



WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

Comments of the
World Shipping Council

Submitted to the
Federal Maritime Commission

In the Matter of

**Petition of the Coalition for Fair Port Practices for
Rulemaking; Notice of Filing and Request for Comments
Petition P4-16**

February 28, 2017



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The World Shipping Council (“WSC” or the “Council”) files these comments in response to the Commission’s Request for Comments on Petition P4-16, published on December 28, 2016 (81 Fed. Reg. 95612). For the reasons described below, the Commission should deny the petition.

WSC is a trade association that represents the liner shipping industry on regulatory, policy, safety, and environmental issues. The Council’s twenty-two members operate approximately ninety percent of global container capacity. The Council’s members would be directly and adversely affected if the Commission were to adopt the relief requested in the petition.

There is no disagreement that protracted longshore labor negotiations on the West Coast in 2014 and 2015 resulted in port congestion that slowed cargo movement through the ports and caused increased costs for *all* parties involved in the transportation of maritime cargo containers, including costs associated with storage and use of containers and other equipment. It is also true, however, that that unusual West Coast labor situation has been resolved, and that cargo is now moving relatively smoothly through the nation’s ports. There is no current basis for entertaining the requested relief, and proceeding with a rulemaking on the basis of the petition would result in a regulation that is unsupported factually or legally, and that would run a high risk of encouraging more disputes and port congestion.

The petition fails for three primary reasons.

First, the Petition relies exclusively on pre-1984 Act rules and associated cases, largely covering non-containerized shipments, as the legal basis for the requested new regulations. The petition is explicit on this point, stating that: “The interpretive rule proposed by the Petitioners would essentially revive rules that the Commission had in place for the Port of New York for over 40 years.” *Petition* at 32. Nowhere does the petition address the reasons why the Commission repealed those regulations twenty-four years ago – chief among those reasons being the fact that the old rules were adopted to address a pre-containerization world. The petition does not even attempt to identify any alternative precedent or legal theory in support of the proposed regulations, and the petition fails to appreciate the fact that the purpose and nature of detention charges in a containerized world are different than demurrage charges in a breakbulk world. In addition, the characterization of the requested relief as adoption of an “interpretive rule” is

legally incorrect. The requested relief, if adopted, would be a legislative rule, and thus would have to be treated with the procedural formality and substantive rigor that such rules require.

Second, the petition does not provide an adequate factual basis to conclude that there is a current, widespread market failure with respect to detention and demurrage charges that would justify the adoption of a prescriptive, nationwide rule of the sort proposed. Many of the exhibits to the petition demonstrate that detention and demurrage charges during recent instances of port congestion were mitigated by carriers and marine terminal operators, demonstrating that the marketplace and existing carrier and MTO mechanisms are capable, along with the FMC complaint procedure, of addressing charges for which some relief is appropriate.

Third, the petition fails to acknowledge the very real possibility of unintended consequences that could accompany adoption of the requested relief. Free time practices and detention and demurrage charges provide incentives for the expeditious movement of cargoes over ports and for the prompt return of equipment. By limiting the situations in which detention and demurrage may be collected, a rule of the sort requested by the petition may cause carriers and MTOs to limit free time in order to reduce the commercial exposure artificially imposed by a rigid rule. That, we presume, would be an outcome that would be unwelcome to shippers that today, according to the petition itself, benefit from free time allowances up to twenty days. *Petition* at Exhibit C-1. In addition, implementation of the relief requested would raise numerous practical issues about how such a regulation would be applied, including how the parties would apply the very fact-specific tests proposed. Those difficulties must not be underestimated.

The fact that the petition ignores the potential unintended consequences does not mean that the Commission may safely do the same. If the Commission issues a regulation, it is the Commission that must accept responsibility for the consequences of that regulation, and the issues are more complicated and less predictable than the petition presents them to be.

We discuss each of these points in more detail below.

1. The petition does not provide an adequate legal basis to proceed with a general rulemaking.

A. The legal precedent relied upon by petitioners does not support the requested relief, and, to the extent that precedent is applicable at all, forecloses much of that relief.

The petition is explicit about what it seeks: reversion to regulations that were enacted and repealed decades ago in a pre-containerized era. Specifically, the petition states at page 32 that:

“The interpretive rule proposed by Petitioners would essentially revive rules that the Commission had in place for the Port of New York for over 40 years.”

