



February 1, 2018

Submitted via Email

Rachel E. Dickon
Assistant Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

RE: FMC Docket P4-16

Dear Ms. Dickon:

I am writing on behalf of the National Retail Federation (NRF) with respect to FMC Docket P4-16, the petition of the Coalition for Fair Port Practices for Rulemaking. NRF strongly supports the coalition's petition. We believe it is appropriate for the Commission to issue a Policy Statement containing guidance and standards with respect to unreasonable detention, demurrage, and per diem charges. As evidenced by the recent hearing, this issue impacts all supply chain stakeholders, no matter their size. The Commission needs to act now to develop a Policy Statement that will help address these ongoing issues.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Speed to market is essential for the retail industry because of the high cost for carrying large inventories. In addition, many of NRF's members are in the fashion business, where quick merchandise turns are a fact of life. Missed delivery dates mean missed sales, faster markdowns, and increased advertising costs. Speed and reliability are so important that many retailers have defined container dwell time as a Key Performance Metric (KPI) and work closely with their supply chain partners, including carriers, to continuously improve supply chain speed and efficiency.

As a result, NRF's members believe that detention/demurrage charges serve a useful purpose at times: faster transit from ship to distribution center, and a greater likelihood that essential intermodal equipment will be available when it is needed. Retailers also budget for detention/demurrage charges because they recognize that in many cases such fees are necessary and reasonable to keep cargo moving. However, when the carrier is unable to make a container available for pickup in a timely fashion, or in instances where the terminal is closed for a variety of reasons, NRF's members believe that the application of detention and demurrage fees is, on its face, unreasonable. Our support for the Coalition's petition is an attempt to provide guidance on what is and what is not the reasonable application of detention and demurrage fees.

Nevertheless, carriers and marine terminals have suggested that the Coalition's petition is an effort to uniformly extend free time. This could not be further from the truth. NRF supports the Coalition's petition because it does not seek the elimination of detention/demurrage, nor is it asking for the FMC to wade into the business of establishing guidelines for reasonable free time. We would, in fact, oppose efforts to eliminate detention/demurrage fees and are not in support of any Commission action that would establish minimum free time. We believe that dwell time is a KPI that is best left to the commercial relationship between the retailer and the carrier.

There seems to be some concern that if the Commission were to approve the Coalition's guidance that congestion at the terminal would increase because shippers would abuse the system, seeking longer and longer free-time windows. It is a fact that when terminals become congested, the free time problems can cascade, but not because retailers are seeking longer free time windows. As noted above, retailers and their suppliers incur significant costs when cargo is delayed. We have every reason to want to move cargo quickly.

In its follow up questions number 2 and 4, the Commission seems to be concerned that granting the Coalition's petition might induce shippers to make significant operating changes that would further increase congestion or abuse terminals by using them as storage facilities. This will not happen. Shippers want their cargo in a timely fashion. They negotiate free time limits, and they expect the cargo to be tendered within those limits. In cases where the free time is waved or extended, we would anticipate retailers moving quickly to pick up cargo or return equipment. No one is interested in turning terminals into warehouses.

Indeed, our concern about this issue goes beyond the scope of the Coalition's petition. For a very long time, retailers and other shipper groups, have been asking for more transparency into terminal operations precisely because we have no commercial relationship with terminals and we believe transparency can improve best practices. Our members have participated in the FMC's own investigations into port productivity and the development of information portals, we have supported federal legislation designed to develop key port metrics, including dwell time statistics—an effort that has met strong opposition from terminal operators, and we've worked with stakeholder groups in the ports of New York/New Jersey and Los Angeles/Long Beach. We applaud Commissioner Dye's efforts to develop best practices. The large number of participants in the Coalition, and the long-term concern that shippers have exhibited with respect to congestion indicates our desire to increase cargo velocity, not to turn marine terminals into storage facilities.

Moreover, retailers would not have uniformly supported these best practice and metric activities if all we wanted was more free time. In short, storing containers on a marine terminal makes no practical business sense. It's not a best practice and shippers are unlikely to begin doing that if the Coalition's petition is granted.

Marine terminals and ocean carriers have argued that the guidance requested by the Coalition is unnecessary because the problems associated with labor disputes and bad weather have been addressed. They cite the recent extension of free time in the Port of Houston during Hurricane Harvey as a case in point. There seems to be some argument that so called "episodic" events, which aren't associated with a weather event, would be too difficult to manage.

This view of the problem is wrong. The difficulties that retailers face on a daily basis are not episodic, they are widespread and systemic in the same way that weather and other issues are systemic when they occur. The inability to get an appointment in a timely manner is a wide-spread problem. The inability to pick up cargo because a section of the yard is closed is a wide-spread problem. The inability to pick up cargo because of unannounced, stop-work meetings is a wide-spread problem.

Terminals and carriers have argued that providing guidance on appropriate detention and demurrage would distort the market. We disagree. First, handling weather emergencies should not be a factor in competition. Emergencies *require* carriers and terminal operators to be proactive and to extend free time. Second, this argument seems to say that it's okay to have terminals who demand detention and demurrage in situations where they don't tender the cargo within the free time window, so long as shippers have a choice in who they can contract with. But shippers don't always have a choice, and the emergence of big shipping alliances reduces a shipper's ability to choose terminal operations. In any case, shippers do not have any contractual relationship with terminal operators, and the testimony of terminals and carriers at the recent hearings underscores the fact that carriers often have little sway over terminals. Indeed, carriers themselves may charge demurrage even when marine terminals are at fault. The bottom line is that shippers frequently find themselves caught in a catch 22 between carrier and terminal without any ability to influence either, and forced to pay fees up front to "ransom" their cargo in some situations.

The Coalition is not trying to establish a new fault-based standard within the Shipping Act, as carrier and terminal operators claim. The Coalition asserts that on its face, it is unreasonable to impose a fee designed to incentivize the movement of containers or equipment, when it is impossible to do so because of factors beyond the shipper's control. Such factors include weather-related emergencies, labor strife that results in terminal closure or significant slowdowns, or other situations such as breakdowns in terminal operating systems, problems with appointment systems, stop-work meetings, or any other situation in which the shipper arrives within the free time window and the terminal is unable to tender the cargo.

Marine terminals and carriers also argue that they ought to be remunerated for the expense of storing containers, even in situations where bad weather or other disruptions make it impossible for importers to pick up cargo within the free time window. Carriers complain that it's not fair for them to bear these costs particularly in instances where no one is at fault, such as a snow event or a hurricane. When no one is at fault, they argue that the costs for storing containers on a port should be paid anyway, because these costs continue even when the port is closed.

This argument suggests that shippers are unaffected by weather emergencies or other events that cause delay at the ports. This view is myopic. When cargo is delayed, retailers face significant additional costs in the form of lost sales, missed in-store days, chargebacks, and markdowns.

Retailers need reliability to make sure that merchandise, especially fashion merchandise, arrives in store at the proper selling season. Carriers and terminal operators would have retailers not only pay the price for missed delivery dates, but bear the cost of the container storage and a fee for the intermodal equipment during a time when the retailer cannot access cargo it desperately needs in order to conduct business. To NRF members, that is unreasonable.

In closing, NRF thanks the Commission for holding hearings on the Coalition's petition and for its consideration of this important issue. If you have any questions about NRF or its views on this issue, or need follow-up information, please contact Jonathan Gold, NRF's Vice President, Supply Chain and Customs Policy.

Sincerely,

A handwritten signature in black ink, appearing to read "David French", with a stylized flourish at the end.

David French
Senior Vice President
Government Relations