive.

THE SHIPPING ACT OF 1984 AND OSRA AMENDMENTS FACILITATE COMPETITIVE MARKETPLACES AND SUPPORT A DIVERSITY OF PRIVATE CONTRACTS

The purpose of the Shipping Act of 1984 (the "1984 Act"), as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), is to help create a competitive marketplace. These statutes encourage robust ocean and port services by a diversity of market participants. By statute, Congress has spelled out its intent to:

- (1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
[and] ...
- (4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

46 U.S.C. § 40101.

These statutes have encouraged the creation of a more market-oriented and efficient supply chain. The healthy, vigorous, diverse, and competitive marketplaces which now thrive under the successful implementation of the modernized 1984 Act and OSRA are facilitating tens of millions of transactions and interchanges across the intermodal supply chain without incident or complaint. The success of this system is that the supply chain efficiently organizes itself to the benefit of the American economy.

Participants in this marketplace operate according to the basic competitiveness principles and private contracting mechanisms encouraged by these statutes. The statutes allow participants in the supply chain to address and adjust quickly to commercial issues which arise regarding supply, demand, quality, and quantity, including rates, service levels, and efficiency. Parties can

also avoid or resolve legal issues which arise – including concerns over specific market transactions such as demurrage and detention – through basic application of contract law.

In this market, the rates and terms of carriage are agreed to by professionals and sophisticated parties conducting business in a competitive commercial marketplace. Because the principal goal of the Shipping Act is to encourage these exact kinds of agreements, freely negotiated and enforceable under contract law, they are presumptively “just and reasonable” within the meaning of 46 U.S.C. §41102 (c).

THE FMC SHOULD NOT IMPLEMENT ANTI-COMPETITIVE RULES CONTRARY TO THE SHIPPING ACT OF 1984 AND OSRA AMENDMENTS

The rulemaking proposed in Petition No. P4-16 would eliminate competition in one of the most competitive pricing and practice areas which currently exists in the intermodal marketplace. This competition has flourished under federal law which protects the rights of parties to bargain for and agree to the substantive contractual terms upon which they do business with one another. The FMC should not undertake a nationwide rulemaking to impose a universal term sheet on all intermodal transactions, an action which would be facially inconsistent with the 1984 Act and OSRA Amendments.

Under the 1984 Act and OSRA, the Federal Maritime Commission guards against anti-competitive actions beyond those authorized by the Act. The FMC performs this task principally through the maintenance and enforcement of its comprehensive reporting and filing requirements for ocean carriers and terminal operators, through enforcement of its regulations and the parties’ contracts, and through adjudication of complaints by individuals that assert unfair competition which might run afoul of the law. Petition No. P4-16, however, urges the FMC to deviate dramatically from its monitoring, enforcement, and adjudicatory functions, and asks it to enact substantive rules that dictate specific contract terms to market participants and to directly restrict competition by rule to a greater degree than the market participants could lawfully achieve under the Shipping Act by their own private agreements.

While the Petition claims to seek “clarification” of terms and practices, there is no need for clarification. The terms of art and the commercial practices related to detention and demurrage clauses have been in existence and used worldwide in contracts and tariffs for decades across innumerable borders, languages, and legal regimes. Contracts and tariffs address these terms and practices directly because businesses on both sides of a transaction place value on congestion management and equipment utilization.¹ The sophisticated business participants in the

¹ As the FMC recently concluded in its *Report: Rules, Rates, and Practices Relating to Detention, Demurrage and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* (April, 2015), pp. 11-12, (“*April 2015 Report*”) limitations on “free time” will reduce congestion and costs by limiting container dwell times, increasing equipment utilization, reducing equipment costs, and improving marine terminal productivity. Petition P4-16 affirms these legitimate and important business terms by acknowledging that the purpose of “demurrage, detention, and per diem is to further the public interest of reducing port congestion and facilitating efficient waterborne transportation.” (Pet., at 4). Thus, without free time limits, enforced by means

standardized intermodal supply chain – carriers, shippers, and intermediaries – rely on well-understood practices and terms which are applied universally to contracts which describe the terms, rates and practices associated with “free time.”

The Petition does not seek technical clarification of any term, practice, statute or regulation. Instead, it asks the FMC to impose substantive terms on intermodal contracts. The Petition readily admits that its true purpose is not “clarification” at all, but to “more fairly allocate [] the costs of congestion” and “place on [ocean common carriers and marine terminal operators] a greater incentive to [reduce port congestion].” (Pet., at 45). In other words, this Petition seeks a rule which dictates substantive terms to govern demurrage and detention transactions nationwide and would void contractual agreements to the contrary.

The Petition further admits that it intends to achieve these re-allocations of costs within the supply chain by rule, as “[t]he interpretive rule proposed by Petitioners would essentially revive rules that the Commission had in place for the port of New York [beginning in 1948].” (Pet., at 32-33). Petition No. P4-16 relies almost entirely on these old New York demurrage rules, and other pre-1984 Act decisions by the FMC (and the FMC’s predecessor agency), which have long since been abandoned.² In effect, the Petition asks the FMC to resurrect this prior legal landscape and enact rules as if Congress had not adopted fundamental changes to the substantive requirements and underlying policies of the Shipping Act over the intervening seven decades.

Significantly, the Petition ignores the modernization of the law in the 1984 Act and OSRA, both of which focused on promoting marketplace efficiency and private contracts as alternatives to the old system of conferences and public tariffs. In contrast to prior versions of the Act and the regulatory decisions based on those prior versions, OSRA in particular “dramatically altered the way business is done in the ocean liner industry.” *The Impact of the Ocean Shipping Reform Act of 1998*, Federal Maritime Commission (Sept. 2001), p. 8. It also created the new “opportunity for shippers and carriers to enter into individual, confidential service contracts, and the inability of carrier agreements to prohibit or directly interfere in that process.” (*Id.*).

Carrier agreements under OSRA may only “establish voluntary contract guidelines applicable to members’ individual service contracting principles, but they are non-enforceable by the agreement.” (*Id.*). In advocating for a rule of universally applicable and enforceable agreement terms, Petitioners are asking the FMC to create substantive rules which would, on their face, violate the law if they were adopted by the market participants themselves. In addition, while “[s]hippers no longer have ‘me-too’ rights to obtain the same essential terms as similarly situated shippers,”

of detention and demurrage charges, “congestion begets further congestion, which in turn may result in higher costs for everyone in the supply chain.” *April 2015 Report*, at 21.

² Notably, even these pre-1984 examples have been cherry-picked, as the Petition fails to acknowledge that many of the early examinations of “Free Time” at ports observed that the over-extension of free-time – for the benefit of shippers – was detrimental to marine terminal efficiency, caused waterfront congestion, and resulted in higher costs elsewhere in the supply chain. See *California v. United States*, 320 U.S. 577, 583 (1944) (“unreasonably long free time tends to be parasitic on rates for other services.”).

(*Id.*) some of the arguments posed by those providing exhibits to this Petition seem to argue for the re-establishment of “me-too” solutions.