Those regulations, which were codified at 46 CFR Part 525 when they were effective, were repealed by Commission order in Docket No. 92-29, 58 Fed. Reg. 10983 (1993), after no party commented on the proposed repeal. A central reason why the Commission repealed the regulations that petitioners now seek to resuscitate is that the old rules did not apply to containerized cargo, and containerized cargo at the time of repeal (and today) comprises the majority of liner cargo movements. The Commission put it this way:

“As noted above, the Commission did not receive any comments on the proposed removal of part 525. The Commission notes that part 525 does not apply to containerized cargo and that such cargo now comprises the majority of liner cargo movements into the port. Therefore, it would appear that the underlying conditions that existed when part 525 was promulgated have fundamentally changed and retention of the rule is no longer necessary.”

Id. at 10984.

In the same way that the petition seeks to bring back old rules that were designed for a different time and a very different commercial marketplace, it seeks to use the legal precedent from those old rules as the legal basis for its requested relief. The petition cites the Commission’s predecessor’s 1948 decision adopting free time and demurrage charges for the Port of New York as the primary legal support for the petition’s requested relief.¹ Indeed, that case is essentially the only substantive precedent cited by the petition, which invokes that 1948 case fourteen times.

The current petition is not the only time that the Commission has been asked to apply its old precedent regarding free time and demurrage to modern port congestion issues. In *Petition of the Association of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference at the New York/New Jersey Port District (P3-02)*, petitioners there asked the Commission to open an investigation of the NYTC’s truck detention activities. There, as with the current Petition, the proponents of Commission action relied heavily on the Commission’s *New York I* case and its progeny.

In *Bi-State*, the Commission rejected petitioners’ reliance on *New York I* and similar cases, stating:

“Bi-State cites only to Commission findings dating back to the original truck detention investigations and the *American Export-Isbrandtsen* cases of the 1960 and early 1970s rather than providing economic analyses or other studies to corroborate each of its claims. Petition at 19-22. Bi-State concedes that these pre-

¹ See *Petition* at 5, n.5, citing *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (1948) (*NY I*).

containerization holdings and resulting regulations do not take into consideration the technological advancements of the last decade, but asserts that they clearly establish that ‘port congestion is against public policy; that port congestion decreases the efficiency of terminals, and that port congestion increases costs to importers, exporters, and truckers; and that the MTOs require incentives to create efficiency, such as reasonable and just Truck Detention regulations, to ease the congestion caused by MTOs.’ Petition at 18. While Bi-State has accurately recited a portion of these holdings, this precedent more correctly provides, in relevant part, that given the unusual truck delays caused by marine terminals in the Port in the 1960s, it was unreasonable for NYTC to omit truck detention rules from its Tariff, and it was appropriate for the Commission to order and promulgate such rules. *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 6 S.R.R. 138 (I.D. 1965), *aff’d* 9 F.M.C. 505 (1966); *American Export-Isbrandtsen I* at 968; *American Export-Isbrandtsen II* at 829. However, Bi-State fails to demonstrate how these cases support its current allegations.”

Bi-State, Order of Dismissal (FMC 2004).

In the same way that the Commission in *Bi-State* rejected petitioners’ attempt to apply old precedent to a superficially similar set of arguments without addressing all that had changed legally and commercially since that precedent was established, the Commission here should reject petitioners’ request that the Commission simply re-impose a regulatory scheme from decades ago.

The problem with petitioners’ reliance on old cases is not simply that the cases are old. The problem is that both the law and the commercial circumstances have changed in such a way that it would be dangerously simplistic for the Commission to proceed as if both the facts and the law are today as they were in the 1940s, 50s, 60s and 70s. A couple of examples may be helpful.

With respect to the law, the cases cited by petitioners were decided at a time when, under Section 17 of the 1916 Act, the Commission had the statutory authority to prescribe commercial rules and practices that regulated parties were legally bound to adopt. The second sentence of Section 17 of the 1916 Act that contained that authority was dropped when the 1984 Act was enacted.² In addition to the fact that the Shipping Act no longer authorizes the Commission to

² Section 17 of the 1916 Act read as follows:

“Every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced a just a reasonable regulation or practice.”

prescribe particular practices or rules, the other difference between the law at the time of the cases relied upon by petitioners and the law today is that the Commission no longer has the authority to set rates and charges. See *Notice of Inquiry Concerning Use and Effect of Surcharges by Common Carriers and Conferences*, 26 S.R.R. 108, 119 (“We note, however, that the Commission does not have statutory authority to regulate the level of rates charged. . .”).

These two changes in the law matter, because the old New York demurrage rules were very specific and prescriptive. The Commission no longer has authority to adopt such rules, nor may it avoid that lack of authority by purporting to “interpret” 46 U.S.C. 41102(c) in the manner requested by petitioners.

