BEFORE THE FEDERAL MARITIME COMMISSION

Petition No. P4-16
PETITION OF THE COALITION FOR FAIR PORT PRACTICES FOR RULEMAKING

TESTIMONY OF
THE COALITION FOR FAIR PORT PRACTICES

I. INTRODUCTION

Good morning. Acting Chair Khouri, Commissioner Dye, and Commissioner Maffet, on behalf of the Coalition for Fair Port Practices, we want to thank you for scheduling this hearing and for the opportunity to appear before you today to explain the unfair demurrage/detention practices that American businesses experience when our nation's seaports are congested or otherwise inaccessible due to causes beyond their control.

In our testimony, the Coalition will explain the problems facing the many users of our nation's seaports with respect to demurrage/detention practices and the relief that its many members are seeking from the Commission. And we hope to be able to answer all of your questions.

The Coalition is comprised of 26 trade organizations who represent tens of thousands of American business across broad and diverse industry sectors, including:

- large and small importers and exporters of retail, auto, food, meats, coffee/tea, chemicals, and other commodities;
- motor carriers and drayage companies who operate at our nation's east, west and gulf coast seaports; and
- logistics providers, forwarders, and customs brokers from across this nation—all of whom support the Petition pending before you.

Appearing for the Coalition are 5 company witnesses and its legal counsel. We would like for the company witnesses to provide their statements first, followed by counsel's testimony. To the extent that a company witness uses less than 5 minutes, we would ask that the unused time be allocated to counsel. At the conclusion of all testimony we would welcome your questions. We would now like to turn to the company testimony, starting with Mr. Don Pisano.

II. THERE IS A PROBLEM WITH DEMURRAGE AND DETENTION PRACTICES NATIONWIDE

As the Commission has just heard, American businesses have experienced unfair demurrage and detention practices when the causes of port congestion and delays are completely beyond their control.

These practices directly conflict with the very purpose of demurrage and detention as described in long-standing Commission precedent, i.e. demurrage and detention are charges intended to incentivize the timely removal of cargo from terminals and the timely return of equipment.

But when a port is inaccessible preventing the removal or cargo or return of equipment, it is unreasonable to penalize the shipper or draymen in cases where they have no control over the cause and no power to address the delays.

- The issues raised in this proceeding do not concern only past events. Rather, larger vessels off-loading increasing volumes of cargo at our nation's seaports, labor disputes, hurricanes and snow storms have created severe congestion in the past and will likely cause congestion in the future.

- The Commission itself recognized demurrage/detention practices assessed during port congestion as a serious issue during its 2014 field hearings, and its staff issued a report on this topic in 2015.

- In that Report, the Commission identified options for BCOs and draymen to consider to address the issue, including petitioning the Commission for rulemaking.

- The Coalition carefully evaluated those options which led to the filing of its Petition and request for the Commission to take action to help address this problem.

American businesses depend on a competitive and efficient ocean transportation system. The lack of **any** standards as to what constitutes unreasonable demurrage and detention practices leads to unfair practices which undermine the integrity and efficiency of the US ocean transportation system.

We are here today to reaffirm the Coalition's request for the Commission to exercise its authority to address this problem by issuing a policy statement that interprets existing requirements under the Shipping Act that prohibit unreasonable demurrage and detention practices.

The Coalition strongly believes that an FMC policy statement would help to eliminate confusion over proper demurrage and detention practices, it would eliminate many demurrage/detention disputes, and it would help to facilitate commercial solutions.

III. COMMERCIAL SOLUTIONS ARE NOT SUFFICIENT TO SOLVE THE PROBLEM

As noted on page 6 of the handout, carriers and terminals have claimed that existing commercial arrangements can adequately address the problem. We disagree.

Labor problems and other congestion-causing events occur with regularity, but it has become increasingly clear that the market has not been able to come up with fair demurrage and detention practices in cases where the causes of delays preventing the movement of containers

are out of the control of the shipper or drayman. Indeed, some of these problems, such as congestion caused by the use of larger vessels, have increased.

