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RE: Docket No. 22-04, Comments on Demurrage and Detention Billing Requirements ANPRM [FR Doc. 2022-02981]

Dear Mr. Cody,

The American Association of Port Authorities (AAPA) is the unified voice of the seaport industry in the United States. AAPA represents ports in the nation's capital regarding issues facing the maritime industry, promotes the common interests of the port community, and provides industry leadership on security, trade, transportation, infrastructure, and other issues related to port development and operations. The port industry thanks the Federal Maritime Commission (FMC) for its solicitation of comments regarding demurrage and detention billings.

AAPA respectfully submits these comments on behalf of the U.S. port members of the Association.

Ports have been in news headlines, handling greater volumes of cargo than ever amidst a supply chain crisis. Consumers are understandably concerned with the increased challenges of shipping, which result from many factors, some endogenous, some exogenous. On top of the 'base' freight rates, per diems and surcharges have come under the microscope. To wit – the FMC estimates that from July to September 2021, eight of the largest ocean carriers charged

customers "fees" – presumably inclusive of base freight rates in addition to surcharges – totaling $2.2 billion – a 50% increase from the previous three-month period.[1]

It is imperative that this honorable Commission understand that *neither* the freight rate explosion nor the surcharges from carriers *are the same as* fluidity incentive charges. *Terminal demurrage has not and should not* be the target of customer and policy concerns. These fluidity charges provide the impetus for ports and MTOs to move cargo and sustain efficient freight operations. They are useful and powerful tools for maintaining systemic fluidity and incentives.

Maritime ports contribute $5.4 trillion annually in direct and indirect economic activity to the U.S. economy. Responsible for over a quarter of the nation's gross domestic product, seaports are massive national and local economic engines. Port authorities are American non-profit and/or public entities, and the commerce they facilitate generates hundreds of billions of dollars in Federal, state, and local taxes every year. Approximately half of the U.S. ports in the Association are 'operating' or part-operating, meaning they directly handle the cargo (or passenger) operations at their ports. The other ports are 'landlord ports,' which lease the terminal land – and operations thereon – to MTOs.

[1] The White House Briefing Room, *Lowering Prices and Leveling the Playing Field in Ocean Shipping* [Fact Sheet]. WHITEHOUSE.GOV. (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/

A. Scope

Any New Regulation Should Distinguish Between MTO Demurrage Fees and Ocean Carrier Demurrage Fees, as Congress Has Recently Recognized

There is an important distinction between the demurrage fees levied by ports and marine terminal operators, and the demurrage fees imposed by carriers.

Ports and MTOs charge *terminal demurrage fees* to incentivize freight movement when containers or cargo arrive at the port complex, and before they leave the gate by truck or rail. Often, these fee schedules are *set* publicly or *approved* publicly. In many cases, the terminal demurrage fees are assessed on carriers (as opposed to beneficial cargo owners (BCOs)), because the carriers maintain custody and control over the cargo and are in the best position to direct its movement.

Carriers charge cargo owners and shippers *carrier demurrage fees*, which are defined by private contracts. Understanding this distinction is fundamental and should inform and guide the Commission's efforts towards any potential changes in regulation for demurrage and detention billing requirements.

Port and Marine Terminal Operator Demurrage Fees

Port and MTO terminal demurrage fees serve as the epitome of the *incentive principle*. These fees are critical for facilitating the movement of long-dwelling cargo off terminal space and for maintaining a fluid, resilient supply chain.

Based on recent events, these fluidity charges have proven instrumental in mitigating congestion at port terminals. There is a *direct nexus* between the terminal demurrage charge and the fluidity rate of cargo. Incentives matter and incentives work, as is evidenced by the mere threat of 'long-dwell' fees at large gateways. The San Pedro Bay port complex has seen a 49% drop in aging cargo at port terminals following the threat of implementing additional surcharges.[2] The White House has celebrated this initiative because it had an immediate and appreciable effect.[3]

Ocean Carrier Demurrage Fees

The terminal demurrage fees described above are distinguishable from carrier demurrage fees levied on shippers or BCOs. Carriers charge their own demurrage fees to cargo owners, but ports have no knowledge of these underlying rates and terms, as they are privately negotiated in contract. Ocean carriers hold up the release of cargo at port terminals upon nonpayment of the *carrier demurrage* by the BCO or shipper. Similarly, carriers may refuse to pay ports and MTOs the *terminal demurrage* fee until payment on outstanding disputes or unpaid charges between the carrier and shipper are made.