As an example of how the changes in the law place the petitioners’ requested relief beyond the authority of the Commission to grant, paragraph (d) of Exhibit A to the petition would prohibit a carrier or MTO from charging more than a “compensatory” rate for detention or demurrage under certain circumstances. Deciding what is permissibly “compensatory” is classic ratemaking, which the Commission cannot do. As a result, there would be no means by which the Commission could even consider, much less implement, this requested relief. On this point about what is a “compensatory” charge, it is important to recognize that even the *New York I* decision upon which petitioners rely did not involve an affirmative U.S. Maritime Commission decision about what rate is “compensatory” and what rate is “penal”. Instead, the Commission simply *assumed* that the first-period demurrage rates were “compensatory,” and that higher rates for later periods were “penal.” The Commission explained it this way:

“In the absence of proof, or of a basis for valid inference, that the cost of harboring demurrage doubles in the second period and quadruples in the third, we find that the charges for the second and third periods are penal to the extent of the excess of those charges over charges for the first period.”

NY I at 109.

The part of the *NY I* decision that should make petitioners wonder whether they really want what they are asking for follows the passage quoted above. In that next passage the Commission states (even in that time when the Commission had ratemaking authority) that the carriers had wide latitude to set their own “compensatory” rates that would apply to first tier demurrage:

“If those charges are not compensatory, the carriers should amend their tariffs by the publication of such new demurrage rates as meet their needs and the requirements of law.”

Id. In other words, if the Commission were to adopt petitioners’ request (and thereby seek to exercise rate authority that it no longer has), then under the very case upon which petitioners rely, carriers and MTOs could simply raise their first-tier detention and demurrage rates to make up the difference, if the market would allow it. Presumably petitioners would not support such

a result, but this could be the outcome if the requested relief were granted and survived judicial review.

Put differently, all of the requested relief is in one form or another an attempt to set some maximum level of detention and demurrage charges. The market today fosters broad competition with respect to those rates, as the petition itself points out at pages 7-9, 13, and 22. If the Commission were to attempt to control that market by labelling some charges as compensatory and some as penal (even though the Commission has no authority to prescribe rates levels for each category), carriers and MTOs could adjust their practices to render the regulation irrelevant, which would be entirely consistent with the greater reliance upon the marketplace that shippers sought and that the Congress delivered in the 1984 Act and in the Ocean Shipping Reform Act. The precise nature of any market adjustments would depend on what actions were perceived as providing a competitive advantage to any given market player, but for purposes of illustration they could include changes in free time periods, changes in daily charges, or moving away from a free time model to a usage-based model for equipment.

An additional reason why the old legal precedent relied upon by petitioners is unavailing is that that precedent expressly rejected some of the very claims for preferential treatment that petitioners make here. For example, petitioners in Exhibit A seek to place the financial risk of delays from government container inspections on carriers and on MTOs, even though carriers and MTOs have no more control – and more often less control – over those events than shippers have. *NYI* expressly rejected that same request, stating after a long discussion about the various government requirements for cargo moving through the nation’s ports that “the carriers can hardly be required to accommodate cargo on their piers free of charge because it may fail to conform to the standards applicable to it.” *Id.* at 97.

From a factual perspective, containerization simply did not exist in 1948 when the petitioners’ primary legal precedent was decided. Although it is true that container detention charges to some extent play a role similar to that of demurrage – encouraging the flow of cargo and equipment – detention charges also compensate the carrier for direct equipment costs and opportunity costs associated with containers that are not returned on time. Those carrier costs do not cease when cargo flows are impeded by weather, labor unrest, or political actions (all of which would be bases for free time extension or payment waiver under the petition’s proposed rule). Given these unavoidable carrier equipment costs, it is entirely reasonable for carriers to allocate such costs by contract or tariff rule, and competition in the marketplace – not regulation – is the best mechanism for setting the terms of that allocation.

There is no magic to the concept of free time with respect to containers; it is simply an extension to containerized trade of an old idea. There is no reason, for example, why carriers could not simply charge a flat fee for each day that the shipper has custody of the container. This point is important analytically, because the petition proceeds from an assumption that container free time must be provided by carriers, and that detention charges for exceeding free time must follow some particular pattern. Neither assumption is true, and both petitioners and the

Commission should recognize that if one-size-fits-all regulations were applied to container detention, the market could respond with different ways of recovering equipment costs – ways that might have nothing to do with free time or detention.

Finally with respect to the factual differences between today's commercial and operational situation and the 1940s operational system that was in place when the primary legal authority on which petitioners rely was adopted, the petition entirely fails to address how chassis availability and mobility affect the ability of all parties to move containerized cargo. The chassis market is complex, and it is in transition from a carrier-owned model to a third-party, trucker, and shipper-owned model. Chassis availability and container movement are two sides of the same coin, but chassis providers are in many cases not regulated by the Commission. That fact, and the resulting complexity, are not addressed by the petition, but they would have to be considered by the Commission if it were to initiate a rulemaking.