The purported purpose of the Petition (to achieve “clarification” of well-understood and applied terminology) is illusory. The Petition ignores the principles of the 1984 Act and its OSRA amendments, is based on outmoded legal concepts, seeks a substantial increase in government intervention in competitive markets, and asks the FMC to consider and adopt substantively anti-competitive rules that are contrary to the intent of Congress.

THE PETITION AND THE FMC APRIL 2015 REPORT DEMONSTRATE THAT A WIDE DIVERSITY OF AGREEMENTS, CONTRACTS AND TARIFFS REGARDING CHARGES, RATES, AND BUSINESS PRACTICES EXIST AS A RESULT OF COMPETITION

Petition No. P4-16 is accompanied by a sampling of anecdotal complaints about various weather events, labor situations, and market changes. The Petition seeks action based on such unrelated events as an errant snow storm in New Jersey, a labor disruption in California, and an unprecedented ocean carrier bankruptcy in South Korea. It relies on these limited and particularized anecdotes as the basis for a national rule proscribing the terms of demurrage and detention for all transactions under the Act at all times.

The policy argument advanced by the Petition based on these various unrelated events is that a single, universal treatment of all demurrage and detention charges nationwide is a necessary cure to the current diversity of inconsistent agreements, rates, policies, and practices which exist among a multitude of parties, even within the same port areas:

“These assessments [of demurrage and detention charges] have not been uniform, because carrier and marine-terminal-operator demurrage and detention policies and practices vary. Policies on free-time extensions are inconsistent among carriers and marine terminal operators, including among terminals at the same port. For example, at Port Elizabeth, Maher Terminals will extend free time if it is unable to deliver cargo, but APM Terminals Elizabeth, LLC, does not automatically extend free time in similar circumstances. Instead, APM Elizabeth reserves the right to extend free time in its discretion.”

(Pet., at 13).

To emphasize the point that demurrage and detention practices are not uniform, the Petition makes several observations about the variation in practices across the industry, often relying in part on the recent *April 2015 Report*:

- “[T]here is tremendous inconsistency in the conduct of carriers and terminals with respect to free time, demurrage, and detention practices...” (Pet., at 22).

- "...some ocean common carriers and terminals may agree to extend free time or waive or reduce demurrage and detention fees in certain cases, the Commission's staff found that 'there is no generally used formula to determine when the normal allowance for free time might be increased or reduced,' (Pet., at 21)(citing *April 2015 Report*, at 24).
- "On occasion, ocean common carriers and marine terminal operators may agree voluntarily or through negotiations with their customers to either stop the accrual of demurrage/detention or extend free time, effectively delaying the accrual of demurrage/detention charges." (Pet., at 7).
- "...[m]any port authority schedules or ordinances include authority for the executive director to extend free time for demurrage in certain situations.' Similarly, '[f]ree time for demurrage may also be extended by the terminal operator or by the VOCC.'" (Pet., at 7-8)(citing *April 2015 Report*, at 17).
- "Indeed, the Commission noted that some carriers have tariffs that allow for additional free time where the carrier is unable to tender cargo for delivery during free time. It also found that at least one carrier had a tariff that called for the suspension of free time during a carrier disability occurring after free time expires." (Pet., at 8)(citing *April 2015 Report*, at 18).
- "Although some marine terminal operators 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 tariffs are inconsistent." Describing different tariff terms and practices which vary from port-to-port at the Ports of Port Elizabeth, New York, Los Angeles, Long Beach, Mobile, Seattle, and Virginia. (Pet., at 8-9).
- "Some marine terminal operators will collect demurrage charges from shippers, consignees, or drayage providers as a condition to the release of a container, even though the carriers' tariff may specify the applicable charge. ... In contrast, some marine terminal operators may forego collection of their demurrage assessment from the cargo interest and invoice the ocean common carrier instead." (Pet., at 9)(citing *April 2015 Report*, at 16, 18).
- "...during these periodic events, demurrage, detention, and per diem, i.e., charges by ocean common carriers and marine terminal operators that are intended to incentivize the efficient removal of

cargo from or return of equipment at U.S. ports, did not abate consistently...” (Pet., at 3).

The Petition provides other evidence that shippers and motor carriers agree to a wide variety of contractual terms, including negotiated waivers of assessments which vary from carrier to carrier and terminal to terminal, and as a result many demurrage charges are 100% waived, others are partially waived, and others not at all. (Pet., at 14-17). The diversity of contracts and tariffs in place are reflected in the fact that, “some ocean carriers waived demurrage in whole or in part during the recent West Coast port congestion, [but] this conduct was hardly a consistent practice...” (Pet., at 34).

As further described in the FMC *April 2015 Report*, there is tremendous diversity of detention and demurrage practices, rates, and agreements among carriers, terminals and ports. In particular, the charts in Appendix B show actual market characteristics, as observed by the FMC, which provide shippers concerned with these charges multiple options and prices for services.

In addition to the diversity and wide range of rates and charges adopted by ports and carriers, variations in business practices are also reflected in the FMC’s observations that “[c]arriers may ‘stop the clock,’ waive, reduce or compromise fees relating to congestion if they have the flexibility to do so under their tariff or service contract.” (*Id.*, at 31). The flexibility associated with variables in contracts or tariffs between carriers and shippers is also applied when it is an agreed-to obligation found in the “rates and rules [which] may be specified in a VOCC’s tariff, a terminal or port authority’s MTO schedule, or in a service contract between a shipper and VOCC.” (*Id.*, at 10). Explicitly, the FMC acknowledges that under current contracts and agreements, practices “**vary widely by customer and situation** as to whether they will waive or reduce demurrage and detention charges...” (*Id.*, at 31)(emphasis added).

Further, “[i]mporters who move their cargo under service contract appear to have the ability to negotiate terms with the VOCCs that would address declines in terminal handling velocity with corresponding increases in demurrage and detention free time but, to date have not negotiated these charges.” (*Id.*, at 25). Anecdotal evidence provided by the Petition confirms that the largest shippers do, in fact, enjoy better terms and exercise market power through the negotiation of demurrage rates and practice terms. As one motor carrier explains:

“Depending on the customer and steamship line per diem charges are invoiced differently. Many of our clients have extended free time because they are volume shippers. Free time in beneficial cargo owner (BCO) service contracts ranges from 10 calendar days up to 20 working days. ... For customers without a service contract, IMF was billed the standard free time listed in the ... UIIA along with the steamship lines’ posted tariff rates. The standard free time is from 3 working days up to 7 calendar days.”

(Pet., Exh. C-1)(Grato Decl., pg. 2).

The relative market impacts and ultimate impositions of charges can also vary widely based on the relationship between the motor carrier providing container drayage and the shipper. Petition No. P4-16 itself describes how these charges vary from company to company, and customer to customer, based on the ability of motor carriers to rebill their customers for all of their demurrage charges. (Pet., at 18). For instance, one trucking company describes its “standard operating procedure for per diem billed” as a “simple process” of either “dispute the bill with the steamship line directly [if any discrepancies are found]” or “if the invoice is valid we bill our customers and pay the steamship line the charges” plus an “administrative fee per invoice ... to process per diem charges on [our customers] behalf.” (Pet., Exh. C-1)(Grato Decl., pg. 2).

