

UNITED STATES
FEDERAL MARITIME COMMISSION

Petition of the Coalition for Fair Port Practices for Rulemaking
Request for Comments
Petition No. P4-16

COMMENTS
SUBMITTED BY THE
TRANSPORTATION INTERMEDIARIES ASSOCIATION

1625 Prince Street, Suite 200
Alexandria, Virginia 22314
703-299-5700
www.tianet.org

Robert A. Voltmann
President and CEO

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The Transportation Intermediaries Association (TIA) submits these comments in response to the Federal Maritime Commission's Notice of Public Hearing and Request for Comments on the Petition of the Coalition for Fair Port Practices for Rulemaking.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

The Transportation Intermediaries Association (TIA) is the professional organization of the \$167 billion third-party logistics industry in North America. Transportation intermediaries, also known as third-party logistics companies (3PLs), act as the facilitators to arrange the efficient and economical movement of goods between cargo ships, airplanes, trucks, rail, warehouses, and store shelves. TIA member companies serve tens of thousands of shippers and play a key role in domestic and international commerce.

TIA represents over 1,700 member companies in an industry that employs more than 126,000 people with a total annual payroll of more than \$7.5 billion. TIA member companies work as motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air freight forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers. Over eighty percent of these member companies are small, family-owned businesses.

TIA is the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

TIA'S POSITION

As a member of the Coalition for Fair Port Practices, TIA encourages the Federal Maritime Commission to issue guidance on what constitutes reasonable practices for assessing detention, demurrage, and per diem charges. The existing system of contractual and customer relationships at American ports results too often in idiosyncratic responses during predictable episodes of congestion.

American economic competitiveness relies on the efficient and reliable movement of cargo through our nation's ports, and every company that participates in moving that cargo has a vested interest in expediting that movement. Carriers have a legal responsibility to tender cargo in a reasonable time and include a reasonable amount of free time. Intermediaries and cargo owners always want to reclaim their cargo and move goods efficiently through ports. When a delay in claiming cargo or returning equipment in a timely manner is within the control of the intermediary, cargo owner, or drayman, then they should be held responsible for charges associated with the delays.

Congestion is a byproduct of a system of contractual relationships that decreases the ability of ports to recover from disruptive events. In the December 5, 2017 Supply Chain Innovation Teams Initiative Report, Commissioner Dye concluded that one major systemic challenge for the United States international supply chain is that "the lack of direct customer relationships between actors in this system (such as shippers and terminals) impedes cooperative problem-solving, exacerbates disruptions (decreasing systemic reliability) and makes recovering from disruptions more difficult (decreasing systemic resilience). Where direct customer relationships exist between actors in the system, there is a commercial vehicle to harmonize the supply chain by addressing disruptions." TIA supports the efforts of Commissioner Dye and the Supply Chain Innovation Team initiative to identify commercial solutions for

supply chain issues, and where those commercial solutions may prove inadequate. TIA hopes that the Commission will consider the issue of unreasonable detention, demurrage, and per diem charges raised by the petition in terms of the systemic limitations that prevent commercial solutions or which produce friction in commercial relationships that decrease supply chain efficiency and make it harder for American exporters and importers to compete in a global marketplace.

Shippers, receivers, and draymen lack a commercial means to resolve systemic issues that lead to port congestion and cargo backlogs caused by such factors as terminal labor negotiations, ocean carrier industry adoption of ever-larger container ships that crowd terminal facilities, or technology shortcomings that provide inaccurate or untimely information that make it harder to claim their cargo. The current system of regulations and commercial relationships does not empower those companies during predictable episodes of port congestion. Rather, the current system forces decisions about whether to absorb the fees, take the business risk of passing the fees on to future customers in the form of higher rates, or take the business risk of taking on significant legal costs to pursue relief from unreasonable charges.

TIA members who move cargo through U.S. ports do not determine the size of the ocean carrier vessel, the choice of terminal by the ocean carrier, or the decisions made as a vessel is loaded or unloaded. However, the decisions made in siloed contractual relationships to which that TIA member is not a party, such as the relationship between a marine terminal operator and its labor force or the contract between an ocean common carrier and a marine terminal operator, cause port congestion that frequently puts TIA members at the mercy of events outside their control. Where those charges are the result of inefficiencies caused by ports, terminal operators, and shipping lines, there is no current guidance or protection to shield small and medium sized intermediaries or shippers from unreasonable charges related to circumstances beyond their control.

As with the lack of contractual relationships between actors in port systems, the lack of clear guidance for reasonableness is itself a systemic handicap that most directly impacts the small-and medium-sized enterprises that make up the ecosystem of importers, exporters, intermediaries, and draymen that move cargo through U.S. ports. When a dispute arises, a shipper, receiver, or drayman must negotiate with a carrier or a marine terminal operator to resolve the dispute. As there is no guidance or standard as to what constitutes unreasonable practices for charging detention, demurrage, and per diem, significant amounts of time and energy can be expended even if the negotiation concludes unsuccessfully. The goal of the policy statement put forward by the Coalition for Fair Port Practices is to provide better clarity into reasonable practices under the Shipping Act as guidance for companies to make better decisions in pursuing relief and achieve commercial solutions to such disputes more efficiently.