The regulations proposed by the petition would place the Commission in the position of allocating commercial risk even when no party to a detention or demurrage transaction caused the situation leading to the charge. That is the case because whether a charge was lawful or not under the proposed regulations would depend on whether the ocean carrier or MTO failed “to tender cargo for delivery or accept equipment returns during free time, for **any reason** beyond the shipper's, consignee's, or drayage provider's control . . .” *Petition* at 38 (emphasis in original). Under the petition's requested relief, the fact that a carrier or MTO also did not cause the circumstances giving rise to the delay would be immaterial to assignment of responsibility and potential liability. In addition to the example of Customs inspections discussed above, the petition seeks waivers of charges where difficulties are caused by weather or political protests – events that are similarly outside of the control of carriers and MTOs. Put in terms of the Shipping Act provision upon which the entire petition is based, there is no precedent and no logical argument for the proposition that it is not “just and reasonable” within the meaning of 46 U.S.C. § 41102(c) for parties to commercially apportion risk for factors outside of the control of either party.

In summary, the petition is based on old cases and old regulations that addressed non-containerized cargo, and those old cases themselves are based on statutory authority that no longer exists. Those cases, therefore, cannot provide a legal basis for the relief requested by the petition, and the petition offers no alternative legal basis for the requested relief. For these reasons alone the petition must be dismissed.

B. The relief requested would constitute a legislative rule, which may only be promulgated through notice-and-comment rulemaking, and which would be subject to judicial review.

There is one further legal issue that warrants comment, although the Commission need not address this issue if the Commission denies the petition on the other grounds discussed in

these comments. This additional issue is the question of whether the proposed relief constitutes a “legislative” rule, or whether it would fall under the category of an “interpretive” rule, as suggested by the petition at pages 2 and 32. The difference is significant, because legislative rules must comply with the Administrative Procedure Act and must follow the well-known public notice and comment procedure, and are subject to judicial review. “Interpretive” rules need not follow that procedure. The petition is a bit coy on this point, but if the Commission were to consider further action as requested by the petition, the Commission would have to address the classification of the relief requested.

The courts have been candid that the distinction between legislative and interpretive rules is not always clear. In general, “[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties – and that would be the basis for an enforcement action for those violations or requirements – is a legislative rule.” *National Mining Association v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). The regulation sought here would make it unlawful for a carrier or MTO to collect a detention or demurrage charge in any situation in which that entity failed “to tender cargo for delivery or accept equipment returns during free time, for **any reason** beyond the shipper’s, consignee’s, or drayage provider’s control . . .” *Petition* at 38 (emphasis in original). Such a regulation would not only form the basis for a claimed violation of 46 U.S.C. § 41102(c), violations of which can result in both fines and reparations awards, but it would also revive and expand the scope of an old Commission regulation. Indeed, as discussed above, the explicit characterization of the action requested by the petition is that: “The interpretive rule proposed by Petitioners would essentially revive rules that the Commission had in place for the Port of New York for over 40 years.” *Petition* at 32.

The D.C. Circuit has enunciated a four-part test for identifying legislative rules. The test is stated in the disjunctive; if any prong is met, then the agency action is a legislative rule:

“Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect”, which in turn is best ascertained by asking: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to *any* of these questions is affirmative, we have a legislative, not an interpretive rule.”

American Mining Congress v. Mine Safety and Health Administration, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (emphasis added).

The second and third *American Mining* factors cannot be applied here, because the Commission has taken no action, but factors (1) and (4) both confirm that the petition seeks a legislative rule. With respect to the first prong of the test, it is clear today that there is no

recognized legal theory that would prevent a carrier from charging detention in every case in which the inability of the shipper to return a container was not the fault of the shipper. As discussed above, the Commission's predecessor rejected that approach in *NY I*, the very case upon which the petition principally relies. The petition seeks to create new, enforceable obligations, and thus it is a legislative rule under factor (1). With respect to prong (4) of the *American Mining* test, the petition expressly requests the re-adoption of a prior legislative rule – the New York detention and demurrage rules. There can be no more plain indication that the petition seeks a legislative rule. Thus, if the Commission were to proceed with a rulemaking, an action that is not supported by the record here or by the law, any such rulemaking would be subject to the notice and comment procedures of the Administrative Procedure Act and to judicial review.³

