TRAILING ONE'S COAT - DEMURRAGE, DETENTION AND RECENT FEDERAL MARITIME COMMISSION RULEMAKING

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I. Federal Maritime Commission Primer

- a. **The FMC's Mission Statement**: Ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices.
- b. **The principle statutes administered by the Commission**, now codified in Title 46 of the U.S. Code at sections 40101 through 44106, are:
 - i. **The Shipping Act of 1984**, as amended by the Ocean Shipping Reform Act of 1998
 - ii. **The Foreign Shipping Practices Act of 1988** (gives the FMC additional tools to combat unfair foreign maritime practices and restrictions that adversely affect the operations of U.S. carriers).
 - iii. **Section 19 of the Merchant Marine Act, 1920** (Grants power to the Commission to make rules and regulations to further objectives and policies of the Jones Act).
 - iv. **Sections 2 and 3 of Pub. L. No. 89-777, 80 stat.1350** (Evidence of Financial Responsibility for Passenger Transportation).

c. History:

i. Formation of the FMC in 1961

- 1. In 1961, the Kennedy Administration and Congress decided that the tasks of regulating the activities of international liner shipping companies and promoting a healthy U.S. merchant marine should be pursued by separate agencies. By executive order (called Reorganization Plan No. 7) President John F. Kennedy established the Federal Maritime Commission and the Maritime Administration (MARAD). Note: Prior to 1961 both jurisdictions fell under the umbrella of the U.S. Maritime Commission.
- 2. As an independent agency, the FMC was charged with regulating U.S. ocean commerce while MARAD promoted the United States' merchant marine and oversaw the emergency reserve of cargo ships for use in times of conflict.
- 3. The Commission's creation in 1961 also coincided with the early days of the containerization revolution.
- 4. This challenged the fledgling FMC to usher in updates to the nation's transportation regulations and removing obstacles to the intermodal services critical to modernizing commerce.

ii. The Shipping Act of 1984

- 1. The 1984 Act introduced the concept of contract carriage under service contracts filed with the FMC. The pricing of liner services via negotiated contracts, rather than exclusively by public tariffs, profoundly changed the liner industry.
- 2. The 1984 Act also clarified the authority of conference members to offer intermodal pricing (the integration of ocean carriage with truck or rail service).
- 3. The Act also overhauled FMC's authority to review and approve agreements.
 - a. Under the 1984 Act, cooperative agreements automatically become effective after 45 days unless the Commission takes specific actions to block the effective date of the agreement.
 - b. As a result of that change, the Commission heightened its emphasis on monitoring competitive conditions and carrier activity to ensure that carrier agreements remain in compliance.

iii. The Ocean Shipping Reform Act of 1998

- 1. The 1984 Act required that the FMC conduct a 5-year study on how the reforms worked in practice.
- 2. That review was conducted between April 1991 and April 1992 by a high-profile advisory panel The Advisory Commission on Conferences in Ocean Shipping (ACCOS).
- The ACCOS Report's research, findings, and recommendations, while not initially acted on by Congress, provided the basis for a second round of deregulatory liner legislation – The Ocean Shipping Reform Act of 1998 (OSRA).
- 4. OSRA was signed into law on October 14, 1998 and went into effect on May 1, 1999. It provides the basis of U.S. liner shipping policy today.
- 5. The primary objectives of OSRA were to provide the ocean shipping industry with greater flexibility to conduct daily business, to remove certain regulatory restrictions, and to promote U.S. international liner trade by supporting greater reliance on the marketplace.
- 6. Among its most notable changes, OSRA sought to:
 - a. End liner conferences' authority to regulate their members' service contracts.
 - b. Encourage confidentiality of rates in contracts.
 - c. Give the Commission enhanced authority to provide exemptions from existing statutory provisions.
 - d. Strengthen the FMC's authority to address restrictive practices by foreign governments and state-controlled carriers.

d. Structure:

- i. Commission
- ii. Office of Managing Director
 - 1. Bureau of Certification and Licensing
 - 2. Bureau of Enforcement
 - 3. Bureau of Trade Analysis
 - 4. Office of Consumer Affairs and Disputes Resolution
- iii. Office of General Counsel
- iv. Office of the Secretary
- v. Office of Administrative Law Judges

e. Authorities for Proceedings and Dispute Resolution:

- i. **Formal Complaint**: Heard by ALJ and the Commission, 46 C.F.R. Ch. 411 contains a list of violations, prohibitions, and penalties. Ch. 413 outlines the procedures.
- ii. **Small Claims**: (46 C.F.R. Part 205) and its subparts delineates policy and procedure for claims of less than \$50,000 and dispute of audit decisions.
- iii. **Investigative Claims**: Encompasses any activities of ocean common carriers, ocean transport intermediaries ("OTIs"), shippers, or marine terminal operators regarding compliance with statutes and regulations.
- iv. **Petitions for relief or other affirmative action**: (46 C.F.R. §502.74-75) outlines procedures for Administrative Law Judges to include the consolidation of like proceedings and opportunities for informal settlement.
- v. **Rule Making**: **56 U.S.C.** §**305** provides general rulemaking authority to the Commission and "broad discretionary authority to deal with the ever-changing technological and economic conditions of the commercial shipping industry.¹ The Commission issues interpretive rules and statements of policy concerning provisions of the Shipping Act of 1984, and has used the rulemaking process to do so.²
- f. Today, the FMC ensures competitive and efficient ocean transportation services for the shipping public by:
 - i. Ensuring agreements between ocean common carriers and marine terminal operators (MTOs) serving the U.S. foreign ocean borne trades do not cause substantial increase in transportation costs or decrease in services.
 - ii. Maintaining and reviewing confidentially filed service contracts to guard against detrimental effects on shipping.

¹ States Marine Int'l, Inc. v. Peterson, 518 F.2d 1070, 1080 (D.C. Cir. 1975) (discussing prior version of §305). Additionally, further legislation provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." (5 U.S.C. §553(e).)

² 46 C.F.R. Part 545 (the policy statements published at §545.1 and 545.2 were promulgated rulemaking).

- iii. Providing a forum for exporters, importers, and other members of the shipping public to obtain relief from ocean shipping practices or disputes that impede the flow of commerce.
- iv. Ensuring common carriers' tariff rates and charges are published in automated tariff systems and electronically available to the public.
- v. Monitoring rates, charges, and rules of government-owned or controlled carriers to ensure they are just and reasonable.
- vi. Taking action to address unfavorable conditions caused by foreign governments or business practices in U.S.-foreign shipping trades.
- g. Today, the FMC protects the public from financial harm and contributes to the integrity and security of the U.S. supply chain and transportation system by:
 - i. Helping resolve disputes involving the shipment of cargo, personal or household goods, or disputes between cruise vessel operators and passengers.
 - ii. Investigating and ruling on complaints regarding rates, charges, classifications, and practices of common carriers, MTOs, and OTIs that violate the Shipping Act of 1984.
 - iii. Licensing OTIs with appropriate character and adequate financial responsibility.
 - iv. Identifying and holding regulated entities accountable for mislabeling cargo shipped to or from the United States.
 - v. Ensuring that cruise lines maintain financial responsibility to pay claims for personal injury or death, and to reimburse passengers for failure to perform a cruise.

II. Relevant Terminology

- a. Ocean common carrier ("OCC"), in the industry also called ocean carrier, line or liner, or vessel operating common carrier ("VOCC"). The terms are interchangeable.
- b. Intermodal Equipment and Charges: Carrier Equipment
 - i. Dry Van/Dry Box
 - ii. Temperature Controlled Container ("Reefer")
- c. Special Equipment
- d. Chassis Sources
 - i. Sometimes provided by ocean carriers
 - ii. Intermodal Equipment Providers
 - 1. Direct ChassisLink Inc.
 - 2. Flexi-Van Leasing LLC
 - 3. Interpool Inc. (d/b/a TRAC Intermodal)
 - iii. Chassis Pools: Carriers typically contract with IEPs to provide chassis to designated pools

- e. "Equipment" and "Storage" Charges
 - i. Demurrage: a charge for use of terminal space
 - ii. Detention: a charge for use of carrier equipment
 - iii. **Free Time**: time allowed to cargo interests to retrieve their shipments, calculated from time of discharge or time of availability.³
 - 1. or...⁴
 - 2. or...⁵
 - 3. Although ports and terminals do not control the contractual relationships between cargo interests and shippers, and thus the free time a carrier offers its customers, they can negotiate with carriers about the demurrage and free time policies of the ports and terminals vis-à-vis carriers.
 - 4. The "tender" cases tend to involve port-to-port moves (i.e., merchant haulage) rather than door-to-door moves (carrier haulage), where actual delivery is more likely to occur. Still, cargo interests rely on *Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n*, 10 F.M.C. 409, 415 (FMC 1967) and others to claim that "tender", and therefore the start of free time, requires more than depositing cargo on a reasonable pier. ⁶

III. What Cargo Interests and Motor Carriers Want

a. **FMC Docket No. P4-16**, Petition for Rulemaking Submitted by the Coalition for Fair Port Practices filed December 7, 2016 (Attachment 1)

b. By filing the Petition, 26 trade associations representing importers, exporters, drayage providers, freight forwarders, customs brokers, and third-party logistics providers (3PLs) initiated a rulemaking proceeding pursuant to 46 C.F.R. § 502.51 for the purpose of adopting a rule that will clarify, for the purposes of demurrage and

³ As cited in the petition, Demurrage and Detention charges typically do not accrue until the expiration of a "free time" period, which is an initial period allowing for the efficient removal of cargo or return of equipment during which no charges accrue. Free time is not a gratuity. Rather, it is part of the ocean common carrier's transportation obligation. (*Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966).

⁴ Free Time and Demurrage—New York Harbor (NY II), 9 Shipping Reg. (P&F) 860, 873, 874 (F.M.C. Dec. 7, 1967) (noting that tendering cargo for delivery is an obligation "for the performance of which [a carrier] may collect no greater compensation than that required by [its] contract of carriage" and carriers have an obligation to tender for delivery free of assessments); see NY I, 3 U.S.M.C. at 101 (stating that free time "is an obligation which the carrier is bound to discharge as part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties.").

⁵ Many believe that free time should not begin until the carrier tenders the cargo for delivery. A carrier tenders cargo for delivery when it unloads the cargo, makes it accessible to the consignee, and afford the consignee a reasonable opportunity to remove it. *The Eddy*, 72 U.S. 481, 495 (1867); *Am. President Lines, Ltd. V. Fed. Mar. Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962).

⁶ To tender delivery, unless the Customs or regulations of the port require otherwise, a carrier must: (1) unload cargo onto a dock or pier, (2) place it at a location where it is accessible to the consignee, (3) segregate it by a bill of lading and count, (4) give the notice to the consignee and (5) afford the consignee a reasonable opportunity to come and get it. *Am President Lines, Ltd. V. Fed. Mar. Bd.*, 317 F.2d 887, 887, 888 (D.C. Cir. 1962).

- detention, what constitutes "just and responsible rules and practices" in accordance with 46 U.S.C. \$41102(c).
- c. The Petition states the Commission has specifically found that demurrage and detention practices are encompassed within the ambit of §41102(c), because demurrage and detention relate to the delivery of property at terminals.⁹
- d. The Petition states the Commission and its predecessor have held that "where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal.¹⁰
- e. Cargo Interests contend in Petition that although detention and demurrage charges are intended to incentivize the efficient removal of cargo from, or return of equipment to, U.S. ports, ocean common carriers and marine terminal operators used the charges as revenue builders, and unfairly and inconsistently applied them against circumstances over which shippers, consignees, and drayage providers had no control.
- f. The Petition also lists inconsistent tariffs and billing practices¹¹, unwillingness to waive charges or extend free time during labor shortages or inclement weather, and inflexibility with respect to delays due to U.S. Customs and Border Protection inspections.¹²

⁷ The test of reasonableness as applied to terminal practices "is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." (*W. Gulf Maritime Ass'n v. Port of Houston*, 18 Shipping Reg. (P&F) 784, 790 (F.M.C. 1978), *affirmed without opinion sub nom W. Gulf Maritime Ass'n v FMC*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980).