In most cases, terminals and carriers are in the best position to address port delays and congestion, **not** the shipper or drayman. Shippers and draymen do not have the ability solve labor disputes, they do not control the loading and unloading of vessels or terminal appointments, and they cannot control removal of snow after a storm.

Yet, when these delays occur, carriers and terminals typically still demand payment of demurrage and detention up front to secure the release of cargo—even when the very purpose of the charges, i.e. to incentivize the timely removal of cargo, cannot be met. The lack of any regulatory guidance on the reasonableness of such practices results in substantial confusion, obfuscation, denial and delay.

Experience has shown that relying solely on commercial solutions is ineffective and leads to major inefficiencies as parties must address whether the payments were proper after the fact. Many shippers and draymen – and even larger ones – often do not have the commercial leverage to negotiate contract terms to fairly address the problem.

Another significant barrier to effective commercial solutions is that shippers and draymen lack contractual privity with the terminals but rather negotiate with the ocean carriers. This structure often impedes the effectiveness of the BCO/carrier negotiations since the terms set by the terminals dictate what the VOCC is willing to negotiate.

The status quo hurts American business who depend on an efficient ocean transportation system and is flatly inconsistent with the policies of this Administration, which seeks to promote fair business practices for American companies.

The Coalition strongly supports Commissioner Dye's efforts in creating the Supply Chain Innovation Teams to encourage innovation and new technologies. While these activities can be expected to improve some causes of port congestion, they are unlikely to completely eliminate all the causes and are not designed to specifically address unfair demurrage/detention practices. A policy statement would therefore complement the work of the Commission's SCITs.

IV. THE COMMISSION IS THE SOLE PARTY WITH BOTH THE POWER AND EXPERTISE TO ADDRESS THE PROBLEM

The Commission is empowered under Section 41102 of the Act to ensure that carriers and terminals "establish just and reasonable regulations and practices relating to receiving, handling, storing or delivering property." It has long been established under Commission precedent that free-time and demurrage/detention fall within this prohibition.

The Commission's authority to issue guidance as to unreasonable practices under Section 41102 is clear and unequivocal. However, the ocean carriers and terminals wrongly claim that the

proposed policy statement asks the agency to prescribe commercial tariff rules and that the Commission lacks this authority. This is nonsense.

- Unlike the 1946 New York Rules case, nowhere does the policy statement prescribe the number of free time days, or the level of demurrage/detention charges that must be included in tariffs.

- The opponents wrongly conflate the policy statement's interpretation of unreasonable practices that may occur during port congestion as a prescription of reasonable free time and demurrage/detention tariff rules.

- The very wording of the policy belies this claim.

The Commission is the only party empowered by Congress to address unfair business practices employed through demurrage/detention charges. The Commission and its staff have the expertise needed, and we have faith in your abilities, to craft a policy statement that can address this problem in a proactive manner, rather than through binding regulations. Thus, we strongly urge you to exercise your authority.

Finally, the agency's CADRS office can provide important informal dispute resolution assistance which is very much appreciated by industry. But there are limitations here, since carriers and terminals can refuse to participate in such dispute resolution and the office has no powers to issue orders declaring certain carrier and terminal practices as unreasonable.

- More importantly, use of CADRS may lead to a solution once a dispute already exists, whereas an agency policy statement would operate to prevent many disputes from arising in the first place.

V. THE PETITIONERS ARE REQUESTING THE COMMISSION TO ISSUE A POLICY STATEMENT THAT WILL GUIDE THE INDUSTRY

The Coalition is requesting the Commission to issue a policy statement that would interpret Section 41102(c) to mean that when an ocean carrier is unable to tender cargo and such disability is beyond the control of the shipper or drayman, then it would be unreasonable to fail to extend free time or charge penalty demurrage.

The requested policy statement is consistent with the carriers' common carrier obligation, as well as some existing commercial practices.

