BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION NO. P4-16

PETITION OF THE COALITION FOR FAIR PORT PRACTICES FOR RULEMAKING

CLOSING COMMENTS

by

THE COALITION FOR FAIR PORT PRACTICES

In the hearing in the above proceeding held on January 16 and 17, 2018, modified by a decision served January 24, 2018, the Federal Maritime Commission ("FMC") indicated that the record in this proceeding would be held open until February 1 for closing comments by any party. The Coalition for Fair Port Practices ("Coalition") hereby submits brief closing comments.

I. Application of the Coalition's Proposed Policy Statement Would Not Alter the Section 10(d)(1) Standard of "Reasonableness"

The World Shipping Council's ("WSC") assertion at the hearing that the Coalition's proposed policy statement ("Policy") looks only to shipper fault and, thus, is inconsistent with the reasonableness standard of Section 10(d)(1) of the amended Shipping Act of 1984, is wrong.[1] The very terms of the Policy belie this claim by expressly interpreting Section 10(d)(1) based on "unreasonable" carrier and marine terminal conduct. WSC incorrectly argues that the Policy's interpretation of unreasonable carrier and marine terminal demurrage and detention practices in the factual context of port congestion and other delays that are beyond the control of the shipper

[1] Shipping Act of 1984, § 10(d)(1), 46 U.S.C. § 41102(c).

or drayman somehow changes the underlying Section 10(d)(1) reasonableness liability standard. WSC's claim has no merit.

Part (b) of the Policy interprets the carrier's breach of its transportation obligation by failing to tender cargo for delivery through the entire free time period as unreasonable when, as a factual matter, the port delays are beyond the shipper's/drayman's control. Part (c) of the Policy interprets the carrier's assessment of demurrage as unreasonable when it fails to release cargo upon the shipper's request when, as a factual matter, port delays that arise after the expiration of free time are beyond the shipper's or drayman's control. Part (d) of the Policy interprets as unreasonable the carrier's charging of a penal level of demurrage when the carrier can tender cargo for delivery but the shipper cannot access the port due to intervening events and circumstances that impact a substantial portion of the port and are beyond the shipper's or drayman's control. In each case, demurrage charges cannot achieve their purpose of incentivizing timely cargo pickup. Moreover, each of these categories of carrier conduct is inconsistent with the Commission's definition of a just and reasonable terminal practice, which is one that is "otherwise lawful but not excessive and which is fit and appropriate to the end in view." *Distribution Servs., Ltd. v. Trans-Pac. Freight Conference*, 24 Shipping Reg. (P & F). 714, 721 (Jan. 6, 1988) (quoting *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966)).

To the extent the Policy looks at the shipper, it is to assess whether the shipper's conduct should exculpate the carrier. Under parts (b) and (c) of the Policy, if the port delays resulting in the carrier's failure to tender cargo for delivery (or accept returned equipment) are caused by the shipper's conduct, the carrier's assessment of demurrage upon the expiration of free time cannot be interpreted as an unreasonable practice under Section 10(d)(1). Similarly, under part (d) of

the Policy, if the shipper's conduct prevents it from picking up cargo made available by the carrier, the Carrier's assessment of penal demurrage would not be interpreted as an unreasonable practice under Section 10(d)(1).

Make no mistake, the Policy's interpretation of Section 10(d)(1) requires a showing of unreasonable carrier (or marine terminal) conduct. Shipper conduct is only relevant to prevent carrier demurrage/detention practices from being found unreasonable in the context of delays in cargo pickup or equipment return caused by or under the control of the shipper or drayman.

II. Application of the Coalition's Proposed Policy Statement Would Not Shift the Burden of Proving Unreasonable Conduct Under Section 10(d)(1) From Complainants to Terminals and Carriers

Similarly, the assertion at the hearing by the National Association of Waterfront Employers (NAWE) that the Policy shifts the burden of proof concerning the "unreasonableness" standard under Section 10(d)(1) is incorrect. Although the Policy clarifies the elements of unreasonableness in the context of detention and demurrage assessed during port congestion or other events beyond the control of the shipper or drayman, a complainant who brings a Section 10(d)(1) action carries the burden of proof. Only if the complainant establishes a prima facie case of "unreasonableness" with respect to the carrier's or terminal's demurrage or detention practices would the burden shift to the defendant to prove any defense it may have. But this burden-shifting would not require a defendant to first prove that its demurrage and detention practices are reasonable upon the shipper's filing of a complaint. Also, while NAWE may have concerns about introducing evidence that contradicts a shipper's evidence, this concern deals with whether the shipper has met its burden, not whether the burden has shifted to the defendant.