⁸ The Petition satisfied requirements of Commission Rule 51 which permits an interested party to petition the Commission for issuance of an interpretive rule. 46 C.F.R. §502.51(a). 46 U.S.C. §41102(c) states with respect to practices in handling property, that "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering port property.

⁹ See Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting §41102(c) as applying to detention).

¹⁰ NY I, 3 U.S.M.C. 89, 109 (1948). Today, 46 U.S.C. §41104(2) specifies that a carrier must provide service in accordance with rates in its tariffs or service contracts.

¹¹ Fed. Mar. Comm'n, Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports 12 (2015).

¹² Recently, *CMA CGM S.A. v. Leader Int'l Express Corp.*, Case No. 19-cv-357, July 22, 2020, ED Va., granted the CMA CGM's motion for summary judgment for breach of a maritime contract. The Court found Leader liable for \$1.3 M in demurrage, detention, and related charges following a lengthy customs hold. Leader raised affirmative defenses of frustration of purpose, impossibility/impracticality, and force majeure. The court found frustration of purpose inapplicable as Leader failed to prove that "nonoccurrence of a customs hold" was a basic assumption on which the contract was made. The court also found customs holds and delays fully foreseeable, and therefore held that Leader fully assumed that risk, rendering the doctrine of impossibility inapplicable. The court found the force majeure clause inapplicable because Leader failed to give the appropriate notice obligated by the contract.

- g. It further alleged shippers, consignees, and drayage providers "do not choose the terminals that carriers use. They are not parties to port labor collective bargaining agreements"¹³.
- h. The Petition asserts a clear FMC policy or rule will promote the observance of reasonable demurrage and detention practices by:
 - i. Guiding ocean common carriers and marine terminals to avoid establishing unjust and unreasonable practices and incurring attendant liability.
 - ii. Raising awareness amongst cargo interests with respect to the scope of their own obligations.
 - iii. Fostering efficient resolution of disputes and promoting collaboration.
 - iv. Ensuring OCCs and MTOs use demurrage and detention consistent with the primary purpose of efficient cargo removal and equipment returns.
- i. The Petitioners' proposed policies included four separate paragraphs:
 - i. Paragraph (a) set the relevant text of Section 10(d) of the Shipping Act, 46 U.S.C. §41102(c), which is interpreted in the remaining paragraphs.
 - ii. Paragraph (b) addressed the "unreasonable practice" where an OCC or MTO fails to tender cargo for delivery or accept equipment returns during the free time period due to circumstances beyond the control of the shipper, receiver, or drayage provider and the OCC or MTO refused to extend free time.
 - iii. Paragraph (c) addressed the "unreasonable practice" under the same circumstances as (b) but the failure to accommodate an attempt to retrieve cargo or return equipment occurs after free time expired.¹⁴
 - iv. Paragraph (d) addresses demurrage and detention assessments at levels above "storage cost" when the carrier or terminal can fulfill their obligations to tender cargo for delivery or accept equipment but the shipper cannot retrieve cargo or return equipment for reasons beyond their control.

IV. Demurrage and Detention – FMC Interpretive Rule

- a. Genesis of Rule and Chronology Fact Finding Investigation 28
 - i. December 7, 2016 The Petition for Rulemaking was submitted by the Coalition for Fair Port Practices (P4-16)
 - 1. Coalition for Fair Port Practices "26 Trade Associations representing importers, exporters, drayage providers, freight forwarders, customs brokers and third-party logistics providers

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¹³ The Petition at 12.

¹⁴ Cargo contends it would only be reasonable for demurrage or detention to be assessed during the period between the expiration of free time and the commencement of the disability.

- 2. Requested initiation of rulemaking proceeding (46 C.F.R. §502.51) to identify what constitutes "just and reasonable rules and practices with respect to demurrage, detention, and per diem charges " (46 U.S.C. §41102(c))
- ii. January 2018 FMC Hearing (Solicitation of testimony from shippers, ocean transportation intermediaries, ocean carriers, truckers, and marine terminal operators). 15
- iii. FF28 Order: Examination of five key issues related to D&D:
 - 1. Whether the alignment of commercial, contractual, and cargo interests enhances or aggravates the ability of cargo to move efficiently through U.S. ports;
 - 2. When has the carrier or MTO tendered cargo to the shipper and consignee;
 - 3. What are the billing practices for invoicing demurrage or detention;
 - 4. What are the practices with respect to delays caused by various outside or intervening events; and
 - 5. What are the practices for resolution of demurrage and detention disputes between carriers and shippers.
- iv. December 3, 2018 Commissioner Dye's Report and Proposed Rule (Attachments 2 and 3)

1. Findings:

- a. Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- b. All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- c. Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

2. Recommendations:

- a. Transparent, standardized language for demurrage and detention practices;
- b. Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- c. Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and

¹⁵ The information and data were provided in response to FF28 information demand letters. See https://www.fmc.gov/fmc issues information demands in detention dumurrage investigation/

- d. Consistent notice to cargo interests of container availability.
- v. September 6, 2019 FMC Action FMC adopts Commissioner Dye's Report, announcing intent to adopt an interpretive rule that "clarifies how the Commission will assess the reasonableness of demurrage and detention practices."
 - 1. Focus: "INCENTIVE PRINCIPLE," i.e., whether the practice or charge serves "the intended primary purpose as financial incentives to promote freight fluidity."
 - 2. Corollary it would be unreasonable to charge demurrage and detention when shippers are prevented from picking up cargo or returning containers within the Free Time allotted under Tariff or Contract.
 - 3. Factors to be considered in analysis:
 - a. Notice given to cargo interests regarding container availability
 - b. Existence, accessibility, and transparency of Demurrage and Detention policies; and
 - c. Clear dispute resolution processes/policies, including guidelines regarding evidence to be considered in dispute.

b. The Final Interpretive Rule Adopted by the FMC

NOTE: As a result of the Petition, the fact-finding process and the report of Commissioner Dye, Federal Maritime Commission adopted the following interpretive rule:

"46 C.F.R. § 545.5 Interpretation of Shipping Act of 1984-Unjust and unreasonable practices with respect to demurrage and detention.

- (a) Purpose. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
- (b) Applicability and Scope. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.

(c) Incentive Principle.

(1) General. In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which

demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

- (2) Particular Applications of Incentive Principle.
- (i) Cargo Availability. The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
- (ii) Empty Container Return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.
- (iii) Notice of Cargo Availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.
- (iv) Government Inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.
- (d) Demurrage and Detention Policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.
- (e) Transparent Terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.
- (f) Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule."

- 4. Note there is no requirement that Carriers take any specific action to revise D&D practices and charges; it does, however, identify factors that the Commission will consider in determining whether a practice or charge is "just and reasonable."
- c. Identifying Issues: Applying Demurrage Rules
 - i. Example: Free time on an import container commences on October 1 and extends five days until October 5. If a snowstorm blocks truck access to the port for three days beginning October 4, but the OCC and MTO have cleared all roads and the port is operating normally during this period
 - a. Should the Carrier and MTO be able to charge in demurrage from October 6-7?
 - b. If a snowstorm then blocks access to the port from October 8-10—
 - (1) What can the OCC or MTO charge in demurrage for Oct 6-7?
 - (2) Oct 8-10?
 - (3) Thereafter, until cargo is removed?
 - c. Over-the Road Haulers and Cargo Interests (Beneficial Cargo Owners and NVOCCs)
 - d. Ocean Carriers / MTOs
 - ii. Example: Cargo discharges on October 1 and is immediately placed on hold by US Customs, in anticipation of inspection. Customs does not release the cargo from hold for fifteen (15) days. Cargo interests interchange the container out on October 17.

Should the Carrier and MTO be able to assess demurrage from the expiry of Free Time?

- d. Industry Action
 - 1. Carriers
 - i. Best practices
 - 1. Review / modification of Demurrage and Detention Policies
 - 2. Assessment Triggers / Free Time
 - 3. Publication of Dispute Procedures
 - ii. Tariff Changes
 - 2. Cargo Interests (BCOs / NVOCCs)
 - i. Contractual changes
 - ii. Clear definitions of D&D and availability
 - iii. D&D fee responsibility carveouts

- iv. Stop the clock clauses
- v. Address governmental holds/release and impact on free time period
- vi. Reasonable alternatives where terminal space is limited & address cost-sharing
- vii. EDI requirements
- viii. Responsibility for load pickup and return of empties
- ix. Indemnity provisions addressing:
 - D&D
 - Drayage service provider congestion fees
- x. Availability of information regarding D&D billing practices, yard closures, container availability, free time and holds
- xi. Scheduling of appointments prior to container availability
- xii. Access to log records tracking appointments for pickup/container delivery
- xiii. Impact of force majeure events on D&D
- xiv. Identification of NVOCC "as agent" for the importer/foreign registered NVOCC
- xv. Recordkeeping (especially for extenuating circumstances)
 - Attempts to schedule appointments for pickup/return of containers
 - Attempts to pickup/return containers

V. The IMCC, OCEMA, and Chassis Pool Litigation

- a. The Parties
 - i. Intermodal Motor Carriers Conference—A conference of the American Trucking Associations, Inc. of companies engaged in the intermodal transportation of property or providing services supporting intermodal transportation
 - ii. Ocean Carrier Equipment Management Association U.S. based association of ten (10) major ocean common carriers focusing upon operational and safety matters pertaining to intermodal transportation of ocean freight (containerized cargoes)
 - 1. Consolidated Chassis Management LLC formed by OCEMA to develop and own chassis pools
 - a. Chicago Ohio Valley Consolidated Chassis Pool
 - b. Denver Consolidated Chassis Pool
 - c. Gulf Consolidated Chassis Pool
 - d. Mid-South Consolidated Chassis Pool
 - e. Mid-West Consolidated Chassis Pool
 - f. South Atlantic Chassis Pool

b. The Claim

- i. Carriers disallow chassis-provider choice, designating default provider via contract
- ii. Chassis contract overcharges for chassis usage in Merchant Haulage, while undercharging for chassis usage charges in Carrier Haulage
- c. Docket 20-14 Complaint for Violation of the Shipping Act of 1984, 46 U.S.C. §41102(c) (Attachment 4)
 - i. Respondents: OCEMAN, CCM, Individual Members (CMA CGM, COSCO, Evergreen, HAPAG Lloyd, Hyundai, Maersk, MSC, Ocean Network Express, Wan Hai, Yang Ming, ZIM)
 - ii. Status of OCEMA / Individual Carriers Responsive Pleadings

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UPFICE OF THE SECRETARY FEDERAL MARITIME CONT

December 7, 2016

Via E-mail and Hand Delivery

Rachel E. Dickon Assistant Secretary Office of the Secretary Federal Maritime Commission 800 North Capitol Street, N.W Washington, D.C. 20573

RE: Petition for Rulemaking

Dear Assistant Secretary Dickon:

Enclosed please find for filing with the Federal Maritime Commission an original and five (5) copies of the Petition for Rulemaking and accompanying verified statements submitted by the Coalition for Fair Port Practices. An electronic copy of the filing was also submitted via e-mail.

One additional copy of the Petition is enclosed for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me at (202) 263-4108.