Other “truckers have been willing to absorb any temporary additional costs [in demurrage and detention] rather than passing them through to their importer customers.” (*April 2015 Report*, at 25). The FMC observed that the cause of this market activity was not clear, but that it was potentially a decision made by motor carriers resulting from “the recent severe decline in the price of fuel [which] facilitated drayage operators’ willingness to absorb these charges” or, perhaps, the result of “truckers charging their own ‘congestion fees’” to cargo owners in order to make additional revenue from the same market conditions of which the Petitions complain here. (*Id.*, see FN 28).

The ability of various motor carriers to charge back to shippers, absorb, or even profit from a carrier or terminal detention or demurrage charge underscores that market conditions are dynamic on both sides of the intermodal exchange.³ That motor carriers can and often do ultimately avoid any economic distress from detention and demurrage transactions is a function of their ability to also contract for, and negotiate, the best terms for the provision of intermodal transportation services.

The variety of business practices illustrated here provides evidence that there is no problem to remedy under the Act, because there are not any coordinated, anti-competitive, or unfair rates or business practices which uniformly exist regarding demurrage and detention. Rather than suggesting a need for some uniform rule, these diverse contract terms, prices and practices and the existing dynamic marketplace for demurrage and detention are highlighted by the Petition. As the

³ For example, the industry models for management of chassis equipment is changing rapidly. Chassis are a key component in the intermodal transport system, as no motor carrier can move containers without a chassis. The industry as a whole is working through the multiple challenges arising out of the changes in the management, ownership, and availability of intermodal chassis. Governmental intervention now in the development of these new models will add to the unforeseen consequences of the regulations sought by the Petition. Many intermodal equipment arrangements lie outside the purview of FMC regulation because they involve chassis lessors, trucking companies, and railroads but not terminals or carriers. See DOJ comment: <https://www.justice.gov/atr/comments-us-department-justice-regarding-consolidated-chassis-management-pool-agreement-fmc>. By regulating only some users, without parallel regulation of chassis allocation by lessors, trucking companies, and railroads, the rules sought by this Petition will necessarily interfere with the development of commercially rational solutions to chassis management issues. Consistent with the Shipping Act, the risks of chassis allocation and solutions to chassis management issues should remain a matter of private contract.

FMC's own report on the subject confirms, demurrage and detention rates and practices vary widely from port to port, terminal to terminal, carrier to carrier, and customer to customer. Indeed, many shippers are able to exert the market power necessary to enjoy long periods of demurrage free time, and many truckers are made whole, or may even be able to find ways to profit, from these transactions.

This market diversity is precisely the type of economic activity that the 1984 Act and OSRA protect. The FMC is charged with the enforcement of the Act by Congress, and must encourage competitive activity and protect diversity of commercial activity within the marketplace amongst carriers. As the Petition seeks to eliminate the variety of market contracts, agreements, and business practices which exist, and instead require, by rule, results which are not allowed under FMC enforcement of these markets, it must be rejected.

CALIFORNIA'S EXPERIENCE UNDER LOCAL STATUTES THAT LIMIT ENFORCEMENT OF DEMURRAGE AND DETENTION CONTRACTS CONFIRMS THAT THIS PETITION IS UNNECESSARY AND ANTI-COMPETITIVE

As a West Coast trade association, PMSA and its members have recent experience with application of California's statewide regulation of some detention and demurrage practices by statute. This experience, which includes application of the state statute to events during the labor slowdowns in 2014-15, reflects how inefficient, time consuming, expensive, and counter to principles of fairness the regulation of these practices can turn out to be.

Under Cal. Bus. & Prof. Code §22928,⁴ the State of California prohibits intermodal equipment providers and marine terminals from, among other things, charging detention or demurrage to motor carriers on days when the marine terminal truck gate is closed. The statute requires that only shippers – not motor carriers – may be billed for demurrage when a container is not picked up during free time. This statute has generated a fair amount of litigation and numerous arbitrations under the Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”), the national agreement that governs the interchange of intermodal equipment to motor carriers for transportation of intermodal cargo. The complaints by cargo owners and motor carriers in these cases have generally invoked publicized reports of congestion, slowdowns, or other circumstances to allege that a broad range of detention and demurrage practices are categorically “unfair” and illegal.

When, however, these claims have been subjected to the kind of scrutiny that litigation and arbitration requires, the facts more often than not, confirm that practices vary from carrier to carrier, terminal to terminal, and customer to customer. As in all commercial disputes, sometimes the facts are benefitting the ocean carrier and sometimes the BCO or motor carrier, depending on the particulars of the contracts and the circumstances of the case. As a result, even when examined under this state statute which protects motor carriers specifically from the imposition of these charges, the application of detention and demurrage under existing tariffs and service contracts is not per se unfair or unreasonable.

⁴ Cal. Bus. & Prof. Code §22928 is commonly referred to as “SB 45” in reference to its implementing legislation, Senate Bill 45 (Chapter 244, Statutes of 2005).

Consider *NGL Transportation v. West Basin Container Terminal*, Case No. 2:16-cv-04173, (C.D. Cal. 2016). There, the complaining motor carrier alleged that it had incurred demurrage because the gates at the terminal were constructively closed by the labor slowdown at the Ports of Los Angeles and Long Beach in 2014-15. In support of its motion for summary judgment, however, the terminal presented evidence that the throughput volumes at the terminal gate during the alleged slowdown were the same or greater than during equivalent periods the following year, after the labor contract negotiations had been concluded. (Exhibit 1). After this showing, the motor carrier voluntarily dismissed its complaint.

Similarly, a substantial number of motor carriers have invoked Cal. Bus. & Prof. Code §22928 in arbitrations conducted under the UIIA involving disputes arising from the alleged labor slowdown in 2014-15. See http://www.uia.org/about/drp_decisions.php. (Exhibits 2 and 3 hereto). The majority of these arbitrations also sought to invoke the “force majeure” clause of the UIIA to challenge detention charges incurred in the slowdown. Of 40 arbitrations reported as of June 2015, the panel decided in favor of the motor carrier 19 times and for the ocean carrier provider 17 times. In the other 4 cases, the decision was split between the two entities. (*Id.*).

These cases show that there is no generalized basis to conclude that the contractual provisions which underlie these charges are inherently unfair or unreasonable. Indeed, the UIIA arbitration decisions and their outcomes underscore the observation of the arbitration panel in Case No. 20150130-2-XXXI-PD (May 27, 2015) that:

[T]he applicability of force majeure would need to be determined by each Equipment Provider on a case by case basis dependent upon the conditions that existed at a specific facility, on a specific date and time, and if these conditions prevented the pick-up and/or re-delivery of equipment.

These are highly particularized issues that require examination of the terms of the specific contract in force and the specific circumstances of each case.

