Written Testimony of
Edward DeNike, SSA Marine Inc.

Federal Maritime Commission
Petition No. P4-16

PETITION OF THE COALITION FOR FAIR PORT PRACTICES

I. INTRODUCTION

My name is Ed DeNike, and I am President of SSA Containers ("SSA").

SSA welcomes the opportunity to provide this testimony on the petition filed with the Federal Maritime Commission ("FMC" or "Commission") by the Coalition for Fair Port Practices. SSA applauds the Commission's thoroughness in holding hearings as part of its consideration of the petition. For the reasons set forth below, SSA believes the petition should be denied.

Before I turn to the substance of my testimony, I believe it would be helpful to provide you with some background information to help place my testimony in context. I have spent my entire career in the maritime industry, and have worked for 50 years on the waterfront. It has been my good fortune to be part of the management team of what we believe is the best terminal operating company in our industry.

SSA is a subsidiary of Carrix Inc., which is headquartered in Seattle, Washington. Carrix is the largest privately held marine terminal operator in our industry. We are a family run business, the majority of our shares are owned by United States citizens, and we are not affiliated with a government entity. Carrix, through SSA and other subsidiaries, operates 8 container terminals in the United

States and handled approximately 24 million containers in our domestic and international network in 2017. We also operate approximately 70 non-container port facilities globally and approximately 40 intermodal rail facilities in the United States. Additionally, Carrix manages chassis pools, performs container equipment maintenance, break-bulk bagging and handling, and performs a wide variety of other services.

II. THE PURPOSE OF DEMURRAGE AND DETENTION IS SUPPLY CHAIN EFFICIENCY

It is well-recognized that the primary purpose of detention and demurrage is to provide an incentive for cargo interests to remove their cargo from the terminal promptly and to return equipment in a timely manner. This incentive is intended to help avoid terminal congestion and ensure an adequate supply of equipment, both of which are critical to the smooth and efficient operation of the supply chain. A secondary purpose is to compensate ocean carriers and terminal operators for the cost of storing cargo on the marine terminal (which is some of the most costly industrial real estate) and/or providing equipment. These facts have been recognized by the Commission in decisions relating to this subject, and were also recognized by petitioners in the petition.

However, having recognized the legitimate purposes of detention and demurrage, the petitioners nevertheless allege that such charges become a profit center for terminal operators and carriers when congestion occurs. Nothing could be further from the truth. The cost associated with a terminal lease is enormous, particularly on the West Coast. Our lease can amount to $200-300,000 per acre per year. Our facilities in Long Beach cover approximately 565 acres. We are therefore a volume business. Our existence is predicated on throughput. As explained below in my discussion of the congestion which occurred on the West Coast in late 2014 and early 2015, any suggestion that terminals use demurrage during times of congestion to gouge the motor carrier or shipper is patently false.

Moreover, the petition's complaints about the diversity of demurrage/detention charges and related practices misses the mark. Whereas the petition suggests a diversity of charges and practices is to be condemned, I believe this diversity reflects the realities (and flexibility) of the marketplace. Terminal costs can vary based on a variety of factors, such as the physical location and configuration of the terminal, the mode of operation, cargo volumes and flow patterns, customer needs, and others. There is also fierce competition among terminals at different ports and within the same port. The diversity of demurrage practices reflects these competitive and operational realities. However, the petition seeks to replace this healthy marketplace

with instructive government over-regulation, contrary to the Shipping Act's stated policy of fostering a competitive marketplace with a minimum of government intervention.

The petitioners seem reluctant to accept one critical premise concerning to why demurrage and detention exists, and it is not about money. These charges are about influencing the behavior of containers. The supply chain would experience complete gridlock without some incentive to influence container behavior, whether that is to remove cargo from the terminal or return equipment.

III. THE RELIEF SOUGHT BY THE PETITION IS UNNECESSARY

The broad, nationally applicable "statement of policy" sought by the petition is unnecessary and should not be entertained by the Commission.

In addition to seeking to replace a healthy, competitive marketplace with government-imposed standardization, the relief sought by the petition is an overreaction to one event resulting from an unusual set of circumstances which are not likely to be repeated and which the industry has addressed through a variety of means. All of this means the relief sought by the petition is unnecessary.