Sincerely,

Karyn/A. Booth

Attorney for the Coalition for Fair Port Practices

Enclosures

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UFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. [4-/6]

PETITION FOR RULEMAKING **SUBMITTED BY** THE COALITION FOR FAIR PORT PRACTICES

By Its Attorneys

Karyn A. Booth Nicholas J. DiMichael Jason D. Tutrone Madeline J. Sisk THOMPSON HINE LLP 1919 M Street, N.W., Suite 700 Washington, D.C. 20036 (202) 331-8800

Dated: December 7, 2016

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	C.	Opera Shipp Return Subst Charge	graph (d): When an Ocean Common Carrier or Marine Terminal ator is Able to Tender Cargo for Delivery or Accept Equipment but a per, Consignee, or Drayage Provider Cannot Retrieve Cargo or an Equipment Due to an Event Beyond their Control that Affects a antial Area of the Port, then the Carrier or Marine Terminal May Not ge More than Compensatory Demurrage or Detention for the Period Free Time Expires.	42	
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BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. []

PETITION FOR RULEMAKING

SUBMITTED BY

THE COALITION FOR FAIR PORT PRACTICES

The Coalition for Fair Port Practices ("Petitioners" or "Coalition"), a group of 26 trade associations representing importers, exporters, drayage providers, freight forwarders, customs brokers, and third-party logistics providers ("3PLs"), request that the Federal Maritime Commission ("FMC" and "Commission") initiate a rulemaking proceeding, pursuant to 46 C.F.R. § 502.51, for the purpose of adopting a rule that will interpret the Shipping Act of 1984, as amended, and specifically 46 U.S.C. § 41102(c), to clarify what constitutes "just and reasonable rules and practices" with respect to the assessment of demurrage, detention, and per diem charges by ocean common carriers and marine terminal operators when ports are congested or otherwise inaccessible. Specifically, Petitioners are proposing a rule for adoption by the Commission and request specific guidance as to the reasonableness of such charges when port conditions prevent the timely pick up of cargo or the return of carrier equipment because of broad circumstances that are beyond the control of shippers, receivers, or drayage providers. The text of the proposed rule is set forth in Exhibit A attached to this Petition.

This Petition satisfies the requirements of Commission Rule 51, which permits an interested party to petition the Commission for issuance of an interpretive rule. Rule 51 requires this Petition to be verified and to set forth the nature of the relief sought, the interest of the Petitioners, and any facts, views, arguments, and data deemed relevant by the Petitioners. Exhibit A identifies the relief requested by Petitioners, specifically, an interpretive rule that clarifies and provides guidance to the shipping industry as to conduct that constitutes unjust and unreasonable demurrage and detention practices under § 41102(c) of the Shipping Act, when port delays resulting in such charges are beyond the control of the shipper, receiver, or drayage provider.

Exhibit B to this Petition identifies the Petitioners' interests in seeking the requested relief. The 26 organizations that are part of the Coalition represent companies that have been and continue to be affected by demurrage and detention charges levied by ocean common carriers and marine terminal operators. Further, this Petition is supported by 15 verified statements or supporting letters from a broad cross-section of industry stakeholders, including shippers, receivers, motor carriers, port draymen, freight forwarders, 3PLs, and customs brokers. These verified statements and letters are set forth in Exhibit C. The Coalition members strongly believe that the Commission should initiate a rulemaking to provide guidance to the shipping community as to the reasonableness of current demurrage, detention, and per diem practices and charges that are levied during periods of port congestion or disruptions that prevent the timely pickup of cargo or return of equipment.

¹ 46 C.F.R. § 502.51(a).

 $^{^{2}}$ Id.

Section I of this Petition provides relevant background information.

Section II of this Petition identifies relevant facts supporting the need for the proposed Rule, including recent findings of the FMC derived from hearings and its own evaluation of port congestion issues.

Section III explains that the Commission has the authority to issue the proposed rule, which is consistent with § 41102(c) and related case precedent.

Section IV describes the proposed rule and its application to the practices of ocean common carriers and marine terminal operators.

Finally, Section V explains how the rule complements, but does not duplicate, the Commission's Supply Chain Innovation Teams, which were established to explore commercial solutions to a variety of issues facing the U.S. maritime industry, including port congestion and related issues.

I. INTRODUCTION

Recent events involving port congestion, labor strife, an ocean-carrier bankruptcy, inclement weather, and other disruption events have had crippling effects on U.S. ports and the stakeholders who rely on the efficient movement of goods through the ports. But, during these periodic events, demurrage, detention, and per diem, i.e., charges by ocean common carriers and marine terminal operators that are intended to incentivize the efficient removal of cargo from or return of equipment at U.S. ports, did not abate consistently even though shippers, consignees, and drayage providers had no control over the events that caused the ports to be inaccessible and prevented them from retrieving their cargo or returning equipment. The verified statements and letters that support this Petition, which are from a broad cross-section of shippers, dray carriers, freight forwarders, and customs brokers, echo this collective experience. These statements provide many examples of situations where ocean common carriers and marine terminal

operators assessed demurrage, detention, and per diem even though cargo could not be picked up from, or equipment could not be returned to, ports for reasons completely beyond the control of the shippers, on signess, and drayage providers. These statements mirror numerous public reports of such practices, and in fact are consistent with information that the Commission's staff itself has developed. These widespread practices raise concerns under 46 U.S.C. § 41102(c), which requires ocean common carriers and marine terminal operators to observe just and reasonable demurrage, detention, and per diem practices. Thus, to promote the application of just and reasonable demurrage, detention, and per diem practices during future congestion and other events that impact the availability of facilities in U.S. ports and are beyond the control of shippers, receivers or draymen, the Commission should adopt the proposed rule, which will provide necessary guidance to the shipping industry and clarify the agency's enforcement intentions under § 41102(c).

Adopting the proposed rule will not only curtail unjust and unreasonable demurrage, detention, and per diem practices, but it will also provide meaningful incentives to help reduce and mitigate port congestion. The primary goal of demurrage, detention, and per diem is to further the public interest of reducing port congestion and facilitating efficient waterborne transportation. But the incentive placed upon ocean common carriers and marine terminal

³ The Coalition notes that the concerns expressed throughout this Petition on behalf of shippers who have experienced questionable demurrage and detention practices also apply to non-vessel-operating common carriers ("NVOCCs") who act as the "shipper" in their dealings with ocean carriers. Thus, Coalition members who represent NVOCCs are also supporting the relief requested in this Petition.

⁴ Congress enacted the original version of § 41102(c) at § 17 of the Shipping Act of 1916, Pub. L. 64-260, 39 Stat. 728, 734-35 (1916). It carried § 17 of the 1916 Act forward as § 10(d) of the Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, 80 (1984), less language within the provision authorizing prescription of unjust or unreasonable practices. Pursuant to the Ocean Shipping Reform Act of 1998, Congress recodified § 10(d) of the 1984 Act as 46 U.S.C. § 41102(c). References in this Petition to § 41102(c) are interchangeable with references to § 17 of the 1916 Act and § 10(d) of the 1984 Act.

operators to address port congestion is weakened if they can levy demurrage, detention, and per diem charges against parties who have no influence over the operations and conditions that prevent shippers, consignees, and drayage providers from promptly picking up cargo and returning equipment. Thus, the establishment of a clear policy that clarifies the FMC's interpretation of unjust and unreasonable practices under 46 U.S.C. § 41102(c) in such circumstances will: provide needed guidance to the industry; help ensure that demurrage and detention charges are properly assessed in situations where they can fulfill their purpose of incentivizing the timely removal of cargo and return of equipment; and help to focus carriers and marine terminal operators to more efficiently address the circumstances causing port delays.

II. THE COMMISSION SHOULD ADOPT A POLICY THAT CLARIFIES DEMURRAGE, DETENTION, AND PER DIEM PRACTICES THAT ARE UNJUST AND UNREASONABLE UNDER SECTION 41102(C).

The recent experiences of shippers, consignees, and drayage providers demonstrate that the need for Commission guidance on reasonable demurrage and detention practices is acute. This guidance will promote the use of reasonable practices, reduce disputes concerning demurrage and detention, and ensure that demurrage and detention are not used inappropriately to generate revenues for cash-strapped ocean common carriers or for marine terminal operators that typically lack a contractual relationship with the parties paying the charges.

A. Background

Ocean common carriers and marine terminal operators charge demurrage, detention, and per diem for the use of terminal space and equipment. These charges have two main functions. First, they encourage the efficient pickup of cargo⁵ and use of equipment.⁶ Second, they compensate for the use of equipment⁷ and port space.⁸

⁵ Free Time & Demurrage Charges at N.Y (NY I), 3 U.S.M.C. 89, 107 (1948).

Demurrage is the charge assessed for cargo occupying terminal space. Ocean common carriers usually provide this space through marine terminal operators, which are either ports themselves or port tenants who lease terminal facilities. 10

Detention is the charge to shippers and consignees for use of ocean containers and other equipment (e.g., chassis). Similar to detention, **per diem** is the daily charge to drayage providers for use of ocean containers and equipment. References in this Petition to detention include per diem.

These charges, however, typically do not accrue until the expiration of a "free time" period, which is an initial period allowing for the efficient removal of cargo or return of equipment during which no charges accrue. Free time is not a gratuity. Rather, it is part of the ocean common carrier's transportation obligation. Under that obligation, ocean common carriers must provide shippers a realistic period to assemble their cargo for loading, and must provide consignees a realistic period to retrieve their cargo at a terminal after it is unloaded from a vessel. These periods are known as "free time," because they are not subject to additional assessments and, instead, are included in the rates for the ocean transportation. To comply with

⁶ Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970).

⁷ *Id*.

⁸ NY I, 3 U.S.M.C. at 107.

⁹ Fed. Mar. Comm'n, Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports 12 (2015) [hereinafter ("April 2015 Report")].

¹⁰ *Id.* at 16 n.17.

¹¹ *Id.* at 20.

¹² *Id.* at 9 n.4.

¹³ Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 539 (1966).

¹⁴ *Id.*; *NY I*, 3 U.S.M.C. at 101.

¹⁵ NY I, 3 U.S.M.C. at 91 n.5.

their free-time obligation, ocean common carriers will set forth specific free-time periods in their tariffs. They also may specify free time in their service contracts. Free time may be different at the origin and destination to account for the unique transportation and port operations involving cargo loading and tendering of cargo for delivery.

Detention charges are also usually subject to free time. Carriers often provide free time for containers and equipment via their service contracts and tariffs. The goal of this free time is to provide sufficient time for the loading and unloading of the container.

Generally, an ocean common carrier's tariff, a marine terminal operator's schedule, or a contract between an ocean common carrier and shipper, contain the rules and rates relating to demurrage, detention, and free time. ¹⁶ Also, the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA") and corresponding ocean common carrier addenda, which govern the interchange and use of an ocean carrier's equipment, include detention and free-time rules. ¹⁷ Usually, the UIIA provisions apply to drayage providers, who must participate in the UIIA to handle carrier equipment, and not to the actual shipper or receiver.

On occasion, ocean common carriers and marine terminal operators may agree voluntarily or through negotiations with their customers to either stop the accrual of demurrage/detention or extend free time, effectively delaying the accrual of demurrage/detention charges. In 2015, the FMC found that "[m]any port authority schedules or ordinances include authority for the executive director to extend free time for demurrage in certain situations." Similarly, "[f]ree time for demurrage may also be extended by the terminal operator or by the

¹⁶ April 2015 Report, supra note 9, at 10.

¹⁷ Uniform Intermodal Interchange and Facilities Access Agreement, http://www.uiia.org/assets/documents/newuiia-Home.pdf (last visited Dec. 6, 2016).

¹⁸ April 2015 Report, supra note 9, at 17.

VOCC."¹⁹ Indeed, the Commission noted that some carriers have tariffs that allow for additional free time where the carrier is unable to tender cargo for delivery during free time.²⁰ It also found that at least one carrier had a tariff that called for the suspension of free time during a carrier disability occurring after free time expires.²¹

Although some marine terminal operators and ports have tariffs that allow for additional free time or lesser rates where the terminal or port is unable to tender cargo for delivery during free time, these tariffs are inconsistent. Maher Terminals LLC, which operates a terminal at Port Elizabeth, will extend free time if the consignee makes application for delivery of the cargo during the free-time period and Maher is unable for any reason within its control to make the cargo available.²² If, after free time expires, the consignee is prevented from removing cargo by factors beyond its control which affect a substantial portion of the port area, or a longshoremen's strike affecting a smaller area, Maher will charge first-period demurrage rates.²³ The New York Terminal Conference, Port of Los Angeles, and Port of Long Beach reserve the right to extend free time where a consignee is prevented from removing cargo by factors beyond its control.²⁴ APM Terminals Mobile, LLC, will extend free time if the consignee makes an application for delivery of cargo during the free-time period and APM Mobile willfully does not make the cargo

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18 (citing CMA CGM, CMDU-100 U.S. Unified Tariff, Rule 100 – Import Demurrage Rules).