In contrast to carriers, ports do *not* hold up the release of cargo upon the carriers' refusal to pay terminal demurrage fees. Ports are incentivized to resolve disputes promptly and

[2] San Pedro Bay Ports to Revisit Container Dwell Fee (Apr. 8, 2022), San Pedro Bay Ports to Revisit 'Container Dwell Fee' on April 15 | References | Port of Los Angeles

[3] The White House Briefing Room, *A Record Year for America's Ports and a Look to the Year Ahead,* WHITEHOUSE.GOV. (Jan. 20, 2022), https://www.whitehouse.gov/nec/briefing-room/2022/01/20/a-record-year-for-americas-ports-and-a-look-to-the-year-ahead/

efficiently to support a steady flow of cargo and be compensated for the use of valuable terminal space.

Therefore, any potential change in regulation should clearly differentiate between 'port' and 'MTO terminal demurrage fees,' and 'ocean carrier demurrage fees.'

The Pandemic Continues to Strain the Shipping System

The Covid-19 pandemic has exposed vulnerabilities in ocean shipping and has laid bare the need for a national transport system capable of stretching across all links – from sea, to land, to rail, to warehouse, to consumer. Despite operational challenges in every sector of the supply chain, the Biden Administration has noted that U.S. ports moved more goods in 2021 "than ever before."[4] Incentives like fluidity charges – which can be adjusted depending on market conditions behavior – induce freight movement and keep cargo from piling up on the proverbial baggage carousel.

Containers that remain at port facilities for too long threaten to crowd out other incoming and outgoing freight that needs to reach markets, manufacturers, and consumers in the U.S. and around the world. Prevailing challenges such as the scarcity of port terminal space and warehousing continue to impede efforts to generate greater velocity in the shipping system. The overflow in containerized shipping has led to a shift – where possible – to non-containerized cargo segments such as breakbulk. AAPA anecdotally hears that there are demurrage issues in other cargo segments to the extent that BCOs are pushing their free time allowances to limit and

[4] *Id.*

leaving their breakbulk cargo at port terminals. While the market conditions and fluidity tools of demurrage are not identical in other cargo segments, the port industry appreciates the opportunity to continue addressing these trends across all cargo segments.

Congressional Action in Ocean Shipping Reform

As Congress debates statutory reforms in ocean shipping, it has already begun drafting distinctions between terminal demurrage and carrier detention and demurrage. The Ocean Shipping Reform Act (OSRA) would authorize more intensive oversight of industry practices. Congress has recognized the importance of carving out ports and terminal operators from some of the punitive measures in the bill. Indeed, such onerous requirements – while well-intentioned – should not be so overly broad as to encompass *all* actors across the shipping system, particularly ports and MTOs.

B. Minimum Billing Information

As the industry falls under heightened scrutiny, ports understand that reforms in ocean shipping will necessitate greater collection and transparency of supply chain data. While the port industry supports measured and purposeful improvements, reform should not have the effect of dismantling decades-long, customary business practices in the ocean shipping system.

Increased Regulation Could Undermine Long-Standing Financial Relationships

Regulation should allow for inclusion of certain information *with* rather than *on* demurrage and detention billings. Much of the information requested in the Commission's

ANPRM, such as the bill of lading and container numbers, start/end of free time, billing date, payment due date, state/end of demurrage, detention, and per diem clock, and rates schedules are largely attainable and already included on invoices. Additional information may be attainable, but would demand ports engage in costly, administrative data collection. These efforts would significantly undermine streamlined operations at ports and terminals and in turn, *generate* substantial congestion and backlogs.