2. The Petition Does Not Provide an Adequate Factual Basis for the Requested Relief.

In exercising its authority to initiate rulemakings to add new regulatory requirements, the Commission has consistently required that petitions for rulemaking “are to be accompanied by supporting facts and data, so as to convince the Commission of the need for broad regulatory relief.” *Marine Terminal Tariff Provisions Regarding Liability of Vessel Agents*, 27 S.R.R. 611, 614 (FMC 1996). Similarly, in *Bi-State Motor Carriers*, *supra*, the Commission denied a petition for investigation that was supported by press articles from the *Journal of Commerce*⁴ and by affidavits making generalized statements about truck delays and port congestion. See *Bi-State*, Order of the Commission at 16-18 (2004). Applying those standards to the factual submissions offered in support of the petition, the petition fails to make a factual showing that a rule of

³ On this point about the accurate characterization of the relief requested by the petition, the form letters filed in support of the petition bring no more clarity than does the petition itself. The letter filed by Western Overseas Corporation is representative. That letter states on page 2, first full paragraph, that:

“I want to emphasize that we are not asking the Commission to add new regulations, since the Petition makes it clear that the assessment of demurrage and detention in situations where the delays are not attributable to the cargo interests, is unlawful and violates the Shipping Act.”

Whatever this and other commenters signing similar form letters may think about what the *petition* makes clear, there is no interpretation of the Shipping Act of 1984 or OSRA – or indeed of the 1916 Act – that makes it unlawful to charge detention or demurrage in every case where the inability to pick up cargo or return equipment is “not the shipper’s fault.” Such a ruling would be a substantive change in the law, and a major one, and if the Commission were to attempt such a change, it would have to do so through notice-and-comment rulemaking, petitioners’ confusion on the point notwithstanding.

⁴ The petition also cites to numerous press articles for various purposes, but those articles merely report on the fact that various parties had complained about congestion-related problems. Those articles do not provide any factual evidence that would support initiation of a rulemaking to address alleged violations of 46 U.S.C. § 41102(c).

national applicability is warranted here. That failure provides a second, independent basis to dismiss the petition.

Exhibit C-1 to the petition is the verified statement of Christopher Grato of International Motor Freight, Inc. (IMF). The exhibit makes general allegations about port congestion in the ports of New York/New Jersey and Philadelphia in 2014-2015. The exhibit cites a number of factors for such congestion, including “labor issues, inclement weather and equipment shortages,” as well as federal regulations on truck driver hours of service. The declarant states that his company “realized exorbitant demurrage, per diem charges, and labor costs.” However, the exhibit goes on to state that of \$1,200,000 in alleged “per diem” charges, IMF paid only “approximately \$50,000-55,000,” or a little over four percent of the billed amount.

This lead declaration fails to support the requested relief in multiple ways:

1. The declaration is general and conclusory; it does not describe a single charge that would correspond to a situation to which the relief requested in the petition would apply. In other words, there is a description of several factors that caused port congestion, and there is a general description of charges being levied, but there is not even an allegation, much less a factual showing, that any particular charge was not “just and reasonable” within the meaning of 46 U.S.C. § 41102(c).
2. The declaration demonstrates that the declarant was not harmed by the alleged problems, stating: “IMF’s policy was not to advance any demurrage charges for our customers, and as a result, we had very little exposure in this area.”
3. The exhibit makes no attempt to apportion the alleged causes of congestion among the multiple causes cited, and provides no evidence as to whether and to what extent IMF’s customers disputed the charges, stating: “We were unaware if our customers did any behind the scenes negotiating.”

Exhibit C-2, by Mark Miller of MacMillan-Piper, Inc., states that: “In 2014, the contract negotiations between the ILWU and PMA resulted in labor unrest and work slowdowns at the port terminals in Seattle and Tacoma, beginning around Memorial Day and significantly worsening from October 2014 through May 2015.” As a result of that labor-related slowdown, the declaration claims that MacMillan-Piper was billed “nearly \$1.25 million in detention charges by steamship lines. . . .” The declaration also states that “[t]hat amount was eventually reduced to approximately \$250,000”, or approximately 20 percent of the original amount.

With respect to the twenty percent of the billed amount that was paid, there is no description of the circumstances associated with those containers, whether those amounts were disputed, the reasons given by the carrier for not waiving those charges, or whether the relief requested by the petition would apply to the facts surrounding those containers and those charges. Nor does the exhibit explain how the handling of the approximately 565 containers (about 2.7% of the total loaded moves for the referenced period) for which detention was paid

differed from the handling of the total number of 20,300 loaded containers moved during the time covered by the declaration. As such, although Exhibit C-2 reiterates the known frustrations of all parties during the West Coast labor negotiations in 2014-2015, it does not provide a factual basis for the relief requested by the petition.

Exhibit C-3, by Steve Hughes of Centric Parts, like Exhibit C-2, places the blame for port congestion in 2014-2015 on slowdowns associated with labor negotiations, stating also that: “Our demurrage issues halted almost immediately after the contract between the International Longshore and Warehouse Union and Pacific Maritime Association was ratified in 2015, with no discernable problem with delays or demurrage since then.” This declaration, therefore, confirms that the detention and demurrage charges complained of were tied to a specific labor event, and were not tied to ongoing carrier or MTO practices of the sort that would be appropriate for a general rulemaking.