²¹ *Id.* at 18 (citing COSCO tariff, Far East to U.S.A. Tariff No. 201, Free Time/Demurrage at Destination U.S.A., Number 023- B (effective November 22, 2014)).

²² Maher Terminals LLC, Marine Terminal Schedule No. 010599, Section IV.8.A (eff. Oct. 1, 2016).

²³ Id. Section IV.8.B.

²⁴ New York Terminal Conference, Marine Terminal Schedule No. 011408, Section IV.8. (eff. Oct. 1, 2016); Port of Long Beach, Tariff No. 4, Item 406 (eff. June 30, 2016); Port of Los Angeles, Tariff No. 4, Item 730 (eff. Oct. 20, 2016).

available.²⁵ The Port of Seattle may waive demurrage charges for a "Labor Emergency."²⁶ Virginia International Terminals, LLC, extends free time for cargo on free time at the commencement of a longshore strike; first-period demurrage will be charged for cargo not on free time at the commencement of the strike.²⁷ Also, the Port of Long Beach effectively extends free time for certain U.S. Customs and Border Protection inspections of containerized cargo by delaying the commencement of free time until Customs releases its hold on the affected containers.²⁸

Some marine terminal operators will collect demurrage charges from shippers, consignees, or drayage providers as a condition to the release of a container, even though the carrier's tariff may specify the applicable charge. ²⁹ This ensures payment of the terminal operator's demurrage charge, which is usually built into the carrier's demurrage rate for the cargo. In contrast, some marine terminal operators may forego collection of their demurrage assessment from the cargo interest and invoice the ocean common carrier for it instead. ³⁰ In this scenario, the ocean carrier collects its demurrage charges from its shipper customer or the customer's agent and pays the marine terminal operator from this collection.

These payment arrangements reflect the fact that shippers, consignees, and drayage providers do not have a direct relationship with marine terminal operators. Ocean common

²⁵ APM Terminals Mobile, LLC, Terminal Operator Schedule, Rule 21(6), *available at* http://www.apmterminals-na.com, follow APM Terminals Mobile, LLC – Mobile Terminal Tariff (last visited Dec. 6, 2016).

²⁶ Port of Seattle, Terminals Tariff No. 5, Item 5000(E) (eff. Jan. 1, 2016).

²⁷ Virginia International Terminals, LLC, Schedule of Rates No. 1, Section V (eff. Oct. 1, 2016), available at http://www.portofvirginia.com/pdfs/tools/SOR%20v5.pdf.

²⁸ Port of Long Beach, Tariff No. 4, Item 402(a) (eff. June 30, 2016).

²⁹ April 2015 Report, supra note 9, at 16.

³⁰ *Id.* at 18.

carriers contract with the marine terminal operators or ports to handle the cargo they carry. They also negotiate the service terms and rates with those entities. Shippers, consignees, and drayage providers cannot independently select a marine terminal operator or negotiate the terms of the marine terminal operator's service. Instead, they are subject to the carrier's selection of, and relationship with, the marine terminal operator.

B. Recent Experience in the Containerized Trades Reveals Troubling Demurrage and Detention Practices.

Recent events causing port delays and disruption have prevented the timely pickup of cargo or return of equipment and resulted in shippers, consignees, and drayage providers being assessed millions of dollars in demurrage and detention charges. But, many of these delays arise for reasons beyond the control of shippers, consignees and drayage providers, making the collection of demurrage or detention in such circumstances a highly questionable practice. An FMC policy that clarifies when such practices may be contrary to § 41102(c) will promote the observance of just and reasonable demurrage and detention practices and help incentivize carriers and marine terminal operators to reduce future delays and congestion.

1. Recent port congestion or disruption events have mainly arisen for reasons beyond the control of shippers, consignees, and drayage providers.

Port congestion or disruption arise for many reasons. More recently, weather, a carrier bankruptcy, and labor issues have caused significant delays. Also, the shipping industry is

³¹ See Joseph Bonney, Pressure Builds on FMC to Act on Demurrage, Detention Complaints, J. Com. (Jun. 11, 2015), http://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/industry-groups-urge-fmc-act-demurrage-detention_20150611.html (noting that cargo interests have incurred demurrage and detention fees totaling up to several million dollars). The Washington Council on International Trade estimates that the 2014-2015 West Coast port slowdown cost Washington shippers \$7 million in demurrage charges. Wash. Council on Int'l Trade, The Economic Costs of the 2014-2015 West Coast Port Slowdown on Washington State 2 (2016), available at http://wcit.org/wp-content/uploads/2011/08/WCIT-Port-Delays-Economic-Impacts-Report-FINAL1.pdf.

changing. Carriers are increasingly using high-capacity vessels.³² This contributes to congestion, because it requires ports to service increasingly larger volumes of cargo within the same boundaries of the port complex. Further, "[c]arriers offer the same amount of free time 'whether the vessel holds 5,000 TEUs (20-foot equivalent units) or 18,000 TEUs, even though the vessel operators, NVOCCS and merchant haulers alike are challenged to find adequate trucking capacity to dray double and triple the volume in the same time."³³ Carriers also have been reducing free time and increasing demurrage charges in an attempt to encourage shorter dwell times at terminals and thereby reduce their operational costs and increase income. This strains terminal capacity by requiring greater cargo-handling productivity than currently exists.

Similarly, the creation of very large vessel alliances is causing volume increases that terminals are not prepared to handle. The production of the production of

However, in recent events involving port congestion or disruption, a common element is a complete lack of shipper, consignee, and drayage-provider control or even the ability to affect the situation. Recent events that have led to significant port congestion include:

- Hurricane Sandy in 2012.36
- Harsh Winter of 2013-2014.³⁷

³² U.S. Gov't Accountability Office, GAO-17-23, West Coast Ports 8-9 (2016); Bureau of Trade Analysis, Fed. Mar. Comm'n, U.S. Container Port Congestion & Related International Supply Chain Issues 39-40 (2015) [hereinafter July 2015 Report].

³³ Joseph Bonney, Regulators Urged to Question Carriers' Vessel-Sharing Deals, J. Com. (Apr. 5, 2016), http://www.joc.com/maritime-news/container-lines/regulators-urged-question-carriers'-vessel-sharing-deals_20160405.html (quoting National Customs Brokers and Forwarders Association of America).

³⁴ April 2015 Report, supra note 9, at 12; see also Joseph Bonney, Regulators Urged to Question Carriers' Vessel-Sharing Deals, J. Com. (Apr. 5, 2016), http://www.joc.com/maritime-news/container-lines/regulators-urged-question-carriers'-vessel-sharing-deals_20160405.html (quoting National Customs Brokers and Forwarders Association of America).

³⁵ Ex. C-1, at 1-2 (Verified Statement of Christopher Grato, International Motor Freight, Inc.).

³⁶ July 2015 Report, supra note 31, at 75.

- 2014-2015 West Coast Labor Agreement Negotiation. Ports across the West Coast experienced port congestion during contract negotiations between the Pacific Maritime Association and the International Longshore and Warehouse Union that lasted approximately eight months beginning in 2014.
- Cargo Diversions from West Coast Ports to East Coast Ports from March-September 2015. While West Coast ports were experiencing port congestion throughout 2014 and 2015, port congestion developed at East Coast ports, particularly the Port of New York and New Jersey, due to cargo being diverted away from West Coast ports to avoid the West Coast port congestion, the calling of larger ships, and increased operational complexity caused by alliances.³⁸
- Winter Storms of 2014-2015. The ports of New York and New Jersey, Baltimore, and Virginia experienced port congestion after severe winter storms³⁹ throughout the 2014 and 2015 winters.
- 2016 Port Hiring Practices Protest Port of New York and New Jersey. A June 2016 protest, organized by the mayor of Newark, protesting port hiring practices impacted port efficiencies during the protest.⁴⁰
- Fall 2016 Hanjin Shipping Bankruptcy. Ports on both the West and East coasts felt effects of the recent bankruptcy filing of Hanjin Shipping Co. Ltd. The total impact of this event is yet to be determined.

Shippers, consignees, and drayage providers do not create and cannot avoid these events.

They cannot control the weather. They do not choose the terminals that carriers use. They are not parties to port labor collective bargaining agreements. Because their relationship with terminals is limited to the retrieval of cargo or return of equipment, they cannot negotiate rates or service conditions with terminals in a manner that encourages resolution of labor issues, addresses cargo handling productivity, or address the provision of adequate investment or staffing.

³⁷ *Id*.

³⁸ *Id*.

³⁹ Winter Storm Marcus resulted in port congestion at Port of Virginia's Norfolk terminals. Winter Storm Jonas closed the Port of New York and New Jersey and Port of Baltimore from January 22, 2016 to January 26, 2016.

⁴⁰ Hugh R. Morley, *Protest of NY-NJ Port Hiring Practices Shuts Down Traffic Temporarily*, J. Com. (Jul. 18, 2016), http://www.joc.com/port-news/us-ports/port-new-york-and-new-jersey/protest-ny-nj-port-hiring-practices-grabs-attention-temporarily-slowing-truckers 20160718.html.

2. Despite their lack of control over recent events causing port congestion or disruption, shippers, consignees, and drayage providers have incurred significant demurrage and detention charges in connection with these events.

Ocean common carriers and marine terminal operators have assessed shippers, consignees, and drayage providers millions of dollars of demurrage and detention charges related to recent port congestion or other events restricting the accessibility of the ports and arising from circumstances beyond the control of the shippers, consignees, and drayage providers. These assessments have not been uniform, because carrier and marine-terminal-operator demurrage and detention policies and practices vary. Policies on free-time extensions are inconsistent among carriers and marine terminal operators, including among terminals at the same port. For example, at Port Elizabeth, Maher Terminals will extend free time if it is unable to deliver cargo, but APM Terminals Elizabeth, LLC, does not automatically extend free time in similar circumstances. Instead, APM Elizabeth reserves the right to extend free time in its discretion. These inconsistencies generate uncertainty among shippers, consignees, and drayage providers about how demurrage and detention will be assessed when access to ports is restricted or ports are congested.

⁴¹ See Joseph Bonney, Pressure Builds on FMC to Act on Demurrage, Detention Complaints, J. Com. (Jun. 11, 2015), http://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/industry-groups-urge-fmc-act-demurrage-detention_20150611.html (noting that cargo interests have incurred demurrage and detention fees totaling up to several million dollars). The Washington Council on International Trade estimates that the 2014-2015 West Coast port slowdown cost Washington shippers \$7 million in demurrage charges. Wash. Council on Int'l Trade, The Economic Costs of the 2014-2015 West Coast Port Slowdown on Washington State 2 (2016), available at http://wcit.org/wp-content/uploads/2011/08/WCIT-Port-Delays-Economic-Impacts-Report-FINAL1.pdf.

⁴² Maher Terminals LLC, Marine Terminal Schedule No. 010599 Section IV.8.A (eff. Oct. 1, 2016).

⁴³ New York Terminal Conference, Marine Terminal Schedule No. 011408, Section IV.8. (eff. Oct. 1, 2016).

Some shippers, consignees, and drayage providers have attempted to negotiate waivers of the assessments, but they often are only partially successful after months of negotiations and being forced to first pay large demurrage charges up front to obtain the release of their cargo. For example, MacMillan Piper, Inc. was able to obtain an 80% reduction in assessments, but only after being forced to pay the full amount—\$1.25 million—up front. 44 Moreover, the accommodation for the charges required over a year of negotiations, which is an inefficient and costly use of resources. 45 Similarly, Centric Parts obtained a 50% waiver of assessments after initially being required to pay the full amount up front. 46 Small shippers and drayage providers are at a particular disadvantage when negotiating waivers, because they lack the leverage necessary to negotiate and obtain the accommodations sometimes afforded to larger shippers and drayage providers.