Like the decisions in the California demurrage case and detention arbitration disputes which invoked the state statute, the anecdotal examples presented by the Petition demonstrate very clearly that the question of whether a particular charge was justified varies under the parties’ contracts and the circumstances of the particular charge in question. They do not support the argument that a sweeping nationwide federal regulation is necessary or desirable.

There are tens of thousands of intermodal contracts in place and tens of millions of transactions which occur in California, almost none of which result in any detention or demurrage charges or disputes about those charges. It is the experience of PMSA and its members that parties are most likely to improve their normal, day-to-day transactions by negotiation and by entering into contracts that address issues of price, delay and efficiency according to the true commercial experience of the parties to those transactions.

As the California UIIA arbitrations reflect, sorting through the particulars of the miniscule percentage of cases allegedly affected by labor slowdowns, snowstorms or terminal congestion to determine whether the particular charge was “unfair” or “unreasonable” is a task which requires a case-by-case analysis. This is best left to the contracts of the parties or the adjudicatory processes of private arbitration, litigation, or FMC adjudication. It is not a matter that lends itself to consideration in a general rulemaking procedure.

CONCLUSION

For the foregoing reasons, Petition No. P4-16 should be denied.

Respectfully submitted,

PACIFIC MERCHANT SHIPPING ASSOCIATION

By its Attorneys



Erich P. Wise
FLYNN, DELICH & WISE LLP
One World Trade Center, Suite 1800
Long Beach, CA 90831-1800
(562) 435 2626

Michael C. Jacob
PACIFIC MERCHANT SHIPPING ASSOCIATION
70 Washington Street, Suite 305
Oakland, CA 94607
(510) 987-5000

Dated: February 24, 2017

EXHIBIT 1

1 Erich P. Wise/State Bar No. 63219
erichw@fdw-law.com
2 Alisa Manasantivongs/State Bar No. 260227
3 alisam@fdw-law.com
4 FLYNN, DELICH & WISE LLP
5 One World Trade Center, Suite 1800
6 Long Beach, California 90831-1800
7 Telephone: (562) 435-2626
8 Facsimile: (562) 437-7555

9 Attorneys for Defendant
10 WEST BASIN CONTAINER TERMINAL, LLC

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 FLYNN, DELICH & WISE
14 ATTORNEYS AT LAW
15 One World Trade Center, Suite 1800
16 Long Beach, California 90831-1800
17 (562) 435-2626

18 NGL TRANSPORTATION LLC, and
19 KRISDA, INC., on behalf of
20 themselves and all others similarly
21 situated,

22 Plaintiffs,

23 v.

24 WEST BASIN CONTAINER
25 TERMINAL, LLC; PACIFIC
26 MARITIME SERVICES LLC;
27 MAERSK LINE, LTD.; MAERSK
28 LINE A/S,

Defendants.

) Case No.: 2:16-cv-4173-RGK(JEMx)

)

) **PROPOSED STATEMENT OF
UNCONTROVERTED FACTS AND**

) **CONCLUSIONS OF LAW IN**

) **SUPPORT OF MOTION OF**

) **DEFENDANT WEST BASIN**

) **CONTAINER TERMINAL, LLC**

) **TO DISMISS OR**

) **ALTERNATIVELY, FOR**

) **SUMMARY JUDGMENT ON**

) **PLAINTIFFS' SECOND**

) **AMENDED COMPLAINT**

)

) Hearing Date: November 28, 2016

) Time: 9:00 a.m.

) Courtroom: 850

Complaint Filed: June 10, 2016

First Amended Complaint Filed:

July 11, 2016

Second Amended Complaint Filed:

October 14, 2016

1 TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

2 Defendant West Basin Container Terminal, LLC (“WBCT”) hereby submits
 3 the following Proposed Statement of Uncontroverted Facts and Conclusions of Law.
 4 These include every essential element to entitle WBCT to judgment as a matter of
 5 law.

FLYNN, DELICH & WISE
 ATTORNEYS AT LAW
 One World Trade Center, Suite 1800
 Long Beach, California 90831-1800
 (562) 435-2628

	<u>WBCT’S MATERIAL FACT</u>	<u>SUPPORTING EVIDENCE</u>
1 2 3 4 5 6 7 8 9 10	1 Plaintiffs are intermodal motor carriers who assert claims on behalf of themselves and a putative class that allegedly paid “improper” demurrage and per diem charges.	Second Amended Complaint ¶¶3-4.
11 12 13 14 15 16	2 Defendant WBCT operates a marine terminal in Los Angeles.	Second Amended Complaint ¶5; <u>Declaration of Mark Wheeler in Support of Motion of Defendant WBCT to Dismiss or Alternatively, For Summary Judgment on Plaintiffs’ Second Amended Complaint (“Wheeler Decl.”) ¶1.</u>
17 18 19 20 21 22	3 The Second Amended Complaint generally alleges labor contract negotiations between Port employers and the International Longshore and Warehouse Union and various events arising out of those negotiations in the period from September, 2014 through May, 2015.	Second Amended Complaint ¶¶27-28.
23 24 25 26 27 28	4 The crux of these allegations is the alleged “work slowdown” by the longshoremen at the Ports as one of the Union’s negotiating tactics. This slowdown was manifested principally through Union dispatch of reduced numbers of longshoremen to handle cargo at the Ports.	Second Amended Complaint ¶¶27-30.

FLYNN, DELICH & WISE
 ATTORNEYS AT LAW
 One World Trade Center, Suite 1800
 Long Beach, California 90831-1800
 (562) 435-2626

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5	The Second Amended Complaint alleges that the truck gates at the Defendant Terminals were sometimes "closed."	Second Amended Complaint ¶¶19, 21, 32.
6	The Second Amended Complaint alleges that the Terminals would periodically close the gates to truck traffic when they reached "capacity," and asserts that this occurred because of the shortage of labor caused by the disruption.	Second Amended Complaint ¶¶19, 21.
7	The gate at WBCT remained open to motor carriers on a regular basis throughout the alleged labor disruption period and WBCT delivered hundreds of containers each working day for the entire period from September 1, 2014 through May 31, 2015.	Wheeler Decl. ¶¶3, 6 and Ex. 1.
8	The terminal gate was regularly open week days and Saturdays during the period of September 1, 2014 through May 31, 2015 and usually closed on Sundays and certain holidays and holiday weekends.	Wheeler Decl. ¶¶3, 6 and Ex. 1.
9	WBCT delivered a substantial number of containers to the motor carriers on every one of the days it was open.	Wheeler Decl. ¶¶3, 6 and Ex. 1.
10	Between September 1, 2014 and May 31, 2015, WBCT delivered 223,935 import containers to motor carriers at the truck gate.	Wheeler Decl. ¶6 and Ex. 1.
11	During this time, the gate was open on 229 out of 276 days.	Wheeler Decl. ¶3 and Ex. 1.