Clarifying what constitutes unreasonable detention, demurrage, and per diem practices will also help companies avoid the expensive process of litigating before the Commission or depending on the informal process via the Commercial Affairs and Dispute Resolution Services (CADRS). As the Commission is aware, there are limitations to CADRS services because carriers and terminals must voluntarily agree to participate, and the office cannot impose a standard of reasonableness to detention and demurrage practices. The shortcomings of these systems for resolving disputes make it more difficult for small- and medium-sized enterprises to justify taking on the economic risk of disputing unreasonable charges by carriers or terminal operators with unclear prospects for success.

Testimony by ocean carriers and terminal operators during the hearing indicates that the commercial resolution of unfair charges is inconsistent on a case-by-case basis. Inconsistency impacts competitiveness of American exporters, importers, and intermediaries by imposing unnecessary costs. Nearly all of the over 400,000 American companies that import or export cargo are small- or medium-sized businesses. Forcing these companies to negotiate commercial terms on detention and demurrage with an increasingly consolidated ocean carrier industry, which in turn passes through charges from an increasingly consolidated marine terminal operator industry with whom the small- and medium-sized shipper or intermediary does not have a contractual relationship, unreasonably shifts the costs of inefficiency to those smaller companies and does nothing to discourage future congestion. To ensure American competitiveness, it is critically important that the Commission provide guidance to inform commercial or Commission-facilitated resolution of disputes over detention and demurrage practices.

Small- and medium-sized shippers and intermediaries lack the leverage to negotiate fair and effective commercial solutions with ocean carriers. Even large companies sometimes lack such leverage in some regions or markets, as was indicated during the testimony of Ms. Laura Crowe from Walmart Stores. Negotiated commercial solutions can cover free-time periods and the level of charges, but may not secure a waiver of charges or other consideration when the shipper, receiver, or drayman bears no fault for the delay. In the midst of a port congestion crisis, whether that crisis be due to the weather or circumstances within the control of a terminal operator such as a labor negotiation, those contract terms can be ignored. It makes no sense to impose such charges as an incentive to the shipper or intermediary to collect its cargo and return equipment promptly when circumstances entirely outside their control make this impossible. An FMC policy statement would help all parties in such a situation better understand the boundaries of reasonable conduct and facilitate rapid, fair commercial solutions.

The action requested by TIA and the Coalition is not prescriptive, but would be a proactive step under existing Commission authority to encourage efficiency at U.S. ports and discourage unreasonable behavior during disruptive events. Establishing limited boundaries or guidelines will help all supply chain stakeholders better understand their liability if they are responsible for a delay in processing cargo or returning equipment, and their ability to advocate for a reasonable resolution if the circumstances of the delay were outside their control.

Detention and demurrage charges are helpful tools that encourage the efficient movement of cargo in and out of ports. TIA has no opposition to these charges when the delay in cargo pickup or return of equipment are caused by the intermediary, shipper, or drayage operator (or when the circumstances are within their control). However, these charges are unreasonable when assessed in situations where that shipper, receiver, or drayage operator lacks the means to solve or overcome the delays. Such unreasonable charges should not become a revenue mechanism for ocean carriers or terminals. If used as such, the diverse ecosystem of port users should have access to guidelines or a framework that will let them negotiate a commercial solution or have their complaint fairly arbitrated by a third-party.

The purpose of TIA's involvement in the Coalition is not to seek adjudication by the Commission for any disputes or relief for any charges assessed and paid by TIA members who arrange and move ocean containers. The requested policy statement or guidance would only simplify commercial negotiations related to detention, demurrage, and per diem charges by TIA members and other stakeholders in the international supply chain when delays inevitably occur.

TIA supports the language proposed by the Coalition for Fair Port Practices because it is less specific than tariff language already put in place by some good actors in the system, examples of which were noted in the petition and during Hearing testimony. Outside of those good actors, differences within the U.S. international ocean container freight delivery system mean that practices relating to these charges are not uniform or consistently applied, and that inconsistency is only exacerbated during chaotic instances of port congestion. Action by the Commission to establish guidelines would ensure broad application of fair business practices and reduce the unnecessary expenses and inefficiency in the supply chain.

CONCLUSION

TIA appreciates the opportunity to file comments for the record on this public hearing. TIA encourages the Commission to move forward with a policy statement to clarify what constitutes reasonable detention, demurrage, and per diem charges so that commercial operators at U.S. ports can quickly reach commercial resolutions when these charges result from circumstances outside the control of the shipper, receiver, or motor carrier.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert A. Voltmann", followed by a horizontal line.

Robert A. Voltmann
President & CEO
TIA