The petition cites two primary causes of congestion as the basis for the relief: (i) weather-related events; and (ii) a work slowdown on the West Coast in 2014-15

which resulted in congestion at those ports and cargo being diverted to East Coast ports, some of which in turn became congested due a combination of the diverted cargo and bad weather.

The Commission should bear in mind that shippers and truckers were not the only ones impacted by these events. The International Longshore and Warehouse Union ("ILWU") slowdown at West Coast ports in late 2014 and early 2015 damaged American trade to the tune of $1.9 billion a day according to Penny Pritzker, then Secretary of Commerce. A 10-day stoppage would increase this loss to $2.1 billion per day, and a 20-day stoppage would increase loss to $2.5 billion per day.[1] Terminal operators were not spared the effects of this slowdown. SSA had to hire significant additional labor to work additional shifts due to the congestion. In fact, we used 27% more vessel man-hours per container at our terminals from October, 2014 to January, 2015 (as compared to the same period the year before), and in December of 2014 we used 40% more labor man-hours per container than the same month in the previous year, even though container volume was basically the same. There was no adjustment

[1] Report Commissioned by the National Association of Manufacturers and the National Retail Federation, *The National Impact of a West Coast Port Stoppage*, 5 (June 2014), http://www.nam.org/Data-and-Reports/Reports/The-National-Impact-of-a-West-Coast-Port-Stoppage-(Full-Report).pdf.

of container rates or modification of lease terms with the Port Authority. In essence, we were losing a considerable amount of revenue.

There were no "winners" in the events of late 2014-15, which constituted a "perfect storm" that was without precedent and which is unlikely to be repeated anytime soon. Adopting a sweeping new policy to be applied nationwide based on such a rare occurrence would be an overreaction.

This is particularly true in light of recent experience. For example, Hurricanes Harvey, Irma, and Maria caused considerable damage to the U.S. and its territories, resulting in the most costly Atlantic hurricane season in U.S. history. These events caused considerable congestion and delays at the relevant ports. However, I am not aware of any major problems or complaints relating to demurrage or detention at ports affected by these storms. The serious problems resulting from these events were handled appropriately by the industry and the free marketplace.

I also believe that the industry has learned from the unique experiences of the 2014-15 West Coast congestion, and already has a variety of mechanisms in place to help avoid undue congestion and, if it occurs, to deal reasonably and equitably with demurrage/detention issues. The following are examples of some of the measures that SSA has taken to address congestion and demurrage issues:

1. Waivers – SSA can and frequently does reduce or waive demurrage and detention charges when circumstances warrant. Given that many of the sworn statements supporting the petition reflect substantial waivers of demurrage and detention charges, I believe other marine terminal operators and ocean carriers do likewise.

In the case of SSA, our terminal managers will waive demurrage:

- If a container cannot made available to the motor carrier due to terminal operations, e.g., if our terminal is unable to access the container for operational reasons;
- When the trucker has missed the end-of-shift deadline and needs to return at the next shift for the container; or
- Other individual circumstances when it would be unfair for SSA to collect demurrage.

2. Prior Planning – With improved weather forecasting, those involved in the supply chain can mitigate the effects of a storm by re-routing vessels and cargo, by removing cargo from the terminal before the storm hits, and by taking other preventative measures. Some ports, such as the Port of New York and New Jersey, has adopted a standard written policy regarding the extension of free time in the event of inclement weather. Similarly, the use of routing applications can assist truckers in avoiding road closures and/or traffic congestion. It should be noted that such planning to alleviate potential congestion is not only the responsibility of the MTO or

carrier. While there are certain things they can do, there are also things that shippers and truckers are in a better position to do. For example, if a major snow storm is predicted for the last day of free time, or if there is road construction planned for the primary highway leading to a port on the last day of free time, the shipper and trucker can arrange for the cargo to be picked up on the day before that.

3. Peel-Off – Another innovative market approach adopted by SSA is a form of peel-off, or block delivery in mass, which can improve the use of assets such as trucks, land, and cargo handling equipment.