FLYNN, DELICH & WISE
 ATTORNEYS AT LAW
 One World Trade Center, Suite 1800
 Long Beach, California 90831-1800
 (562) 435-2626

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12	For the normal working days at the terminal truck gate, the average daily throughput was 977 import containers for the alleged disruption period.	Wheeler Decl. ¶3 and Ex. 1.
13	WBCT’s daily entries for the period confirm the regular daily delivery of hundreds of containers from the terminal during the labor disruption period alleged in the Second Amended Complaint.	Wheeler Decl. ¶3 and Ex. 1.
14	From September 1, 2015 through May 31, 2016, the comparable period subsequent to the alleged labor slowdown, 193,885 import containers were delivered to motor carriers at the WBCT truck gate.	Wheeler Decl. ¶¶4, 7 and Ex. 2.
15	The volume of returns for empty containers was 210,629 for the September 1, 2014 to May 31, 2015 period, and 178,383 for the September 1, 2015 through May 31, 2016 period.	Wheeler Decl. ¶¶6-7 and Exs. 1, 2.
16	Exhibits 1 and 2 reflect that the aggregate volumes for the alleged 2014-2015 “labor disruption” period exceeded the aggregate volumes for the comparable 2015-2016 non-“labor disruption” period.	Wheeler Decl. ¶8 and Exs. 1, 2.

//
//
//
//
//

DEFENDANT’S CONCLUSIONS OF LAW

1
2 1. California Business & Professions Code (“Bus. & Prof. Code”)
3 §22928(b)(1) prohibits the imposition of per diem, detention, or demurrage charges
4 on an intermodal motor carrier “[w]hen the intermodal marine or terminal truck gate
5 is closed during posted normal working hours,” including “during a labor disruption
6 period...that closes the truck gate.” A truck gate is closed on a given day if a motor
7 carrier is wholly denied the opportunity to access the terminal for the entire day.

8 2. Plaintiffs’ claim for Unlawful Business Practices under Bus. & Prof. Code
9 §17200 is based on a violation of Bus. & Prof. Code §22928(b). WBCT did not
10 violate Bus. & Prof. Code §22928(b) and Plaintiffs therefore fail to state a claim for
11 Unlawful Business Practices under Bus. & Prof. Code §17200.

12 3. Plaintiffs’ claim for Unfair Business Practices under Bus. & Prof. Code
13 §17200 is based on WBCT’s collection of demurrage during the alleged labor
14 disruption period of September 1, 2014 to May 31, 2015. Plaintiffs cannot show that
15 WBCT’s collection of demurrage was unlawful under Bus. & Prof. Code §22928(b).
16 Since the collection of demurrage was not prohibited under Bus. & Prof. Code
17 §22928(b), it was affirmatively required under Bus. & Prof. Code §22928(c)(5).
18 Plaintiffs therefore fail to state a claim for Unfair Business Practices under Bus. &
19 Prof. Code §17200.

20 4. The pleadings and evidence submitted by WBCT show that there is no
21 genuine dispute as to any material fact and WBCT is entitled to judgment as a matter
22 of law under to Fed. R. Civ. Pro. 56.

23 Dated: October 28, 2016 FLYNN, DELICH & WISE LLP

24
25 By: /s/ Erich P. Wise
26 Erich P. Wise
27 Alisa Manasantivongs
28 Attorneys for Defendant
WEST BASIN CONTAINER TERMINAL, LLC

FLYNN, DELICH & WISE
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90831-1800
(562) 435-2626

EXHIBIT 2

**UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT
DISPUTE RESOLUTION PANEL REVIEW AND DECISION**

In the Dispute Between)	
)	
UIIA Motor Carrier, Appellant, and)	Case Number: 20150130-2-XXXI-PD
)	
UIIA Equipment Provider, Respondent)	Date of Decision: 05/27/2015

MOTOR CARRIER'S DISPUTE

The Motor Carrier disputes the following invoices:

Invoice	Invoice #	Inv. Date	Amount	Facility	Outgated	Ingated	Date MC rec'd Inv.	Date MC disputed the Inv.	Date EP responded to MC's dispute	Notice of Intent Rec'd
1	2276160	1/6/15	\$00.00	ITS/ITS	12/10/14	12/22/14	1/6/15	1/21/15	1/30/15	1/15/15

Note: The reason the received date of the Notice of Intent is prior to the Equipment Provider's response is that the Motor Carrier submitted the arbitration claim at the same time they initially disputed the charges with the Equipment Provider. The claim was held until the Equipment Provider was provided the established 30 day timeframe to respond to the Motor Carrier's dispute.

The Motor Carrier basis of dispute is Section G.12 of the UIIA (Force Majeure) due to port congestion that existed at the Ports of Los Angeles and Long Beach. The Motor Carrier indicated that conditions existed that prevented its ability to return equipment within the specified free time. The Motor Carrier indicated that conditions such as labor issues, closed terminals, early gate closures, closed areas, equipment redirections, and non-acceptance of equipment on certain days/shifts have all contributed to the congestion and are issues that were beyond the Motor Carrier's control. Under these situations, delays cannot be avoided by Motor Carriers and therefore the Motor Carrier should not be held responsible for per diem during this timeframe. In addition, the Motor Carrier also argued that California State regulation SB45 prohibited an Equipment Provider from imposing per diem charges during work stoppages and congested conditions.

EQUIPMENT PROVIDER'S RESPONSE

The Equipment Provider responded that even though the terminal was congested during the dates associated with the interchange period, the facility (ITS) was open and receiving empty containers during this timeframe. The Motor Carrier was not charged for the weekend dates of 12/20/14 and 12/21/14.

DISCUSSION

The Motor Carrier submitted its basis of dispute and one JOC article related to the specific Equipment Providers reinstating port congestion surcharges. The date of the JOC article was prior to the dates associated with the interchange period for the disputed invoice.

The Equipment Provider stated that the ITS facility was open and accepting empty equipment on the Equipment Provider's behalf during the interchange period. In addition, the Equipment Provider stated that there was nothing that prevented the Motor Carrier from returning an empty container for 10 days, which was the case with the Motor Carrier's claim.

The Equipment Provider provided the following information regarding the ITS facility:

Normal operating hours for ITS:

Monday – Thursday 0800 to 1630 (Shift 1) and 1700-0230 (Shift 2)

Friday 0800 – 1630 (Shift 1)

Closed on Saturdays and Sundays

Dates ITS facility was closed:

12/10 open 1st shift & 2nd shift

12/11 open 1st shift & 2nd shift

12/12 open 1st shift

12/13 – 12/14 – Closed

12/15 – 12/18 open 1st and 2nd shift

12/19 open 1st shift

12/20 – 12/21 – closed

12/22 open 1st and 2nd shift

Does the ITS Facility provide turn away tickets? Yes, drivers do receive turn around tickets if turned away from the gate.

As precedent in regards to identifying a situation as falling under the Force Majeure provision of the UIIA, the IIEC has previously indicated that in situations when the facility is open, the applicability of force majeure would need to be determined by each Equipment Provider on a case by case

basis dependent upon the conditions that existed at a specific facility, on a specific date and time, and if these conditions prevented the pick-up and/or re-delivery of equipment.