Experiences of shippers, consignees, and drayage providers underscore the fact that carriers and marine terminal operators assess demurrage and detention for delays arising from events completely beyond the control of shippers, consignees, or drayage operators. These assessments have a significant commercial impact, because of their size and frequency during periods of port delays and congestion and because carriers and marine terminal operators often require payment up front.

During the West Coast Labor Agreement Negotiation, American Coffee Corporation incurred demurrage because of unexpected gate closures and long lines to access affected ports.⁴⁷ It also had difficulty making appointments at terminals for pickup of its cargo during its free time

⁴⁴ Ex. C-2, at 2 (Verified Statement of Mark Miller, MacMillan-Piper).

⁴⁵ *Id*.

⁴⁶ Ex. C-3, at 2 (Verified Statement of Steve Hughes, Centric Parts).

⁴⁷ Ex. C-1, at 1 (Verified Statement of Donald A. Pisano, American Coffee Corp.).

period.⁴⁸ For example, in April 2014, its drayage provider attempted to make an appointment at APM Terminal in the Port of Los Angeles to pick up an American Coffee container during free time, but APM was not accepting additional appointments.⁴⁹ When the drayage provider finally secured the appointment, it was for five days after free time expired. Both the ocean common carrier and APM refused to extend free time, and American Coffee was forced to pay demurrage even though it attempted to retrieve the container during the free-time period, when no charges could be assessed.⁵⁰

Chico's FAS, Inc. reports that the time needed to retrieve containers during the West Coast Labor Agreement Negotiation jumped to 7-9 days, while free time remained at 4 days.⁵¹ In one instance during the event, nearly 18 of its containers were held at a port, resulting in a 30% increase in shipment costs.⁵² Chico's FAS frequently was turned away when attempting to retrieve its cargo due to unannounced closings of port areas where containers were awaiting pickup.⁵³ All told, the dispute disrupted the flow of 8-10 million of Chico's FAS's garments and Chico's FAS incurred approximately \$80,000 in demurrage.⁵⁴

During the West Coast Labor Agreement Negotiation, terminals often turned away

Centric Parts after its drayage provider waited in long lines all day to pick up Centric's cargo. 55

Appointment systems at some terminals were not available or would only provide appointments

⁴⁸ *Id.* at 2.

⁴⁹ *Id*.

⁵⁰ *Id*.

⁵¹ Ex. C-4, at 1 (Verified Statement of Shana Riggs, Chico's FAS Inc.).

⁵² *Id*.

⁵³ *Id*.

⁵⁴ *Id*.

⁵⁵ Ex. C-3, at 1 (Verified Statement of Steve Hughes, Centric Parts).

long after free time expired.⁵⁶ And terminals and carriers were reluctant to waive demurrage charges despite the fact that Centric was not able to obtain its cargo through no fault of its own.⁵⁷ Although Centric eventually received a 50% reduction in the demurrage charges billed by the carriers, it had to outlay the full amount up front to receive its cargo, tying up valuable working capital, and it still recovered only 50% of the charges.⁵⁸

VLM Foods Inc. faced, and continues to face, unfair demurrage practices. Often it is assessed demurrage charges due to carrier billing errors that result in its containers being held at the port until the carrier resolves the errors. ⁵⁹ Additionally, although many of its containers have priority for Customs exams, terminals frequently ignore this priority and place these containers at the back of Customs' examination line. This often results in these containers exceeding free time while being examined, whereas if the terminal provided them to Customs in accordance with their priority status, they would have cleared Customs before free time expired. ⁶⁰ Also, in one instance, a carrier charged demurrage for a holiday even though the terminal provided a free day because it was closed. ⁶¹ These demurrage practices have had a devastating effect on VLM's bottom line, because its profit margins on entire containers are razor-thin. ⁶²

Budpak, Inc. and Tea Importers, Inc. have experienced similar demurrage practices.

During the winter of 2014-2015, inclement weather caused the Port of New York and New

⁵⁶ *Id*.

⁵⁷ *Id.* at 1-2.

⁵⁸ *Id.* at 2.

⁵⁹ Ex. C-6, at 1 (Verified Statement of Mark FeDuke, VLM Foods Inc.).

⁶⁰ *Id*.

⁶¹ *Id*.

⁶² *Id*.

Jersey to close.⁶³ Through no fault of its own, Budpak could not retrieve its cargo during the closure.⁶⁴ Nevertheless, it was charged demurrage.⁶⁵ During the West Coast Labor Agreement Negotiation, Tea Importers attempted to pick up a shipment from the Port of Seattle before free time expired, but was unsuccessful.⁶⁶ The resulting demurrage charge was not waived.⁶⁷

Motor carriers and drayage providers have also been adversely impacted by unreasonable detention practices. During the West Coast Labor Agreement Negotiation, MacMillan Piper, Inc., had difficulty returning containers to affected ports, often because terminals refused to receive them. It incurred nearly \$1.25 million in detention charges, which the steamship lines reduced to \$250,000 after over a year's worth of disputes. Additionally, the steamship lines forced MacMillan to pay the \$1.25 million up front by threatening to cancel MacMillan's UIIA agreement with them. The cancellation of a motor carrier's UIIA Agreement with even a single ocean common carrier can cost the motor carrier its entire business, because at a particular port or terminal there often are few other ocean carriers with enough available traffic to dray.

Cargo diversions to the East Coast because of the West Coast Labor Agreement

Negotiation created congestion on the East Coast that impacted International Motor Freight, Inc.

(IMF), an import/export trucking company in Port Newark, NJ.⁷² Long wait times developed at

⁶³ Ex. C-2, at 1 (Verified Statement of Gregg Singer, Budpak, Inc.)

⁶⁴ *Id*.

⁶⁵ *Id*

⁶⁶ Ex. C-5 (Verified Statement of Andrew Wertheim, Tea Importers, Inc.)

⁶⁷ IA

⁶⁸ Ex. C-2, at 2 (Verified Statement of Mark Miller, MacMillan-Piper).

⁶⁹ *Id*.

⁷⁰ *Id*.

⁷¹ *Id*.

⁷² Ex. C-1, at 1 (Verified Statement of Christopher Grato, International Motor Freight, Inc.).

the Port of New York and New Jersey as lines formed to return the increased volume of empty containers.⁷³ The inability of terminals to process empty containers and other inefficiencies at the port resulted in ocean common carriers invoicing IMF over \$1.2 million in detention charges.⁷⁴ To secure payment, these ocean carriers threatened termination of IMFs participation in the UIIA.⁷⁵ Ultimately, IMF rebilled their customers (shippers) for all of these charges, but ended up having to pay approximately \$50,000-\$55,000 of them.⁷⁶

An ocean common carrier invoiced ContainerPort Group (CPG) \$25,610 in detention charges related to "door" moves CPG performed in Norfolk, Virginia, when the Port of Virginia was experiencing port congestion caused by two winter storms in 2015.⁷⁷ Similarly, CPG received an invoice of \$22,410 from an ocean common carrier relating to detention charges for 27 containers at the Ports of New York and New Jersey and Port of Baltimore that were experiencing port congestion because the ports closed from January 22, 2016 to January 26, 2016, due to winter storm Jonas.⁷⁸ The ocean carrier initially refused to extend free time to account for port closures.⁷⁹

During the West Coast Labor Agreement Negotiation, California Multimodal, LLC, experienced appointment shortages and restrictions on equipment return, which led to demurrage and detention assessments. Terminals would not extend free time when appointments to pick up

⁷³ *Id.* at 1-2.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 1.

⁷⁷ Ex. C-9, at 2 (Verified Statement of Robert Leef, ContainerPort Group, Inc.).

⁷⁸ *Id*.

⁷⁹ *Id.* at 2-3.

cargo were not available within the free time period.⁸⁰ Also, terminals would regularly advise drayage providers of restrictions on equipment return, leaving the drayage providers to try to find other locations that would accept the equipment.⁸¹ Often, the providers could not find another return location before free time expired.⁸²

Some shippers appear to have been assessed demurrage charges from a marine terminal operator that cover amounts owed by an ocean common carrier. Brokers and forwarders claim that, shortly after Hanjin Shipping Co. Ltd. declared bankruptcy, Maher Terminals at the Port of New York and New Jersey attempted to charge them thousands of dollars for each affected container. The parties stated that they were "charged between \$1,000 to \$2,500 per container by the [terminal] despite its boxes having been stored at the facilities for just a couple of days."

Customs brokers and freight forwarders have witnessed ocean common carriers and terminals holding cargo hostage while demanding payment for demurrage and detention charges arising from port conditions beyond the control of their consignee clients. Serra International, Inc. observes that free time issues have increased along with shipper frustrations, noting that shippers have no incentive to let their cargo sit at terminals. It also observes that ocean common carriers and terminals are often slow to move cargo for port shipments, as opposed to

⁸⁰ Ex. C-10, at 3 (Verified Statement of Robert Loya, California Multimodal, LLC).

⁸¹ *Id.* at 4.

⁸² *Id.* at 4.

⁸³ NY-NJ Terminal Accursed of Unreasonable Fees Tied to Hanjin Chaos, J. Com. (Sep. 7, 2016), http://www.joc.com/port-news/terminal-operators/ny-nj-terminal-accused-unreasonable-demurrage-fees-tied-hanjin-chaos_20160907.html.

⁸⁴ *Id*.

⁸⁵ See Ex. C-11 (Verified Statement of Al Raffa, Seafrigo USA, Inc.); Ex. C-12 (Verified Statement of Jacqueline Dossantos, All In One Customs Brokers Inc.).

⁸⁶ Ex. C-13, at 1 (Verified Statement of Jeanette R. Gioia, Serra International, Inc.).

door shipments, likely because carriers and terminals are rewarded with demurrage and detention when free time is exceeded.⁸⁷

The verified statements and letters in Exhibit C provide additional examples of unreasonable demurrage and detention practices of ocean common carriers and marine terminal operators during port congestion events. These statements confirm that carriers and marine terminal operators generally are reluctant to extend free time during port congestion events that are beyond the control of shippers, consignees, and drayage providers.

3. The recent Commission staff report on demurrage, detention, and free time confirms the experiences of Petitioners and their members.

The shipper, consignee, and drayage-provider experiences identified in Part II.B.1 echo complaints and statements that the Commission has received about demurrage and detention problems. During the fall of 2014, the FMC proactively conducted four forums at the Ports of Los Angeles, Baltimore, Charleston, and New Orleans, respectively, "to hear firsthand the problems that stakeholders in the U.S. intermodal system were facing." Throughout the forums, the Commission heard concerns relating to the assessment of demurrage and detention charges by marine terminal operators and ocean common carriers where importers and exporters (and their truckers) experienced terminal delays over which they had no control. These comments led the Commission to release a staff report in April 2015 that specifically addressed demurrage, detention, and free-time, in addition to a subsequent report in July 2015 providing a more thorough review of major themes during the fall 2014 port congestion forums.

⁸⁷ *Id.* at 2.

⁸⁸ July 2015 Report, supra note 32, at 6.

⁸⁹ *Id.* at 3.

⁹⁰ April 2015 Report, supra note 9.

⁹¹ July 2015 Report, supra note 32.

The *April 2015 Report* describes various congestion-related issues that shippers provided to the Commission. For example, "[m]any shippers reported that they had been repeatedly told by the MTO that they could not pick up a container due to on-dock congestion and gate delays." Shippers also reported that once a terminal allowed cargo pick up, the ocean carrier or marine terminal operator would not release the cargo until demurrage charges were paid. Additionally, truckers lodged a number of complaints with the Commission, including: "that certain areas at terminals have been restricted or placed off limits; this makes some containers unavailable for pick up" and that "VOCCS and MTOs have limited the days and shifts during which they will accept the returns of empty containers."