The form of peel-off methodology currently being used is straightforward: importers with significant volumes of cargo on a single vessel arrange with the terminal to have that cargo placed together on the terminal to provide the importer's trucker with quick and easy access to the cargo. The trucker simply takes the container on the top of the stack. This reduces or eliminates the need to match a specific truck with a specific container, and the corresponding need to sort through stacks of containers on the terminal (we often have to move 3 or 4 containers to make the correct container available). SSA is encouraging use of this methodology by importers or groups of importers and motor carriers when sufficient cargo volumes exist to make the sorting feasible. Significant efficiencies could be realized if all or most containers are removed from the marine terminal by the next available truck,

much like passengers leaving an airport take the next available taxi. The potential reductions in turn times, truck waiting time, cargo transit time and the potential improvements in terminal productivity and efficiency that would result from a system under which a trucker does not arrive at a terminal in order to pick up a specific box, but can simply arrive and take the next available box, are very significant.

Of course, such a system would require a willingness on the part of a number of stakeholders to make changes to their mode of operation. As cargo volumes continue to increase, and the supply chain is called upon to handle these increasing volumes with greater speed using the same amount of land, while at the same time reducing the environmental impact of its operations, the industry will need to be increasingly willing to consider creative measures to address these issues. SSA is a strong advocate of a move toward a broader peel-off system, and we are exploring and will continue to explore ways to move towards such a system.

4. Appointment Systems – Where local conditions make it appropriate to do so, terminal operators may adopt truck reservation or appointment systems to help avoid congestion and maintain the efficient flow of cargo. For example, SSA uses such a system for import containers in Oakland, where it helped alleviate congestion resulting from the closure of another terminal and has helped prevent that congestion from recurring. Terminal operators at other ports have adopted their own versions of

such systems, each tailored to local needs and preferences. Such systems help avoid the delays that can result in the assessment of demurrage.

SSA does not assess demurrage when such charges result from the lack of available appointments when the trucker has sought to make an appointment in a timely fashion. In that regard, it should be noted that appointment requests often do not come in on a timely basis, they often come near the end of the free time period when appointments may already be full for that day. In addition, appointment requests are sometimes unduly limited in what time periods the trucker will accept. For example, the trucker may say we need an appointment between 2:00 and 5:00 tomorrow, which may be full, but there may be numerous appointments at other times of the day. It is examples such as these that demonstrate why individual circumstances must be considered, even in a case that on its face may seem unreasonable, and why a blanket rule will not work.

SSA believes industry solutions are preferable to government imposed solutions. As mentioned, SSA and others in the industry have adopted a variety of measures to deal with congestion and demurrage issues, and are continually evaluating additional measures to improve efficiency and avoid delays. The lack of congestion and demurrage issues despite the daily challenges associated with moving millions of containers through the urban areas in which U.S. ports are located,

demonstrates that mandated government regulation of the type sought by the petition is unnecessary. For the reasons stated above and the many existing means available to deal with any demurrage-related issues, the relief sought by the petition is unnecessary.

As noted above, SSA and other terminals and carriers can and do reduce or waive demurrage charges when circumstances warrant. If ordinary commercial negotiation does not provide a stakeholder with satisfaction, they can (and do) avail themselves of the dispute resolution procedures under the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA), which is used throughout the industry. Other avenues available to those who are unhappy with a particular situation include the Commission's Office of Consumer Affairs and Dispute Resolution Services, the filing of an informal or formal complaint with the Commission, and the courts.

V. THE RELIEF SOUGHT BY THE PETITION IS INEQUITABLE AND NO MORE EFFICIENT THAN THE STATUS QUO

In addition to being unnecessary, the relief sought by the petition is inequitable and does not improve on the efficiency of the status quo. The statement of policy would replace the equitable and balanced system developed by the marketplace and described above under which each party has the ability to address the risks of inclement weather and similar occurrences through commercial negotiations with a

government mandated system that would place all risk and expense for delays beyond the control of the shipper or trucker on the terminal operator, which is in almost all cases not in control of events. This is blatantly unfair. Moreover, since reasonableness is a factual issue under the Shipping Act, the statement of policy would not eliminate the factual inquiries that necessarily accompany any determination of reasonableness and thus would not improve the status quo in that regard. In addition, it would negatively impact the availability of equipment by reducing the incentive for the prompt return of the equipment created by demurrage and detention charges. In fact, the relief sought by the petition risks exacerbating congestion, which is contrary to the interests of all stakeholders.