An important point to consider is that ports do not bill ocean carriers for individual containers. Rather, for efficiency, a bill is sent to carriers each month assessing the demurrage fees for that entire month.

System Limitations Make Providing Additional Information More Burdensome

Some data are not readily available to ports and MTOs and do not align with their financial billing software or system capabilities. The administrative burden of compliance significantly increases with the more detailed information that is required to be included on billings.

As port operations become increasingly costly, consumers ultimately bear the brunt of the escalated cost.

Contrary to good intentions, new requirements and information hurdles to equipment rental and fluidity charges will worsen supply chain issues. Far from effecting a substantive reduction in congestion at U.S. ports, new data requirements would result in unintended

consequences and would almost certainly slow down operations in the short run. Therefore, additional information should *accompany* the billing, not be required on the billing.

C. Billing Practices

Ports and MTOs Contract with Ocean Carriers, Not Individual Cargo Owners

Just as terminal and carrier demurrage fees are distinct, so too are the contractual relationships between ports, MTOs, carriers, and cargo owners. Ports and MTOs do not bill directly to shippers or cargo owners; their strongest relationship lies with *ocean carriers*, whom they enter into contracts and interface with daily. As such, ports and terminal operators charge demurrage fees to carriers— with one important caveat.

Sometimes, ports and terminal operators act as collection agents for demurrage charges levied on shippers by carriers. As mentioned above, carriers charge their own fees, and they instruct the terminal operator not to release cargo until payment has been made by the shipper or BCO. In this case, although the fee is being *collected* by the port or terminal operator, the charge itself is *still* a carrier demurrage charge.

Collecting fees in this manner optimizes industry efficiency and allows ports and MTOs to avoid the laborious administrative burdens associated with establishing a billing relationship with every single user of the shipping system, including small-volume and one-time shippers. In most cases, ports and terminal operators do not have relationships with cargo owners, and do not know which individual shipper should be billed. Sometimes, terminal operators bill in conjunction with carriers, and sometimes they bill individually. Some terminal operators are

corporate partners of the carriers and are therefore in a better position to exchange data on interoperable systems. However, some terminal operators are unaffiliated corporate entities and lack this ease and convenience of data sharing. Requiring ports and MTOs to identify all such parties receiving an invoice for charges would generate a web of confusion and undercut business between shippers and the third-party intermediary market of freight forwarders and non-vessel operating common carriers (NVOCCs).

Indeed, many shippers prefer conducting business with ports and terminals in this customary way and would be inconvenienced by having to establish a billing profile at every port facility and terminal their cargo moves through. It is not feasible for MTOs to establish a dedicated billing account for the (tens of) thousands of BCOs whose cargo is being moved through the terminal, particularly if the shipper is a one-time user of the system or is on the low-end of shipping, say, a couple of containers per cycle.

Refunds of Demurrage and Detention Billings

Port and marine terminal operator charges are not usually resolved by refund. Rather, payment from carriers is withheld until the dispute is resolved. It is in the best interest of ports and MTOs to resolve disputes promptly and efficiently if they want to get paid on time. Instead of issuing a refund, the charges are adjusted, or credit is applied against the carrier account. Thus, the idea of issuing a 'refund' does not apply to charges assessed by ports and terminal operators.

Data Collection and National Security Impacts

Should the Commission mandate the inclusion of more detailed information on demurrage and detention billings, care must be taken with how this data is collected, aggregated, and stored. If ports are required to include extensive and detailed information on every billing, there is a national security risk that the aggregated data can be exploited by bad actors or competitors. Further, information regarding ports and terminal pricing, dwell times, and maritime practices risks the disclosure of business-sensitive proprietary information.

Conclusion

In summary, AAPA thanks the FMC for its solicitation of comments and applauds the Commission's efforts to strengthen ocean shipping practices and increase supply chain velocity. AAPA supports purposeful changes to demurrage and detention billings but urges the FMC to remain narrow in scope. Potential changes in regulation should clearly differentiate between fees charged by ports and terminal operators, and fees charged by ocean carriers.

Respectfully Submitted,

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