III. The Hearing Testimony and Record in this Proceeding Supports the Existence of a Systemic Problem Regarding Demurrage and Detention Practices That Only the Commission Can Address

The Coalition notes that, in closing remarks at the January 17 hearing, Acting Chairman Khouri quoted the business writer Peter Drucker in saying that:

> when you are faced with a problem, the first thing that you have to decide is, is it systemic or is it episodic. If it's the first, deal with it and deal with it properly. If it's the second, leave it alone. That's fine for private business. I think are we in a situation . . . are there some places in between that we need to seriously look at where do we with a judicious hand step in and try to make things better, recognizing that we're not going to be able to solve all problems in this particular area?

The Coalition very much agrees with Acting Chairman Khouri, in a number of respects.

The Coalition strongly believes that the problem of port demurrage and detention is a systemic problem. There are numerous indications that this is so. First, this proceeding has generated an extraordinary amount of participation by industry stakeholders impacted by carrier and marine terminal demurrage and detention practices. The Coalition's Petition was itself initiated by 26 national organizations from across the economy, representing literally tens of thousands of American businesses, including large and small importers and exporters; motor carriers and drayage companies; and logistics providers, forwarders and customs brokers from across this nation. The Petition was supported in comments by nearly a hundred other participants. The Coalition's witnesses at the hearing comprised the nation's largest retailer, a medium-sized company, and draymen from the east, west and gulf coasts. Other witnesses on

the shipper, intermediary and drayage panels confirmed that the problems were ongoing and national in scope.

Moreover, the nature of the problems outlined were systemic. Congestion is an ongoing issue, especially as ships get larger and larger. While major storms do not occur daily, they occur with regularity. Labor disputes have occurred many times in the past and can reasonably be predicted to occur again in the future. The Commission heard frequent and consistent testimony at the hearing regarding the difficulty of getting appointments within free time, as the industry appears to be moving increasingly to an appointments system for picking up and dropping off containers. Most importantly, there was a systemic issue mentioned time and again at the hearing which operates as an impediment to achieving efficient commercial resolutions to demurrage and detention disputes—and that is the lack of contractual privity between shippers/draymen on the one hand and MTOs on the other. This underlying systemic and structural issue results in the failure by some carriers and terminals to adopt fair and reasonable demurrage and detention practices and to promptly and efficiently account for and solve demurrage and detention disputes. Indeed, the problem of lack of a direct contractual relationship between shippers and MTOs was identified as a "major systemic challenge" in the Final Report of the Supply Chain Innovation Teams Initiative headed by Commissioner Dye.[2]

And, this is not a case where the problems are solely in the past. While the impetus for the Coalition's December 2016 Petition was the events of 2014-2015, more recent written and oral testimony confirms the ongoing nature of the problem. *See, e.g.*, testimony of Donald Pisano, Laura Crowe, Robert Leef, and Fred Johnring at the hearing. Mr. Leef's testimony at the

[2]See, Final Report, FMC Supply Chain Innovation Teams Initiative, December 5, 2017, p. 3 ("SCIT Final Report").

hearing, for example, pointed out problems in the port of Baltimore in 2017.[3] Hearing testimony clearly indicated that problems with appointments are ongoing. Indeed, the very finger-pointing between carriers and MTOs at the hearing about who was responsible for any problem suggests that the problem is not just a past, one-time episode.

Acting Chairman Khouri was exactly correct in asking are there places where the Commission needs to examine where "we with a judicious hand step in and try to make things better . . .?" The Coalition strongly believes that the Commission has the wisdom and expertise to "make things better," by crafting a policy statement that will proactively address unreasonable demurrage and detention practices that are occurring across the country on a continuing basis. By clarifying the Section 10(d)(1) unreasonableness standard in a policy statement the Commission would be allowing the market to operate efficiently consistent with the policies of the Shipping Act.[4]

IV. Conclusion

For the foregoing reasons and based on the comprehensive record established in this proceeding, the Coalition respectfully requests the Commission to grant its Petition for Rulemaking to initiate a proceeding for the purpose of adopting the Coalition's proposed policy statement attached to the Petition.

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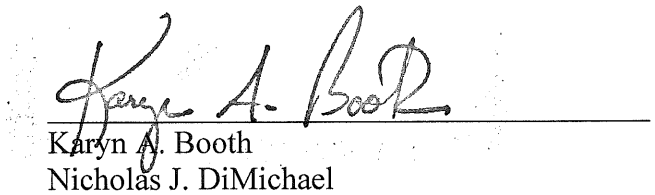
[3] *See also*, SCIT Final Report, pp. 9-10, which discussed current growth in port volumes to date.

[4] See Shipping Act of 1984 § 2(2), 46 U.S.C. § 40101(2).

Respectfully Submitted,

THE COALITION FOR FAIR PORT PRACTICES

By Its Attorneys



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