The Motor Carrier also indicated that the Equipment Provider is not in compliance with the California State regulation SB45, which prohibits intermodal marine Equipment Providers from imposing per diem, detention and demurrage charges under the following conditions: 1) when the intermodal marine terminal or terminal truck gate is closed during posted normal working hours, or during a labor disruption or any other period involving an act of God or any other planned or unplanned action that closes the truck gate, 2) when the intermodal marine terminal decides to divert equipment without 48 hours' electronic or written notification to the Motor Carrier, 3) when a loaded container is not available for pickup when the Motor Carrier arrives at the intermodal marine terminal, and 4) when the intermodal marine terminal is too congested to accept the container and turns away the Motor Carrier. The Motor Carrier indicated that one or more of the above conditions existed during the period covered by the disputed charges.

DECISION

The panel reviewed all documents and evidence submitted by the parties. The two modal panel members could not agree on whether the conditions outlined by the Motor Carrier and the supporting documents it provided met the criteria set forth in Section G.12., Force Majeure provision, of the UIIA preventing the Motor Carrier from redelivering the equipment to the Equipment Provider within the specified free time. In addition, the two panel members were also unable to reach a consensus on whether the specific conditions under SB45 were met that precluded the Equipment Provider from assessing per diem charges to the Motor Carrier. Therefore, the third panel member was brought in under Exhibit D to the UIIA.

The third panel member stated that UIIA counsel had indicated that while the identification of a work slowdown as a strike is correct and does identify a force majeure condition within Section G.12 of the UIIA, that alone does not meet the requirements for invoking relief available in this section. Force Majeure as defined in Section G.12 of the UIIA requires conditions to exist that prevent the Motor Carrier from interchanging the equipment. Section G.12 states: "In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in the Provider's Addendum." SB45 clearly states that in order to qualify for relief, the planned or unplanned action (i.e. Labor disruption) would need to close the truck gate, or that the intermodal marine terminal turns away a Motor Carrier due to congestion. Both provision G.12 of the UIIA and SB45 contemplate the inability to interchange equipment. The third panel member indicated that the MC did not present evidence that supported its contention that the port congestion prevented it from returning equipment within the specified free time. Therefore, the third panel member finds in favor of the Equipment Provider.

UIIA PROVISIONS RELIED UPON BY BINDING ARBITRATION PANEL:

The panel relied upon the following provisions from the UIIA (October 1, 2014) to make its decision:

G. General Terms

11. Compliance with the Law: The Parties shall obey all applicable federal, state and local laws, rules and regulations including those pertaining to the transportation of hazardous material. **[Revised 08/26/13]**

12. Force Majeure: In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in Provider's Addendum, or Provider's applicable Tariff, as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond the Motor Carrier's control, the Motor Carrier shall be exempted from the per diem charges to the extent of, and for the duration of, the condition that prevented the redelivery of the Equipment. [Revised 09/13/04]

EXHIBIT D TO THE UIIA

3. A three-member arbitration panel will be appointed by IANA to handle disputed invoices submitted for arbitration. The panel will consist of one IANA member from each mode, i.e. a Motor Carrier, Water Carrier and Railroad. However, the decision will be rendered by the two arbitrators representing the modes involved in the disputed invoice(s). The third appointed arbitrator from the mode not involved in the transaction will act as an alternate, and will render a decision only in the event the arbitrators from the involved modes cannot agree on a resolution of the dispute.

DECISION: A majority of the panel finds in favor of the Equipment Provider.

CASE REVIEWED AND DECIDED BY:

CHAD PETERSON
Rail Carrier Member

JAMES MICHALSKI
Ocean Carrier Member

KEVIN LHOTAK
Motor Carrier Member

EXHIBIT 3

**UNIFORM INTERMODAL INTERCHANGE AND FACILITIES ACCESS AGREEMENT
DISPUTE RESOLUTION PANEL REVIEW AND DECISION**

In the Dispute Between)	
)	
UIIA Motor Carrier, Appellant, and)	Case Number: 20141222-3-XXXX-PD
)	
UIIA Equipment Provider, Respondent)	Date of Decision: 05/18/2015

MOTOR CARRIER'S DISPUTE

The Motor Carrier disputes the following invoices:

Invoice	Inv. Date	Facility Outgate/Ingate	Outgated	Ingated	Date MC stated they rec'd Inv.	Date MC disputed the Inv.	Date EP responded to MC's dispute	Notice of Intent Rec'd
NAIM3057602	11/10/2014	Shippers Transport/PCT	10/17/2014	10/30/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3057599	11/10/2014	Shippers Transport/PCT	10/17/2014	10/29/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3057581	11/10/2014	Shippers Transport/PCT	10/17/2014	10/29/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3057585	11/10/2014	Shippers Transport/PCT	10/17/2014	10/29/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061069	11/12/2014	Shippers Transport/PCT	10/27/2014	11/6/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061048	11/12/2014	TTI/PCT	10/23/2014	11/3/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061058	11/12/2014	Shippers Transport/PCT	10/26/2014	11/7/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061080	11/12/2014	Shippers Transport/Street Turn, Long Beach	10/17/2014	10/30/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061555	11/13/2014	Shippers Transport/PCT	9/18/2014	9/30/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061615	11/13/2014	TTI/TTI	10/23/2014	11/4/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061625	11/13/2014	TTI/TTI	10/23/2014	11/4/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3061685	11/13/2014	TTI/TTI	10/22/2014	11/3/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3063005	11/14/2014	BNSF Hobart/PCT	9/23/2014	11/6/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3075449	11/25/2014	Shippers Transport/ SSA Pier A	10/23/2014	11/18/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3075543	11/25/2014	TTI/TTI	11/8/2014	11/18/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3079199	11/26/2014	Shippers Transport/TTI	11/9/2014	11/21/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
BLAE0176270*	11/26/2014	Street Turn, Long Beach/ SSA Pier A	11/10/2014	11/20/2014	12/8/2014	12/8/2014	12/9/2014	12/22/2014
BLAE0176268*	11/26/2014	Street Turn, Long Beach/SSA Pier A	11/10/2014	11/20/2014	12/8/2014	12/8/2014	12/9/2014	12/22/2014

Invoice	Inv. Date	Facility Outgate/Ingate	Outgated	Ingated	Date MC stated they rec'd Inv.	Date MC disputed the Inv.	Date EP responded to MC's dispute	Notice of Intent Rec'd
NAIM3091239***	12/8/2014	TTI	11/13/2014	12/1/2014	12/8/2014	12/8/2014	1/13/2015**	12/22/2014
NAIM3130229	1/13/2015	TT/TTI	11/13/2014	12/1/2014	1/13/2015	12/8/2014	1/13/2015**	12/22/2014

*Initial response from EP on 12/9 only included invoices BLAE017270 and BLAE0176268

**EP Response to remaining invoices disputed on 12/8 was not received until after Notice of Intent Form was received.

***Invoice NAIM3091239 was cancelled and adjusted for Thanksgiving Holiday. Corrected invoice is NAIM3130229 and is included in dispute