The declaration does not describe how the handling or experience of Centric’s “82 shipments affected by the port disruption” differed from the rest of its shipments that make up its import volumes of “6,000 TEUs per year.” Thus, the declaration does not provide any details about whether the circumstances of the 82 affected shipments would be covered by the relief requested in the petition.

Exhibit C-4, by Donald Pisano of American Coffee Corporation, makes a number of complaints about how carriers and terminals run their businesses, and about the effects of labor slowdowns. However, the only specific instance complained of is the imposition of \$1,175 in demurrage charges that were associated with an inspection hold of a shipment by U.S. Customs. As discussed in section 1, above, the precedent upon which petitioners rely holds that delays associated with Customs inspections are not for the account of the terminal operator or carrier, and thus this declaration does not provide any example of a practice that could be said to contravene the section 41102(c) “just and reasonable” standard. *See NY I* at 96.

Exhibits C-5-8 provide only general statements that labor negotiations, weather, and Customs inspection delays led to demurrage and/or detention charges. These declarations do not describe details that could enable the Commission to identify any practices that could properly be addressed by a general rulemaking.⁵

Exhibit C-9, by Robert Leef of ContainerPort Group, Inc., describes four situations through Exhibits A-D. None provides a basis to grant the petition.

Exhibit A describes a situation in which the shipper (the declarant’s customer) agreed to pay approximately \$2,000 in per diem charges associated with three containers. This situation

⁵ The text of the petition cites Exhibit C-6 for the proposition that “demurrage practices have had a devastating effect on VLM’s bottom line. . . .” Petition at 16. Exhibit C-6 says nothing about “devastating” bottom line impacts, and indeed provides no information whatsoever about declarant’s profit and loss situation. The petition’s incorrect characterization of this exhibit serves as a caution that rhetoric is not evidence.

does not present any harm to the declarant's company, and there is no indication that the shipper that paid disputed the charges.

Exhibit B involves a situation in which a request for waiver of charges was declined in a situation in which the port was periodically congested, but the terminal was open and operating. There is no indication of the extent to which the declarant sought to move containers in advance of the expiration of free time. This sort of situation underscores the very real practical problems that would be associated with the relief requested by the petition. Would this sort of situation qualify for relief? How would the parties make that determination? What would be the port congestion implications if free time were extended based on weather slowdowns? Would shippers and truckers that were able through due diligence to move cargo be disadvantaged versus those who did not seek to move their cargo, but were granted relief? Neither this exhibit nor the larger petition seeks to answer those questions.

Exhibit C deals with a situation in which the carrier "eventually waived most of the charges," thus not presenting any harm to the declarant or its customers. These sorts of waivers are reflected in many of the exhibits to the petition.

Exhibit D addresses charges incurred during delays associated with the implementation of new terminal technology. The exhibit itself characterizes the charges as "not as significant as ones mentioned above," and thus they provide no basis upon which to initiate a rulemaking.

Exhibit C-10, by Robert Loya of California Multimodal, LLC (CMI), speaks to port congestion issues associated with West Coast labor negotiations in 2014-2015. The bulk of the exhibit is dedicated to problems with marine terminal appointment systems, which made it more difficult for drayage drivers to access containers on the terminal. It is unclear from the declaration what the scope of such problems was, and how many terminals experienced these problems. The declaration makes reference to amounts of demurrage billings for two overlapping periods during 2014-2015. The declaration is unclear whether these billings, of approximately \$2,500,000, were paid by CMI or were paid by CMI's customers. It is also unclear whether these charges were disputed, or whether some of the charges were waived.

In addition, although the number of \$2.5 million dollars in the aggregate sounds large, if one examines the spreadsheet showing demurrage for Container Freight/EIT, LLC, for the period September 2014 through March 2015 (which is the period highlighted on page 2 of Exhibit C-10), that amount was spread over a throughput of 51,941 containers, for an average of under \$49 per container. Especially without any facts about the circumstances in which demurrage was applied, and the exhibit provides none, these numbers are not evidence of unreasonable practices.

Exhibit C-11, by Al Raffia of Seafrigo USA, Inc., claims that declarant's company and its customers "have paid exorbitant charges for demurrage and/or detention," but there are no particulars, examples, or figures to support the claim. As such, this exhibit adds nothing to the petition.