Paragraph (b) of the proposed statement of policy would require marine terminal operators to extend free time whenever a disability (e.g., port congestion, port disruption, weather) is beyond the control of the cargo interest. However, in almost all cases, these disabilities are also beyond the control of the terminal operator, which continues to incur expenses (terminal lease payments, labor, etc.) during such events. Why is it fair to require the terminal operator to relinquish its ability to recover storage and other costs as the result of any and all events beyond its control? Why is this blanket policy more equitable than the status quo, which permits the parties to respond to events of this type in a commercially reasonable way?

Paragraph (c) of the statement of policy addresses the situation where a disability occurs after free time has expired. In such cases, the marine terminal operator could assess charges for the period of time between the end of free time and the beginning of the disability, but would not be permitted to assess such charges during the disability period. Again, why should the terminal operator be required to forfeit the ability to recover storage and other costs? In this context, it is also important to remember that the conduct of cargo interests is an important factor in port congestion and the risks associated with the expiration of free time.

It is SSA's experience that many shippers seek and obtain extended free time from their ocean carriers as part of the commercial terms negotiated by those parties. Regardless of whether a shipper has extended free time, the tendency is to maximize the value of free storage by waiting until the end of the free time period to remove cargo from the terminal. [2] Obviously, if a shipper waits until the last day of free time to remove its container from the terminal and there is a problem on that day, the container will (and should) incur demurrage charges.

SSA has long maintained that the terminal is not a warehouse for the storage of cargo. By shifting all risk from the shipper to the terminal, the policy advocated by

[2] There are businesses that offer free time management services to shippers to enable them to maximize their use of free storage for their cargo. "No Such Thing As Free Time," American Shipper, June, 2017.

the petition would encourage greater use of the terminal as a storage facility, which will in turn increase congestion and costs, extend turn times, and decrease efficiency. It would also negatively impact equipment availability. In other words, the proposed rule would have exactly the opposite effect from that intended. This is not a desirable result for anyone involved in the supply chain. This is demonstrated by our past experience at the Port of Seattle, where at one point in time none of the terminals charged demurrage for competitive reasons. This resulted in approximately 800 containers being stored on our terminal for a period of 7 to 8 weeks, hampering operations. Once we began charging demurrage, these containers were removed promptly and the congestion and resulting operational problems they were causing were eliminated.

Finally, paragraph (d) of the statement of policy provides that if the terminal is able to deliver or accept cargo and/or equipment, but the shipper is unable to pick up the cargo or return the equipment due to circumstances beyond its control affecting a substantial portion of the port area, then the terminal could recover its costs, but could not assess charges in excess of its costs during the disability period. This provision is unreasonable, unfair, and does not eliminate the factual questions involved in any reasonableness determination.

Take the example of a shipper unable to pick up a container when the terminal

is open and operating due to circumstances beyond the shipper's control, such as a traffic accident that blocks access to the terminal on a given day. If the shipper picks up the container a day or two later, how would a terminal know that the delay in picking up the container was due to a traffic accident? Who informs the terminal of the accident? What proof of causation is sufficient? And when must such proof be submitted? Who makes the ultimate determination as to the reason for the delay in picking up the container? Who determines whether the charges assessed by the terminal reflect its storage costs, and when and how is that determination made? Such a government-imposed, one-size-fits-all policy risks government micromanagement in determining when an event was a disability that affected the port area and what constitutes a reasonable storage charge. It would be far worse than the status quo.

A number of other examples highlight how unfair the "statement of policy" advocated by the petition would be. These are situations, or variations on them, that I have seen in my experience on the waterfront. These examples also illustrate the hundreds of individual factual situations that can occur and that are not effectively or fairly dealt with through a blanket rule.