The Motor Carrier basis of dispute is Section G.12. of the UIIA (Force Majeure) due to the port congestion conditions on the West Coast, which the Motor Carrier indicates precluded it from returning the equipment within the specified free time period. The Motor Carrier stated that the essential condition within the Force Majeure clause in the UIIA is that the Motor Carrier is unable to interchange equipment to the Equipment Provider because of causes beyond the Motor Carrier's control. When this condition is met, the Motor Carrier is exempted from the per diem charges during the duration of this condition. The Motor Carrier believes that the conditions caused by the West Coast port congestion met this condition under force majeure. The Motor Carrier also referenced a court decision involving United Arab Shipping and PB Express that it believes supports its belief that the conditions on the West Coast would be considered beyond the Motor Carrier's control [See Discussion Section on page 2]. Also included as supporting documentation were several Equipment Providers' tariffs that have been filed with FMC and include force majeure provisions that reference "port congestion" as a form of force majeure. The Motor Carrier stated in its basis that it has the trucks, drivers and logistical system to timely return the containers, but was unable to return the equipment to the port because of terminal closures, re-routing, gate changes/restrictions and extensive backups at the gate that were the result of the port congestion and beyond the Motor Carrier's control.

The Motor Carrier also indicated that the Equipment Provider is not in compliance with the California State regulation SB45, which prohibits intermodal marine Equipment Providers from imposing per diem, detention and demurrage charges under the following conditions: 1) when the intermodal marine terminal or terminal truck gate is closed during posted normal working hours, or during a labor disruption or any other period involving an act of God or any other planned or unplanned action that closes the truck gate, 2) when the intermodal marine terminal decides to divert equipment without 48 hours' electronic or written notification to the Motor Carrier, 3) when a loaded container is not available for pickup when the Motor Carrier arrives at the intermodal marine terminal, and 4) when the intermodal marine terminal is too congested to accept the container and turns away the Motor Carrier. The Motor Carrier indicated that one or more of the above conditions existed during the period covered by each of the disputed charges and prevented it from returning the equipment within the specified free time.

The Motor Carrier also provided JOC articles, status updates issued by different equipment providers relating to the port congestion, data relating to turn times being experienced by its company and various other documents that the Motor Carrier believes support its argument that these conditions existed at the port facilities.

EQUIPMENT PROVIDER'S RESPONSE

The Equipment Provider responded that it does not believe the situation on the West Coast is a condition of Force Majeure. Per the UIIA, a Force Majeure situation would be defined as "In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in Provider's Addendum, or Provider's applicable Tariff, as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond the Motor Carrier's control, the Motor Carrier shall be exempted from the per diem charges to the extent of, and for the duration of, the condition that prevented the redelivery of the Equipment." The Equipment Provider argues that "port congestion" cannot be compared to an Act of God, war, insurrections, strikes, fire, or flood. In addition, the Motor Carrier's references to Equipment Providers tariffs should be excluded from the panel's review as these documents are agreements between the Equipment Providers and its customers, not the Motor Carriers. The Equipment Provider indicated that "port congestion" and "force majeure" are recognized as two separate issues.

The Equipment Provider responded with e-mail confirmations from the facilities (TTI, Pier A and PCT) confirming their normal operating hours and dates that these facilities were closed during the interchange period of 9/18/14 through 12/1/14. Based on the responses from the terminals, the Equipment Provider indicated that none of the operating hours associated with these facilities had any impact on the Motor Carrier's ability to return the equipment within the free time period.

The TTI terminal normal operating hours are:

1st shift 8:00am – 5:00pm

2nd shift 6:00pm – 3:00am

TTI confirmed it was open during normal business hours from the dates of 09/18/2014 to 12/01/2014. TTI also confirmed that all truckers are provided with gate passes when they check in. Therefore, if the Motor Carrier was turned away, it would just need to provide the gate pass number to prove that it had attempted to return the empties, but was turned away.

Pier A confirmed it does not provide turn away tickets & its normal business hours are as listed below:

Monday thru Friday 0800 – 1700

Monday thru Thursday 1800 – 0300

Pier A also confirmed it was closed on the following dates, outside the normal business hours:

10/02/2014 – stop work meeting

11/6/2014 – stop work meeting

11/27/14 – Thanksgiving Holiday

PCT confirmed that it does not provide turn away tickets and its normal business hours are as listed below:

Monday thru Friday 0800 – 1700

Tuesday thru Friday 1800 – 0300

PCT also confirmed it was closed on the following dates, outside the normal business hours:

10/2/2014 1800 shift

11/6/14 1800 shift

11/11/14 0800 & 1800 shift

11/27/14 0800 – 1800 shift

12/4/14 0800 – 1800 shift

12/24/14 & 12/25/14 0800 shift & 1800 shift

12/31/14 0800 & 1800 shift

PCT noted that it was open some Monday night shifts during this time.

DISCUSSION

The majority of the supporting documentation provided by the Motor Carrier encompasses a wide range of dates of JOC articles discussing the congestion issues on the West Coast, a court decision involving the subject matter of force majeure, individual U/I/A Equipment Providers' commercial tariffs, and eModal transmissions

that address conditions at specific facilities as it relates to equipment return. IANA staff went through all of the documentation that was provided and identified the information that is dated between the timeframe of the interchange dates related to the invoices above and for the e-Modal transmissions that were specific to the facility where the interchange of equipment occurred. This information has been included as part of the primary documentation for this claim. The other supporting documentation is available under Central Desktop under the document titled "ADDL SUPPORTING DOCS" for the panel's review as well.

Journal of Commerce Articles: The JOC articles included with the claim are dated between 09/18/2014 through 12/01/14 and provide general statements regarding the congestion issues on the West Coast and the overall conditions that existed at the Port of Los Angeles and Port of Long Beach. There were no JOC articles provided by the Motor Carrier that specifically described the conditions at the TTI, Pier A or the PCT facilities, which are the facilities where the equipment associated with the disputed invoices was in-gated. (Please see operating hours provided by these facilities above).

Court Case Referenced by Motor Carrier – United Arab vs PB Express, Inc.: The Motor Carrier submitted a copy of a court case involving UIIA EP, United Arab Shipping and UIIA MC, PB Express, Inc. that was regarding force majeure due to work stoppage of independent contractors hired by the Motor Carrier. The original court decision was found in favor of United Arab Shipping, but was later reversed and found in favor of PB Express. The court determined that the specific situation associated with the work stoppage was beyond the Motor Carrier's control and therefore force majeure would be applicable.