Exhibit C-12, by Jaqueline Dossantos of All In One Customs Brokers, Inc., complains about detention charges of \$1,115 with respect to a single container, which charges appear to have arisen when free time was exceeded as a result of a U.S. Customs inspection of the container. As with the claim asserted in Exhibit C-4, the Commission has long held that carriers and MTOs cannot be forced to pay shipper costs associated with Customs inspections. Therefore, Exhibit C-12 provides no support for the petition.

Exhibit C-13, by Jeannette R. Gioia of Serra International, Inc., describes a situation in which special shipper instructions apparently delayed release of containers and their removal from the port, resulting in demurrage charges. It appears that the declarant's company paid the charges on behalf of the shipper, and was apparently reimbursed for the charges, so it appears that there was no harm to the declarant's company. The exhibit is silent on the question of whether the shipper disputed the charges, or whether the shipper negotiated or received any relief from the carrier. The situation described appears to have involved more in terms of shipper/carrier special instructions and factual nuance than is reflected in the exhibit, and the example thus underscores the fact-specific nature of detention and demurrage transactions. Certainly the unusual circumstances surrounding the shipment discussed in Exhibit C-13 do not provide a basis for initiating a general rulemaking.

Exhibit C-14, by Peggy Mecca of Mecca and Son Trucking Co., Inc., makes general statements and estimates of demurrage charges paid in 2014 and 2015, but, with the exception of the situation discussed below, provides no specifics.

The exception to the lack of specificity in Exhibit C-14 relates to two containers for which the declarant's company claims to have paid a total of \$2,600 in demurrage. There appears to be a factual dispute between the terminal and the trucker regarding whether free time should have been extended for these containers. The trucker contends that weather-related port congestion and a short work-week (Monday holiday) justified extension of free time after the trucker was unable to retrieve containers on the last free day. The terminal operator, on the other hand, provided information to the trucker that the terminal was open and that high volumes of containers were moving Tuesday-Friday of the disputed week. There is nothing in the exhibit that indicates that the trucker attempted pick-up before the last day of free time.

Similar to Exhibit C-13, Exhibit C-14 presents a disputed factual situation. Equally important in the context of this petition for rulemaking, it does not appear that the relief requested by the petition, had it been in place at the time the dispute occurred, would have provided a different outcome. For example, under the petition's Exhibit A, paragraph (b), free time would be extended if "(1) port congestion; (2) port disruption; [or] (3) weather-related events" makes a terminal or ocean carrier "unable to tender cargo for delivery and/or to receive equipment. . . ." How would that apply to the circumstances described in Exhibit C-14? There was some snow and heavy activity on the terminal during the week in question, but the terminal operator described the flow through the terminal as "fluid," and noted average gate moves of 5000 per day during the week in question. It also appears that the trucker did not attempt pick-

up until the last day of free time. Under those circumstances, how would the requested relief provide certainty to any party? It would not.

Exhibit C-15, by Jim Shapiro of Thunderbolt Global Logistics, LLC, expresses concern generally about congestion issues in Oakland in the first quarter of 2015. The exhibit contains an invoice for detention charges on eight containers, but states that the declarant had to pay detention on “several” containers. Thus, it is unclear how many containers incurred detention charges, and there is insufficient information to ascertain the circumstances in which the detention charges were billed. There is no indication if relief was requested or received for any of the containers. This example, whatever the complete acts may be, do not as presented provide a sufficient basis for the Commission to initiate a general rulemaking of nationwide applicability.

As noted at the beginning of this section of the WSC comments, the Commission requires a solid factual showing before it initiates general rulemakings. That policy is appropriate both because it prevents the Commission from wasting finite resources on issues that do not require regulation, and also because if there is not enough evidence to demonstrate the existence and clear nature of a problem, then there is not enough information to fashion a regulation that would deliver a useful solution. That is the case here.

The exhibits attached to the petition reiterate what the Commission and the parties already know, which is that a combination of labor negotiations and intermittent inclement weather, along with other operational issues that varied from port to port, caused port congestion from the fall of 2014 until the spring of 2015. As a result of that congestion, there were higher than usual operating costs for carriers and marine terminals and higher than usual billings for detention and demurrage charges. There were also higher than usual instances of relief being provided from those charges. That these charges were often mitigated is demonstrated by Exhibit C-1, which recounts that the declarant paid less than five percent of the charges originally billed. This reflects a system that is generally working, not a system that is broken.

There is no indication that any scenario described in any of the exhibits to the petition would turn out any differently – either procedurally or substantively – if the Commission were to adopt the regulation proposed by petitioners. As discussed in section 3 below, however, adoption of such a regulation would cause additional confusion both for the affected commercial parties and for the Commission when it may be called upon to adjudicate disputes concerning detention and demurrage.

3. The Proposed Regulations Would Create Confusion, Not Clarity, and They Would Not Provide Additional Relief for Any Party.