- Suppose the cargo interest instructs its trucker to pick up a container on or before a certain day in order to avoid demurrage. The trucker is unable to do so because of a shortage of drivers resulting from recent regulatory changes (e.g., hours of service or electronic logging device requirements). Is this a delay resulting from

government action or requirements that would be covered by the statement of policy? If so, why should the risk of this be placed on the marine terminal operator? Shouldn't the risk be placed on the party best able to avoid it, the trucker or the cargo interest hiring the trucker?

- Suppose it is not possible to access certain marine terminals for a period of two days due to mud and rock slides. A shipper that had no intention of picking up cargo on those days picks up cargo two days after its free time has expired, and argues that it should not be charged demurrage because of the two-day closure that in reality had no impact on it. Is the shipper entitled to additional free time even though the disability did not impact it?

- A shipper begins using a new software system in its distribution center. Due to some start-up glitches, the distribution center becomes congested and processing of cargo/equipment is delayed. The shipper argues the problems were beyond its control and that it cannot be charged demurrage in excess of the terminal's cost. Is the terminal entitled to demurrage in this situation?

There are countless other factual scenarios in which application of the proposed statement of policy would be unfair and/or unclear and lead to an unmanageable level of discussions, disputes and administrative burden. In many of these cases, application of the statement of policy would result in the risk of costs resulting from delays beyond the control of the terminal operator being shifted entirely to the terminal operator. Such a broad brush system is inequitable.

VI. SUGGESTED FORMS OF ALTERNATIVE RELIEF ARE PROBLEMATIC

The alternative approaches to the alleged problem of demurrage suggested during the Commission's recent hearings on this subject are flawed and should not be pursued.

The concept of "conditional release" of a container without payment of some or all of the outstanding charges would result in a waiver of the possessory lien on the container, which has been a well-established legal remedy for decades. See U.C.C. §§ 7-209(e) and 7-307(c)). Prohibiting the exercise of such a lien would also be

inconsistent with the Uniform Commercial Code (see U.C.C. §§ 7-209(a) and 7-307(a)) and may well go beyond the Commission's authority to interpret the Shipping Act.

The concept of greater transparency, while appealing in concept, also suffers from shortcomings. First, terminal operators generally follow the demurrage established in the governing port tariff, which is available to the public and known to relevant stakeholders. Second, to the extent the free time offered by the carrier is relevant, this is set forth in the carrier's public tariff or in the service contract between the carrier and the shipper. In either case, it is known to the shipper. While the trucker may not be specifically aware of special service contract free time, it is not the trucker that is responsible for payment in any event. Moreover, it should be the responsibility of the shipper who hires the trucker to inform it of relevant terms – that is not the terminal operator's responsibility. Thus, there appears to be little that could be done (or which needs to be done) to improve the visibility of the applicable free time and demurrage terms.

To the extent "transparency" refers to a requirement that terminal operators break out or state separately what portion of demurrages is "compensatory" and what portion is "punitive," serious practical and legal issues are presented.

The practical issue is the difficulty of defining what costs can be included in a "compensatory" demurrage charge. For example, would such a charge include elements of rental costs, security costs, overhead, and other terminal costs? Once the elements that can be included are identified, then one would have to determine how such cost categories are to be allocated to individual containers. Even assuming this could be done in a manner that works for different terminals at different ports (which is by no means a given), the resulting compensatory demurrage charge may very well

wind up being higher than current demurrage charges.

As a legal matter, establishing the type of cost criteria/formula described above appears to constitute a regulation of the amount of a charge, which is beyond the scope of the Commission's authority. While the Commission has the authority to adopt regulations implementing the Shipping Act and statements of policy interpreting that statute, a rule limiting demurrage to a "compensatory charge," or defining what constitutes a compensatory charge, could very well venture into the area of rate regulation.

VII. CONCLUSION

For all the above reasons, the petition is not workable or fair. It would be excessive regulation of a complicated subject. The application of demurrage and detention should be left to the marketplace to work out. According, SSA urges the Commission to deny the petition.

# # # # #