Equipment Provider's FMC File Tariff: The Motor Carrier also submitted copies of several Equipment Providers' tariffs that are on file with the Federal Maritime Commission (FMC). However, these tariffs are considered outside the scope of the UIIA.

eModal E-mail Communications: The Motor Carrier provided copies of e-mail communications from eModal. These communications identified specific conditions at various facilities. On 09/24/2014, an eModal transmission was sent indicating that dual transactions and full pick-ups at SSA - Pier A would be cut off for the remainder of the first shift. On 9/30/2014 & 10/01/2014, an eModal transmission stated PCT would not be receiving empty equipment for EP on 10/1/14 from 1800 – 0300 to 10/2/14. On 10/23/14 at 2:31 p.m., an eModal transmission stated that Pier A would not be accepting empty returns until further notice, however that same afternoon at 4:22 p.m. an updated eModal message was transmitted to Motor Carriers that stated Pier A was receiving all empties again. All other eModal transmissions that were not related to PCT, Pier A or TTI (in-gating facilities) have been included under the document "ADDL SUPPORTING DOCS" and is available through Central Desktop for the panel's review.

Other Miscellaneous Supporting Documentation: The Motor Carrier also presented as part of its case copies of advisories from two individual Equipment Providers related to the port congestion, information related to several Equipment Providers assessing port congestion surcharges, fact sheets from the Pacific Maritime Association discussing the port congestion issues and also GPS data collected by the Motor Carrier showing truck turn times. This evidence is being presented by the Motor Carrier in support of its basis that conditions existed that were beyond their control, which precluded the Motor Carrier from being able to return the equipment within the specified free time.

As precedent in regards to identifying a situation as falling under the Force Majeure provision of the UIIA, the IIEC has previously indicated that in situations when the facility is open, the applicability of force majeure would need to be determined by each equipment provider on a case by case basis dependent upon the conditions that existed at the specific facility, on a specific date and time, and whether these conditions prevented the pick-up and/or re-delivery of equipment.

In regards to the Motor Carrier's basis relating to SB45, this legislation indicates that no per diem can be assessed to the Motor Carrier under the following conditions: 1) when the intermodal marine terminal or terminal truck gate is closed during posted normal working hours, or during a labor disruption or any other period involving an act of God or any other planned or unplanned action that closes the truck gate, 2) when the intermodal marine terminal decides to divert equipment without 48 hours' electronic or written notification to the Motor Carrier, 3) when a loaded container is not available for pickup when the Motor Carrier arrives at the intermodal marine terminal, and 4) when the intermodal marine terminal is too congested to accept the container and turns away the Motor Carrier. Section G.11 of the UIIA states that all parties must comply with all applicable federal, state and local laws, rules and regulations. Evidence presented by the Equipment Provider related to the operating hours for each of the in-gating facilities included specific dates that PIER A and PCT had unplanned closures for work stoppage meetings that would preclude the assessment of per diem charges on these dates under SB45.

DECISION

The panel reviewed all documents and evidence submitted by the parties. The two modal panel members could not reach a consensus on whether the Motor Carrier proved Force Majeure under Section G.12. of the UIIA or that the specific conditions set forth under the California Business and Professions Code Section 22928 (SB45) were met on an overall basis to relieve the Motor Carrier from the per diem charges being disputed under this claim. The Motor Carrier panel member noted that it thought the GPS data provided by the Motor Carrier showed that there was an increase in turn times, which resulted in impacting the Motor Carrier's ability to return the equipment in a timely manner. The Motor Carrier panel member thought this qualified as a condition under Section G.12. and that additional free time should be extended to the Motor Carrier to match the same percentage that its turn times had increased. Since there was no consensus between the modal panel members, the third panel member was brought in to render a decision under Exhibit D to the UIIA.

The third panel member finds in favor of the Equipment Provider with the exclusion of two invoices where an adjustment was prescribed (see chart below). There was not sufficient evidence presented by the Motor Carrier to support that the conditions under Section G.12 Force Majeure were met and precluded the Motor Carrier's ability to redeliver the equipment back to the Equipment Provider within the specified free time. However, the third panel member finds that evidence was presented that showed there were unplanned closures at the PCT and Pier A facilities for work stoppage meetings on the dates of 10/2/14 and 11/6/14. On the date of 10/2 however, the PCT facility was open during its normal posted hours for the first shift from 0800 – 1700, but closed during the second shift from 1800 – 0300. The California State regulation SB45 precluded the assessment of per diem charges to the Motor Carrier during the timeframe the facilities were closed. The third panel member finds that the invoices where the Motor Carrier was charged per diem on the date of 11/6/14 when both PCT and Pier A were closed for both shifts should be adjusted (see chart below).

UIIA PROVISIONS RELIED UPON BY BINDING ARBITRATION PANEL

The panel relied upon the following provisions from the UIIA (October 1, 2014) to make its decision:

G. General Terms

11. Compliance with the Law: The Parties shall obey all applicable federal, state and local laws, rules and regulations including those pertaining to the transportation of hazardous material. [Revised 08/26/13]
12. Force Majeure: In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in Provider's Addendum, or Provider's applicable Tariff, as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond the Motor Carrier's control, the Motor Carrier shall be exempted from the per diem charges to the extent of, and for the duration of, the condition that prevented the redelivery of the Equipment. [Revised 09/13/04]

EXHIBIT D TO THE UIIA

3. A three-member arbitration panel will be appointed by IANA to handle disputed invoices submitted for arbitration. The panel will consist of one IANA member from each mode, i.e. a Motor Carrier, Water Carrier and Railroad. However, the decision will be rendered by the two arbitrators representing the modes involved in the disputed invoice(s). The third appointed arbitrator from the mode not involved in the transaction will act as an alternate, and will render a decision only in the event the arbitrators from the involved modes cannot agree on a resolution of the dispute.

DECISION: A majority of the panel finds in favor of the Equipment Provider with an exception of the following invoices where some adjustments have been applied.

Invoice Number	Ingate Facility	Last Free Day	In-Gate Date	Adjustment	Reason	NEW Amount Owed
NAIM3061058	PCT	11/4/14	11/7/14	\$00.00	PCT Closed on 11/6/14 for both shifts due to work stoppage meeting	\$00.00
NAIM3063005	PCT	9/29/14	11/6/14	1 day @ \$00.00	PCT Closed on 11/6/14 for both shifts due to work stoppage meeting.	\$00.00
NAIM3075449	Pier A	11/11/14	11/18/14	No adjustment (no charge issued by EP for the date of 11/6/14 as it was still within free time period.	PIER A – Closed for both shifts on 11/6/14 for work stoppage meeting.	\$00.00
BLAE0176270	Pier A	11/19/14	11/20/14	No adjustment (no charge issued by EP for the date of 11/6/14 as it was still within free time period.	Pier A – Closed on 11/6/14 for work stoppage meeting.	\$00.00
BLAE0176268	Pier A	11/19/14	11/20/14	No adjustment (no charge issued by EP for the date of 11/6/14 as it was still within free time period.	Pier A – Closed on 11/6/14 for work stoppage meeting.	\$00.00

Total Invoice Adjustments: \$00.00

Note: There were no invoices under this dispute where Pier A was the in-gating facility on the date of 10/2/14, which is the other date that this facility was closed for both shifts.

CASE REVIEWED AND DECIDED BY:

WALTER WATSON
Rail Carrier Member

AL SMERALDO
Ocean Carrier Member

DAVE MANNING
Motor Carrier Member