In its *April 2015 Report*, the Commission's staff reported that "last-minute notice from VOCCs and MTOs to truckers, importers and exporters about vessel-loading delays, cancelled vessel calls, terminal opening hours, shifts and closed areas, have left cargo interests scrambling to pick up their cargo, load their exports and return their empties." These practices obviously impact the ability of shippers, receivers, and dray operators to fully benefit from free-time periods and lead to unanticipated liability for demurrage and detention. Moreover, although some ocean common carriers and terminals may agree to extend free time or waive or reduce demurrage and detention fees in certain cases, the Commission's staff found that "there is no generally used formula to determine when the normal allowance for free time might be increased or reduced" and "staff has not observed increases in free time in VOCCs' tariff terms or MTO

⁹² April 2015 Report, supra note 9 at 3.

⁹³ *Id*.

⁹⁴ *Id*.

⁹⁵ *Id*.

schedules."⁹⁶ Indeed, importers complained "that they cannot timely return empty containers to the terminal as instructed by the carrier because there are reduced service hours at the ports for the return of empty containers and free time for detention has not been extended to reflect those reduced service hours."⁹⁷

Thus, there is tremendous inconsistency in the conduct of carriers and terminals with respect to free time, demurrage, and detention practices and a lack of clarity with respect to what constitutes reasonable practices under § 41102(c). Adoption of the proposed policy will provide needed guidance and clarity to the shipping industry on this important issue. In fact, the Commission's staff specifically noted in the *April 2015 Report* that a rulemaking proceeding "which would include an identification of the issue the Commission seeks to address, articulating its authority to do so, and providing a burden/cost estimate of the proposal" was one option for addressing carrier and marine terminal demurrage and detention practices. 98

C. A Clear FMC Policy will Promote the Observance of Reasonable Demurrage and Detention Practices.

The attached verified statements and the Commission's own observations concerning current demurrage and detention practices demonstrate that a clear policy interpreting § 41102(c) is needed to provide the guidance necessary for ocean carriers and marine terminals to eliminate unjust and unreasonable demurrage and detention practices.

An interpretive rule on demurrage and detention practices will guide ocean common carriers and marine terminal operators by providing clear parameters for reasonable demurrage and detention rules and practices. Thus, ocean common carriers and marine terminal operators

⁹⁶ *Id.* at 24, 27.

⁹⁷ *Id.* at 29.

⁹⁸ *Id.* at 43.

will be better equipped to avoid establishing unjust and unreasonable practices and incurring attendant liability. Also, they will be more likely to reasonably extend free-time extensions and reduce demurrage and detention where port congestion and other uncontrollable factors prevent cargo pickup and equipment return.

Clear guidance on proper demurrage and detention practices will also benefit shippers, consignees, and drayage providers. It will raise awareness of the scope of their own obligations. It would significantly reduce uncertainty and allow shippers, consignees, and drayage providers to better identify unjust and unreasonable demurrage and detention practices.

Clear guidance will also foster efficient resolution of disputes and promote collaboration. Ambiguity has a chilling effect on valid claims. By removing ambiguity concerning the reasonableness of demurrage and detention practices, the Commission will help parties identify early in a dispute whether a claim about the lawfulness of a demurrage or detention practice is valid. This should help parties avoid the inefficient and costly use of resources that often accompanies protracted disputes. Also, it should reduce disputes that prevent parties from collaborating on how to address impediments to cargo removal and equipment return.

Clear guidance will also ensure that ocean common carriers and marine terminal operators use demurrage and detention consistent with their primary purpose of efficient cargo removal and equipment returns. Because revenue contraction is plaguing ocean common carriers, ⁹⁹ they are desperate to generate revenue. Port delays, which often entail higher costs for carriers and marine terminal operators, further intensify this desperation. Guidance on reasonable

⁹⁹ Peter Buxbaum, *Not a Big Surprise: Most Ship Liens Are Losing Money*, Global Trade (Aug. 17, 2016), http://www.globaltrademag.com/global-logistics/not-big-surprise-ship-lines-losingmoney; *see e.g.*, Greg Knowler, *Maersk Line Falls to \$116 million Loss on Rate Tumble*, J. Com. (Nov. 2, 2016) (noting that falling revenue has become a trend in the container shipping industry).

detention and demurrage practices will ensure that ocean common carriers and marine terminal operators do not inappropriately use these charges as a major revenue source rather than as an incentive for efficient cargo removal and equipment returns.

III. THE COMMISSION HAS AUTHORITY TO ADOPT THE PROPOSED POLICY CONCERNING UNJUST AND UNREASONABLE DEMURRAGE AND DETENTION PRACTICES.

The Commission has clear authority and discretion to adopt a policy that interprets the "just and reasonable" standard under 49 U.S.C. § 41102(c). Under 46 U.S.C. § 305, the Commission "may prescribe regulations to carry out its duties and powers." Those duties and powers include the enforcement of § 41102(c), 100 which prohibits unjust and unreasonable terminal practices. 101 Section 305 provides general rulemaking authority to the Commission and "broad discretionary authority to deal with the ever-changing technological and economic conditions of the commercial shipping industry." Additionally, 5 U.S.C. § 553(e) provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Additionally, the Commission has previously issued interpretive rules and statements of policy concerning other provisions of the Shipping Act of 1984, and has used the rulemaking process to do so. 104 As explained in this Section III, the proposed policy is similar to past policies that the Commission has adopted addressing unjust and unreasonable practices at U.S. ports.

¹⁰⁰ See 46 U.S.C. § 41304(a) (indicating that the Commission may issue orders enforcing violations of 46 U.S.C. Chapter 411).

¹⁰¹ 46 U.S.C. § 41102(c).

¹⁰² States Marine Int'l, Inc. v. Peterson, 518 F.2d 1070, 1080 (D.C. Cir. 1975) (discussing prior version of § 305).

¹⁰³ 5 U.S.C. § 553(e).

¹⁰⁴ 46 C.F.R. Part 545 (the policy statements published at § 545.1 and 545.2 were promulgated via rulemaking).

A. Section 41102 Imposes a Just and Reasonable Standard on Demurrage and Detention Practices.

Section 41102(c) requires demurrage and detention practices to be just and reasonable.

This provision specifically states:

§ 41102 (c) Practices in Handling Property

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Thus, under the statute, ocean common carriers and marine terminal operators must adopt just and reasonable regulations and practices governing free time and demurrage and detention charges, which relate to or are connected with receiving, handling, storing, or delivering property. The test of reasonableness as applied to terminal practices "is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." The Commission has specifically found that demurrage and detention practices are encompassed within the ambit of § 41102(c), because demurrage and detention relate to the delivery of property at terminals. 107

1. If an ocean common carrier or marine terminal operator is unable or refuses to tender cargo for delivery and/or receive equipment during free time, Section 41102(c) requires an extension of free time for a period equal to the duration of the disability.

Under § 41102(c), the Commission and its predecessor have long held that "[w]here a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be

¹⁰⁵ W. Gulf Maritime Ass'n v. Port of Houston, 18 Shipping Reg. (P&F) 784, 790 (F.M.C. 1978), affirmed without opinion sub nom. W. Gulf Maritime Ass'n v. FMC, 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980).

¹⁰⁶ Id.

¹⁰⁷ See Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting § 41102(c) as applying to detention).

extended for a period equal to the duration of the carrier's disability or refusal." The rationale for this holding is that an ocean common carrier must honor its rates; it may not obtain greater compensation for a service than the applicable rate in its service contract or tariff. Also, the transportation service associated with a transportation rate in a service contract or tariff includes tendering cargo for delivery at the destination and affording consignees a fair opportunity to accept delivery of cargo without liability. Thus, when an ocean common carrier tenders cargo for delivery, it must allow a consignee to pick up its cargo during the entire free-time period before it can charge demurrage.

Similarly, if an ocean common carrier refuses or is unable to accept equipment returns, detention free time must be extended for a period equal to the duration of the carrier's disability or refusal. Under the transportation rates in their service contracts and tariffs, carriers provide free time for the use of carrier equipment, including containers. If a carrier were to refuse or be unable to accept equipment returns during free time and does not extend free time, the equipment

¹⁰⁸ E.g., NY I, 3 U.S.M.C. 89, 109 (1948). Today, 46 U.S.C. § 41104(2) specifies that a carrier must provide service in accordance with the rates in its tariffs or service contracts.

¹⁰⁹ Free Time and Demurrage—New York Harbor (NY II), 9 Shipping Reg. (P&F) 860, 873, 874 (F.M.C. Dec. 7, 1967) (noting that tendering cargo for delivery is an obligation "for the performance of which [a carrier] may collect no greater compensation than that required by [its] contract of carriage" and carriers have an obligation to tender for delivery free of assessments); see NY I, 3 U.S.M.C. at 101 (stating that free time "is an obligation which the carrier is bound to discharge as part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties.").

¹¹⁰ NY I, 3 U.S.M.C. at 91 n.5. Courts and the Commission have long held that a carrier's transportation obligation includes a duty to tender cargo for delivery, absent a contrary special contract. E.g., Ex parte Easton, 95 U.S. 68, 75 (1877); The Eddy, 72 U.S. 481, 495 (1867); Am. President Lines, Ltd. v. Fed. Mar. Bd., 317 F.2d 887, 888 (D.C. Cir. 1962); Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n, 10 F.M.C. 409, 415 (1967); Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 539 (1966).

¹¹¹ A carrier tenders cargo for delivery when it unloads the cargo, makes it accessible to the consignee, and affords the consignee a reasonable opportunity to remove it. *The Eddy*, 72 U.S. 481, 495 (1867); *Am. President Lines, Ltd. v. Fed. Mar. Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962).

would have to be returned earlier to avoid detention charges, effectively shortening the permitted use under the transportation rate.

To the extent an ocean common carrier engages a marine terminal operator to tender cargo for delivery or accept equipment returns, the marine terminal operator becomes, in effect, the agent of the carrier in performing these obligations. Thus, it is subject to the same free time obligations as the carrier.

Indeed, the Commission long ago established, in *Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n*,¹¹⁴ that a marine terminal operator may charge only ocean common carriers for terminal facilities used for the tender of cargo delivery before the carrier discharges its transportation obligation. It reasoned that the person who receives services should pay for them; otherwise, the cost of providing those services would be unjustly and unreasonably shifted to users of other terminal services.¹¹⁵ It also explained that when a marine terminal operator holds cargo at its facility before the carrier discharges its transportation obligation—i.e., before free time expires—it provides this service for the ocean common carrier.¹¹⁶ A key aspect of the

¹¹² Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 539 (1966).

¹¹³ See Id. at 539, 540 ("In undertaking the ocean carrier's obligation to provide such facilities and in holding them out for public use, we hold that respondents [terminal operators] have assumed the ocean carrier's responsibility of furnishing reasonable and nondiscriminatory pier services incident to the handling of truck cargoes on their piers which include an allowance of reasonable free time.")

¹¹⁴ Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n, 10 F.M.C. 409 (1967). Although the main issue in Boston was whether a marine terminal operator could charge a carrier for cargo storage charges, the decision also establishes whether the operator could levy the charge against a consignee. The Commission found that it was not just and reasonable for a terminal to assess a storage charge against a vessel for cargo at its facility when the cargo was in demurrage, but it was just and reasonable to assess the charge against the vessel for cargo on free time. Id. at 417, 418. In making the latter finding, the Commission expressly rejected a hearing examiner's position that the consignee should incur the charges. Id. at 416-17.

¹¹⁵ *Id.* at 414-15.

¹¹⁶ *Id.* at 416.

Commission's rationale in *Boston* is that, "[w]hen the cargo is in free time, the terminal facility ... is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation" Additionally, the Commission recognized that an ocean common carrier may contract with a marine terminal operator to perform these duties; but the carrier may not divest itself of them. 118

2. If an ocean common carrier or marine terminal operator is unable or refuses to release cargo or accept equipment returns after free time expires, Section 41102(c) requires the carrier or marine terminal operator to waive demurrage or detention charges for a period equal to the duration of the disability.