The relief requested by the petition is not supported either by the law or by the facts presented in the declarations contained in Exhibits C-1 through C-15. This does not mean that detention and demurrage practices cannot in any instance run afoul of the “just and reasonable” standard in 46 U.S.C. § 41102(c). One can certainly imagine a situation in which one party prevented another party, for example, from removing cargo from a terminal, but nevertheless charged demurrage to the cargo interest or its trucker. Even in that situation, the claimant would have the burden of proof to establish that it had in fact been prevented from performing by the other party, that the other party was culpable in some way, and that the claiming party had fulfilled its obligation to try to make timely performance.

The petition, in contrast, would replace the well-established fact-specific inquiry and burdens of proof with a sweeping rule that would place financial responsibility on carriers and MTOs when a cargo interest is unable to pick up cargo or return equipment in the case of:

“any event or circumstance that is beyond the control of the shipper, receiver, or motor carrier, including but not limited to:

- (1) port congestion; (2) port disruption; (3) weather-related events; (4) delays as a result of governmental action or requirements, unless such delays could have been prevented by the shipper or receiver.”

What would such a standard mean in practice? Could a shipper wait until the last day of free time, and then claim that free time must be extended because heavy rain made the roads congested, and the trucker could not access the terminal in time to pick up the cargo? If the shipper is required to try to pick up cargo before the last day of free time, how many days before must it attempt pick-up? What documentary showing does the shipper have to make before it can claim extended free time under the proposed rule? Is it a violation of the Shipping Act for a carrier to bill a shipper for detention if the shipper has not made a written request for relief, with proper documentation? What if the shipper makes a claim but the carrier disputes the facts? If a terminal operator releases a container against which it claims demurrage while there is an on-going dispute about whether or how much demurrage is due, can the MTO place a lien on other containers associated with that shipper? If not, how is the terminal operator to secure amounts that may ultimately be owed to it? May it require that shippers post a bond or maintain a settlements account? Does it matter how many total days of free time have been granted? Is the rule the same if one shipper has five days of free time and another has twenty days? Who decides?

All of the questions above, and many more, would arise if the relief requested in the petition were granted. Those are just the day-to-day questions, applicable to whatever percentage of the twenty-one million total annual U.S. import and export boxes may have a

detention or demurrage charge. But there are equally serious questions – policy questions – that the petition ignores but that the Commission may not.

If the petition were granted, and MTOs and carriers were legally required to extend free time even when the MTO or carrier had in no way caused whatever issue had delayed the shipper's performance, that could result in carriers and MTOs setting shorter free time periods in order to reduce their financial exposure. Is this a result that shippers want? From a port congestion perspective, is it wise policy to provide shippers with a "get-out-of-jail-free card" that reduces their incentive to promptly remove their cargo from the terminal and promptly return equipment and chassis? If the answer is that shippers already have an incentive to move cargo and equipment as quickly as possible, then why do some shippers negotiate for free time periods up to twenty days, as is reflected both in the petition and in the Commission's 2015 reports on port congestion? One can reasonably argue that carriers in many circumstances are too generous with the free time they agree to provide to many shippers, but this is currently a commercial matter.

There is nothing perfect about the inter-related transportation, information technology, and shared equipment systems used to move containerized cargo through the nation's ports. However, those systems today have the flexibility to adjust commercial incentives in order to seek greater efficiency. Free time, and related detention and demurrage charges, are commercial tools that are part of that system of incentives. There are undoubtedly individual instances in which the use of those tools produces inequities that are recognized by the law. In those cases, commercial negotiation, arbitration (if the UIIA is applicable), court actions, and formal Commission complaint proceedings are available to aggrieved parties. All except the latter – complaints before the Commission – have been employed by parties to seek relief. In some cases relief is granted; in some cases it is not. Certainly the evidence in the more detailed declarations attached to the petition indicate that charges are very often mitigated, with the declarant in Exhibit C-1 having had over 95% of its charges waived, for example.

With respect to the fact that not even a single formal complaint has been filed with the Commission challenging detention and demurrage charges in recent years, the lack of any recent adjudicative experience means that, if the Commission were to initiate a general rulemaking now, it would embark on that endeavor without any real idea about which factual and legal questions would have to be addressed in determining whether imposing a charge or declining to extend free time would contravene 46 U.S.C. § 41102(c). The chances of the Commission "getting it wrong" in an adjudication are low, both because of the development of an adequate factual and legal record through the adversarial process and also because of the availability of judicial review. The chances of the Commission "getting it wrong" in a rulemaking of general applicability, on a record largely devoid of facts, is high.

For all of these reasons, the World Shipping Council respectfully urges the Commission to deny Petition P4-16.