For example, as noted on page 9 of the handout, CMA, COSCO, Maher Terminals, and the Port of Long Beach all publish tariffs that extend free time when the carrier is for any reason prevented from tendering cargo or cargo cannot be loaded at the terminal. The rules of these good actors indicate that the requested policy statement is not inconsistent with some existing commercial practices. But, the policies of these good actors are far from universal.

As you can see from page 10 of the handout, the Coalition is asking for the issuance of a "policy statement" and not a binding rule. The wording of the proposed policy states that its purpose is "interpretation" of the statute. The wording is similar in form to wording the agency has used for policy statements or interpretive rules it has issued in the past.

The distinction is crucial: a Policy Statement is not a binding legislative rule that can be enforced using civil penalties. Rather, any person who believes that a carrier or MTO is acting inconsistently with the Policy would be required to file a complaint with the agency.

In that complaint, the Commission would have the power to examine individual facts and circumstances to determine if the carrier had acted unreasonably.

Yet, the Policy Statement would give broad guidance to the industry, indicating how the Commission would likely exercise its discretion in the ordinary circumstance. The Policy Statement would incentivize carriers and MTOs to adopt reasonable demurrage/detention rules.

Thus, issuance of a Policy Statement is consistent with this Administration's focus on deregulation since it would not be a binding legislative rule and would help the efficiency of the marketplace.

VI. THE REQUESTED POLICY STATEMENT ALLOWS FOR A WIDE VARIETY OF CIRCUMSTANCES

In the Commission's press release announcing this hearing, Acting-Chair Khouri asked whether the Commission could craft a general rule given the wide variety of commercial terms; and disparate operating protocols at our nation's seaports. The answer to these questions is "yes."

First, because a policy statement is a statement of general intent that industry can use to self-govern demurrage/detention practices, it must be applied based on the individual factual circumstances, particularly with respect to the issue as to whether the port delays are beyond the control of the shipper or drayman. Thus, it is designed to be flexible, and not a rigid rule that establishes binding obligations in all cases.

Second, the policy statement does not dictate the specific terms of service contracts or tariffs. Quite the opposite: it allows for a wide variety of commercial terms – because it does not require adoption of a specific free time period at any port, it does not dictate the arrangements for cargo pickup, and it does not set the level of demurrage/detention charges, etc.

Similarly, the requested policy statement allows for a wide variety of operating protocols – it does not say anything about how vessels are to be loaded/unloaded, how cargo moves through the port, how gate operations will work or how any other port/terminal operations are to be performed.

The requested policy statement focuses on one thing—the unreasonableness of levying penal demurrage or detention when it is impossible for the shipper or drayman to access the terminal to

timely pick up cargo or return equipment—and where the very purpose of such charges cannot be achieved.

VII. CONCLUSION

In conclusion, the Commission has a very comprehensive record which justifies issuance of a policy statement that industry can use to govern itself in cases of port congestion.

Even though it was never required, the Coalition asked for a notice and comment proceeding, as a procedural matter, so that the Commission could get broad input as to the scope and wording of the policy statement.

If the Commission believes that any of the words of the proposed policy statement need to be changed that should be addressed in the context of the rulemaking proceeding.

The time to address this problem is now, before the next case of severe port congestion strikes, by proactively discouraging the use of unreasonable demurrage/detention practices and providing industry with the tools it needs to more efficiently resolve demurrage/detention disputes.

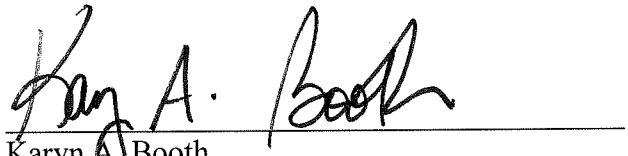
Thus, we respectfully request that you grant the Coalition's Petition and issue a policy statement interpreting unreasonable demurrage/detention practices under Section 41102 of the Act.

Again, we thank the Commission for holding this hearing and would be very glad to answer any questions.

Respectfully submitted,

THE COALITION FOR FAIR PORT PRACTICES

By its attorney:



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