The Commission has long held that § 41102(c) requires terminal practices, like demurrage and detention, to "be fit and appropriate to the end in view." And Commission precedent establishes that a practice is not fit and appropriate to the end in view if it cannot achieve its goals. Relying on Section 41102(c), the Commission's predecessor rejected a demurrage practice that was "useless" for achieving the goals of demurrage. 120

Demurrage and detention exist to induce proper conduct and to compensate for actual costs, not to generate a profit. The goals of demurrage are: (1) to induce timely removal of cargo from a port, and (2) to compensate the carrier for involuntarily storing cargo. The goals of detention are: (1) to induce timely return of equipment, and (2) to compensate for detaining equipment beyond the required return period. The goals of the required return period.

¹¹⁷ *Id*.

¹¹⁸ *Id.* at 415.

¹¹⁹ Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 547 (1966).

¹²⁰ NY I, 3 U.S.M.C. 89, 107 (1948).

¹²¹ *Id*.

¹²² Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970).

Demurrage charges cannot achieve their goals when the ocean common carrier or marine terminal operator refuses or is unable to release cargo due to port conditions beyond the control of the consignee. When an ocean common carrier or marine terminal operator refuses to allow cargo removal, demurrage charges would contravene their purpose of incentivizing timely cargo removal. The goal of timely cargo removal arises in public policy. Specifically, the public has an interest in minimizing port congestion to ensure efficient waterborne transportation. If a shipper or receiver seeks to retrieve its cargo at a port, but it cannot remove the cargo for reasons beyond its control, demurrage cannot induce that conduct. Moreover, allowing an ocean common carrier or marine terminal operator to charge demurrage in such circumstances would unjustly reward the carrier or terminal for keeping cargo at the port, effectively condoning the use of demurrage to generate profits from shippers, consignees, and drayage providers, rather than to facilitate the efficient removal of cargo.

The fact that an inability to remove cargo arises after the expiration of free time should make no difference. When the ocean common carrier or marine terminal operator refuses or is unable to release cargo or accept the return of equipment for reasons beyond the control of the consignee or drayage provider, a demurrage charge cannot induce the shipper's, receiver's or drayage provider's conduct whether such refusal or disability occurs before or after the expiration of free time. It would be unreasonable to require the shipper or receiver to pay the ocean common carrier when the shipper or receiver is prohibited from removing its goods because the carrier is unable or refuses to release the goods. Indeed, permitting an ocean common carrier or marine terminal operator to charge demurrage in such an instance would unjustly enrich the carrier or terminal and could even encourage delays in releasing goods.

¹²³ NY I, 3 U.S.M.C. at 103. The Commission has noted that this public interest plays a significant role in determining when free time ends and demurrage begins. *Id.*

Similarly, detention charges do not achieve their goals when a shipper, consignee, or drayage provider attempts to return equipment, but an ocean common carrier or marine terminal operator refuses or is unable to accept it. When an ocean common carrier or marine terminal operator refuses to accept equipment returns as a result of port congestion or disruptions, detention charges would contravene their goal of timely equipment return and allow the ocean common carrier or marine terminal operator to use such charges improperly as a revenue source.

Additionally, under these circumstances, detention does not provide an incentive to return equipment, because the shipper, consignee, or drayage provider cannot return equipment for reasons beyond its control. Also, the shipper, consignee, or drayage provider would not be unreasonably detaining the equipment, because it would be attempting to return it. Thus, no improper detention would exist for which the ocean common carrier or marine terminal operator would be entitled to compensation.

These considerations warrant a departure from the Commission's past demurrage rule for the port of New York that permitted demurrage not exceeding compensatory levels where the ocean common carrier refused or was unable to accommodate cargo removal after free time expired. In promulgating that rule, the Commission focused on the carrier's transportation obligation, indicating that an ocean common carrier's obligation to tender cargo for delivery free of assessments of any demurrage ends when free time ends. But it did not rule out that some demurrage charges should not be assessed after free time expires. It indicated that, for equitable reasons, waiving demurrage "should be encouraged" for periods when a consignee attempts to pick up cargo, but the carrier is otherwise unable to tender it to the consignee. Under those

¹²⁴ NY II, 9 Shipping Reg. (P&F) at 881.

¹²⁵ Id. at 874.

¹²⁶ Id

circumstances, the Commission noted that the consignee would no longer need or desire storage of its cargo. 127 Moreover, the Commission should have, but did not, considered the purpose of demurrage when it decided that compensatory demurrage is allowed when a carrier refuses or is unable to tender cargo after free time expires.

3. If a shipper, receiver, or motor carrier is unable to remove cargo or return equipment due to events or circumstances beyond its control that affect a substantial portion of the port, Section 41102(c) prohibits an ocean common carrier or marine terminal operator from charging more than compensatory demurrage or detention for the disability period.

Charging demurrage or detention at penal levels when a shipper, consignee, or motor carrier cannot remove cargo or return equipment for reasons beyond the control of the shipper, consignee, or motor carrier is an unreasonable practice. To carry out their purpose of inducing cargo removal and equipment return, demurrage and detention charges are designed to penalize shippers, consignees, and motor carriers. Specifically, these penal demurrage and detention charges are set at levels that exceed the ocean common carrier's or marine terminal operator's cost of storing cargo or owning equipment. ¹²⁸ In contrast, compensatory demurrage and detention, which is designed to compensate for use of port space and equipment, do not exceed the costs of the space or equipment.

For over 40 years, the Commission had a rule prohibiting ocean common carriers from charging penal demurrage when a consignee is unable to remove cargo for reasons beyond its control affecting a port-wide area.¹²⁹ The rationale for this rule was that, when a consignee is

¹²⁷ *Id*.

¹²⁸ NY I, 3 U.S.M.C. at 107.

¹²⁹ The latest iteration of the rule was: "Where a consignee is prevented from removing its cargo by factors beyond its control (such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, and when a consignee is prevented from removing its cargo by a longshoremen's strike which affects only

unable to remove cargo for reasons beyond its control, penal demurrage charges cannot achieve their goal of timely cargo removal. Thus, penal charges would be "a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers." And "[t]he levying of such penal charges, therefore, constitutes an unjust and unreasonable practice . . . and should be forbidden."

Penal detention should likewise be prohibited when a shipper, consignee, or motor carrier cannot return equipment for reasons beyond its control. In this situation, penal detention, i.e. detention charges exceeding that which is needed to compensate for use of equipment outside free time, cannot achieve its goal of accelerating return of equipment. Thus, charging detention at penal levels for the period of such disability of the shipper, consignor, or motor carrier is an unjust and unreasonable practice that § 41102(c) prohibits.

B. The Commission has Issued Rules Prohibiting Unjust and Unreasonable Demurrage Practices Based on Analogous Industry Circumstances.

The interpretive rule proposed by Petitioners would essentially revive rules that the Commission had in place for the port of New York for over 40 years. Additionally, the port congestion events that gave rise to the Commission's New York demurrage rules are similar to the disruptive events that gave rise to recent delays that have plagued ports throughout the country. Thus, adopting a demurrage policy in response to current port conditions would be consistent with Commission precedent.

one pier or less than a substantial portion of the port area, carriers shall (after expiration of free time) assess demurrage against imports at the [compensatory demurrage rate], for such time as the inability to remove the cargo may continue." 46 C.F.R. § 525.1(d) (1992).

¹³⁰ NY I, 3 U.S.M.C. at 107.

¹³¹ *Id*.

 $^{^{132}}$ *Id*

Underlying both the New York demurrage rules and the congestion experienced at West Coast ports in 2014-2015 were protracted disagreements between port/terminal management and labor. In 1948, the Commission's predecessor issued New York demurrage rules to address the problems caused by the strikes of seafarers and truck drivers that gave rise to congestion at the Port of New York. The rules specified the amount of free time for import cargo at the port; required an extension of free time where an ocean common carrier failed to tender cargo for delivery during free time; and, prohibited ocean common carriers from collecting more than a compensatory demurrage rate for any period where the consignee was prevented from removing cargo by factors beyond its control affecting at least a substantial area of the port. 134

In 1968, the Commission revised its New York rules in response to free time and demurrage problems on inbound cargo at the port that a 1965 longshoremen's strike caused. The strike shut down nearly all East and Gulf Coast ports. Because there was insufficient advance warning of the strike, consignees left a substantial amount of cargo on the piers when the strike began. When it ended, an abnormally large number of ships discharged their cargoes quickly, and this, added to the inbound cargoes left on the piers prior to the strike, caused greater than normal congestion on the shore side of the piers in the Port of New York. As a result, according to the record before the Commission, truckers faced difficulty picking up the cargo. The revised rules permitted ocean common carriers to collect demurrage at not

¹³³NY II, 9 Shipping Reg. (P&F) 860, 878 (F.M.C. Dec. 7, 1967).

¹³⁴ NY I, 3 U.S.M.C. at 109-10.

¹³⁵ NY II, 9 Shipping Reg. (P&F) at 863.

¹³⁶ Id. at 864.

¹³⁷ Id. at 865

¹³⁸ Id. at 863.

¹³⁹ Id. at 871.

more than compensatory levels on cargo which an ocean common carrier refused or was unable to tender for delivery *after* free time expired; removed the requirement that a consignee disability arising from a longshoremen strike be port-wide before demurrage is limited to compensatory levels; and required extensions of free time and compensatory demurrage following a longshoremen strike of at least five days.¹⁴⁰

Key similarities exist between the 1965 longshoremen strike and 2014-2015 West Coast labor/management disputes. Both involved longshoremen. Both effectively shut down the ports along an entire coast. And both resulted in vessel bunching that deepened congestion.

Although the more recent West Coast port congestion involved an alleged labor slow-down and alleged retaliatory actions by employers rather than an actual strike or lockout, this distinction should not restrict the Commission from acting today, since the motivation for Commission action would remain the same—to address the apparent unfairness in allowing demurrage and detention assessments when the inability to pick up cargo or return equipment at a congested seaport is beyond the control of the shipper, trucker, or consignee. Even though the 2014-2015 labor/management issues at the West Coast may not have been the sole cause of the port congestion affecting U.S. ports at the time, other potential causes (e.g., offloading of cargo from larger vessels, inefficient chassis operations, and restricted terminal space and shifts available to store containers or return equipment) are still beyond the control of the shipper and consignee.

Additionally, although some ocean common carriers waived demurrage in whole or in part during the recent West Coast port congestion, this conduct was hardly a consistent practice and should not prevent the Commission from acting. For example, despite the congestion at the

¹⁴⁰ *Id.* at 881-82.

New York piers following the 1965 strike, the record before the Commission contained no evidence that cargo was actually assessed penalty demurrage in situations in which a bona fide attempt was made to pick up the cargo.¹⁴¹ It also noted that, generally, ocean common carriers waive demurrage in all strike situations.¹⁴² Thus, the potential existence of a commercial solution did not prevent the Commission from acting in the past.

Further, the Commission's repeal of the New York rules in 1993¹⁴³ does not mean that it lacks jurisdiction to issue similar rules to address current port conditions. It repealed the rules because they became unnecessary following operational and technological changes in the shipping industry. The Commission's predecessor adopted the rules to address demurrage issues involving breakbulk cargo. He but, by 1993, containerized cargo comprised the majority of cargo movements into the port. Also, the absence of any comments on the Commission's proposal to repeal the rules confirmed that the demurrage problems that the rules addressed no longer existed.

Finally, the limited applicability of the New York rules to only breakbulk cargo does not suggest that the Commission cannot apply similar rules to containerized cargo. The Commission did not apply the New York rules to containerized cargo because the container trade was not experiencing the same demurrage issues as the breakbulk trade. Indeed, the Commission

¹⁴¹ *Id.* at 871.

¹⁴² *Id.* at 875.

¹⁴³ Free Time and Demurrage at New York, 58 Fed. Reg. 10,983, 10,984 (Feb. 23, 1993).

¹⁴⁴ Id

¹⁴⁵ NY II, 9 Shipping Reg. (P&F) 860, 880 (F.M.C. Dec. 7, 1967) (confirming that the rules apply to only breakbulk cargo).

¹⁴⁶ *Id*.

¹⁴⁷ Free Time, 58 Fed. Reg. at 10,984.

considered extending the New York rules to containerized cargo on multiple occasions, but each time declined because containerized cargo was not experiencing the issues that the rules addressed. In 1968, when the Commission amended its New York demurrage rules to address longshoremen's strikes, it refused to extend the rules to containerized cargo noting that "[t]he record in this proceeding does not indicate that problems have arisen with respect to cargo shipped in containers." In 1978, the Commission again refused to extend the rules, finding "an absence of present practices which require remedial action or a showing that there exists a potential for future violations of the Shipping Act sufficient to warrant corrective action at this time." But it did not foreclose the possibility of extending the rules to containerized cargo in the future, stating "we intend to remain responsive to conditions that may arise in the future which warrant Commission action." Petitioners contend that there is a need for the Commission to take action to address current unjust and unreasonable demurrage and detention practices that have arisen in the containerized trades.

IV. PETITIONERS PROPOSE A POLICY THAT WOULD CLARIFY WHEN DEMURRAGE AND DETENTION PRACTICES ARE UNJUST AND UNREASONABLE UNDER SECTION 41102(C).

The proposed rule would establish a policy statement that provides guidance to the shipping industry regarding the FMC's interpretation of § 41102(c) in order to prevent the occurrence of unjust and unreasonable demurrage and detention practices by ocean common carriers and marine terminal operators. Specifically, the proposed policy addresses three scenarios in which unjust and unreasonable demurrage and detention practices are occurring at

¹⁴⁸ NY II, 9 Shipping Reg. (P&F) at 880.

¹⁴⁹ Free Time on Containerized Cargo at New York, 18 Shipping Reg. (P&F) 465, 468 (FMC 1978).

¹⁵⁰ Id. at 469.

U.S. ports. As noted previously, the proposed policy is set forth in Exhibit A. This Section IV describes the components of the proposed policy.

The proposed policy includes four separate paragraphs (a)-(d). Paragraph (a) of the proposed policy simply sets forth the relevant text of Section 10(d) of the Shipping Act, 46 U.S.C. § 41102(c), which is interpreted in the remaining paragraphs. Paragraph (b) of the proposed policy addresses the unreasonable practice where an ocean common carrier or marine terminal operator fails to tender cargo for delivery or accept equipment returns during the free time period due to circumstances beyond the control of the shipper, receiver, or drayage provider, and the ocean common carrier or marine terminal operator refuses to extend free time. Paragraph (c) addresses the unreasonable practice occurring under the same scenario as paragraph (b), except the ocean common carrier or marine terminal operator fails to accommodate an attempt to retrieve cargo or return equipment after free time has expired. In this case, it would only be reasonable for demurrage or detention to be assessed during the period between the expiration of free time and the commencement of the disability preventing the carrier or terminal from releasing the cargo or accepting the return of equipment. Paragraph (d) addresses demurrage and detention assessments at levels above and beyond the ocean common carriers' or marine terminal operators' storage cost when the carrier or terminal can fulfill their obligations to tender cargo for delivery or accept equipment but the shipper, consignee, or drayage provider cannot retrieve cargo or return equipment for reasons beyond the control of the shipper, consignee, or drayage provider after free time has expired.

A. Paragraph (b): Free Time should be Extended if an Ocean Common Carrier or Marine Terminal Operator Fails to Tender Cargo for Delivery or Accept Equipment Returns for Reasons Beyond the Control of the Shipper, Receiver, or Motor Carrier.

Paragraph (b) of the proposed policy interprets § 41102(c) as requiring free time to be extended if the ocean common carrier or marine terminal operator fails to tender cargo for delivery or accept equipment returns before free time expires as a result of port conditions that are beyond the control of the shipper, receiver, or drayage provider. It also requires the extension to be equal to the duration of the event causing the ocean common carrier's or marine terminal operator's failure.

1. The failure must commence before free time expires.

Paragraph (b) extends free time only for carrier or terminal failures that commence before free time expires. The purpose of paragraph (b) is to ensure that shippers, consignees, and drayage providers receive the benefit of their free-time period which is encompassed within the ocean common carrier's transportation service. The policy would permit the extension of free time for the period of the ocean-common-carrier or marine-terminal-operator disability regardless of whether the disability terminates within or subsequent to the free time period, since in either case the shipper, consignee, or drayage provider would be deprived of the benefit of all or at least part of the free-time period.

2. A failure would qualify only if caused by an event or circumstance beyond the shipper's, consignee's, or drayage provider's control.

Any ocean-common-carrier or marine-terminal-operator failure to tender cargo for delivery or accept equipment returns during free time, for **any reason** beyond the shipper's, consignee's, or drayage provider's control, would qualify as a failure under Paragraph (b). An ocean common carrier's transportation obligation includes tendering cargo for delivery and receiving equipment for the **entire** free-time period. But, enforcing this obligation where the

shipper, consignee, or drayage provider interfered with the ocean common carrier's or marine terminal operator's performance would be inequitable. Thus, failures to tender cargo for delivery or receive equipment commencing during free time, caused by any event or circumstance beyond the shipper's, receiver's, or drayage provider's control, would warrant a free-time extension under the proposed rule.

Paragraph (b) provides a non-exhaustive list of common events beyond a shipper's, consignee's, or drayage operator's control that may cause an ocean common carrier or marine terminal operator to fail to tender cargo for delivery or accept equipment returns during free time. These events include port congestion, weather, port disruptions (such as those arising from labor disputes), and delays arising from governmental inspections. Delays arising from governmental inspections of cargo before free time expires are beyond a shipper's, consignee's, or drayage provider's control and may arise from the ocean common carrier's, or its marine terminal operator's, failure to tender cargo to U.S. Customs and Border Protection in accordance with its priority status. Tendering goods in this manner deprives a shipper or consignee of the benefit of its free-time period. Imports or exports selected for inspection and/or examination by Customs should not be subject to demurrage and detention costs while being inspected or examined. The shipper or consignee has no control over the decision of the government to inspect a particular shipment or the timing as to when an inspection may occur. When the government inspection exceeds the free time period resulting in the assessment of demurrage and detention, these costs are unfairly borne by the shipper or consignee who are powerless to limit their exposure to such liability. Indeed, in some cases, these costs may be in the thousands of dollars. Further, assessing demurrage and detention in this circumstance cannot fulfill the underlying purpose of such charges since the consignee or its agent is simply not able to remove

the cargo from the port area or return a container through no fault of its own. However, under the proposed policy, delays as a result of governmental actions or requirements that could have been prevented by the shipper or consignee would not qualify for extension of the free time period.

3. Free time should be extended for the duration of the failure.

Extensions of free time under Paragraph (b) must be at least equivalent to the duration of the underlying failure. A failure to tender cargo for delivery or receive equipment that commences during free time deprives the shipper, consignee, or drayage provider of the benefit of the free-time period until the failure ends. Thus, to account for the period of the failure, an equivalent period must be added to free time.

For example, assume an ocean common carrier tenders cargo for delivery on a Monday and the free time is five days—it expires at the end of the day on Friday. If on Tuesday, a snowstorm closes the port for one day and the carrier cannot tender for delivery, Paragraph (b) calls for a one-day extension of free time to Saturday to make up for the failure on Tuesday. If on Friday, a snowstorm causes the port to close for three days—Friday, Saturday, and Sunday—and the carrier cannot tender delivery during this period, Paragraph (b) calls for a three-day extension of free time to Monday.

B. Paragraph (c): No Demurrage or Detention May Accrue for the Period an Ocean Common Carrier or Marine Terminal Operator Fails to Accommodate an Attempt to Retrieve Cargo or Return Equipment After Free Time Has Expired.

Paragraph (c) of the proposed policy addresses the situation where an ocean common carrier or marine terminal operator fails to accommodate an attempt to retrieve cargo or return equipment after free time has expired. It interprets § 41102(c) as requiring in these circumstances a period of non-demurrage or non-detention equivalent to the duration of the event causing the carrier's or terminals' failure.

Paragraph (c) only applies to ocean-common-carrier or marine-terminal-operator failures that occur after free time expires. Its purpose is to protect shippers, consignees, and drayage providers from incurring demurrage and detention where they attempt to pick up cargo or return equipment, but the ocean common carrier or marine terminal operator fails to accommodate the attempt. In such circumstances, charging demurrage or detention would be inequitable, because the shipper, consignee, or drayage provider is attempting to do the very things that demurrage and detention incentivize—pick up the cargo and return equipment – but is frustrated in its attempt to do so. Thus, allowing for the assessment of such charges in this circumstance would be directly at odds with the purposes of demurrage and detention.

Like Paragraph (b), Paragraph (c) would apply to any failure of the ocean common carrier or marine terminal operator to accommodate an attempt to pick up cargo or return equipment if caused by any event or circumstance beyond the shipper's, consignee's, or drayage provider's control. This ensures that shippers, consignees, and drayage providers are not the cause of the carrier or terminal failure. But it also reflects that an ocean common carrier failure to accommodate an attempt to pick up cargo or return equipment for any reason beyond the control of the shipper, consignee, or drayage provider would unnecessarily force additional storage or equipment charges on the shipper, consignee, or drayage provider.

Periods of non-demurrage or non-detention should be equivalent to the period of the disability or event giving rise to the ocean-common-carrier or marine-terminal-operator failure under Paragraph (c). This ensures that demurrage and detention charges are not levied for the days that the shipper, consignee, or motor carrier attempted cargo pickup or equipment return. But it also permits the ocean common carrier or marine terminal operator to charge demurrage both before and after the failure period, except to the extent free time applies.

For example, assume that free time for an import container expired on a Sunday. If the consignee attempts pick up on the following Tuesday, but the marine terminal operator refuses to release the container due to port congestion, demurrage may not be charged for Tuesday, but may be charged for Monday and any day after Tuesday that the container remains on the port, provided that the marine terminal operator is able to release the container.

C. Paragraph (d): When an Ocean Common Carrier or Marine Terminal Operator is Able to Tender Cargo for Delivery or Accept Equipment but a Shipper, Consignee, or Drayage Provider Cannot Retrieve Cargo or Return Equipment Due to an Event Beyond their Control that Affects a Substantial Area of the Port, then the Carrier or Marine Terminal May Not Charge More than Compensatory Demurrage or Detention for the Period After Free Time Expires.

Paragraph (d) of the proposed policy addresses how § 41102(c) applies to situations where the shipper, consignee, or drayage provider are unable to pick up cargo or return equipment after free time because of events beyond their control affecting a substantial portion of the port area, even though the ocean common carrier or marine terminal operator would otherwise be able to tender for delivery or accept equipment. These situations are most likely to arise when a snowstorm or other weather event blocks access to a port or a trucker strike occurs, even if the ocean common carrier or marine terminal operator may be able to release the goods or receive the equipment. This provision is not meant to address flat tires, broken equipment, or other events affecting only a single shipper, consignee, or drayage provider.

This paragraph applies only to shipper, consignee, or drayage provider disabilities that occur after free time expires. Its purpose is to prevent shippers, consignees, and drayage providers from paying **penalty** demurrage and detention rates when they are unable to pick up cargo or return equipment for reasons beyond their control. Before free time expires, the shipper, consignee, or drayage provider is not subject to any detention or demurrage charges, regardless

of whether it can retrieve cargo or return equipment. Thus, this paragraph is only relevant to disabilities existing after free time expires.

Only compensatory demurrage or detention is available for the duration of the disability.

This ensures that the shipper, consignee, or drayage provider is not penalized for the disability.

Outside the disability period, normal demurrage or detention may be charged, subject to free time.

For example, assume free time on an import container commences on October 1 and extends five days until October 5. If a snowstorm blocks truck access to the port for three days beginning October 4, but the ocean common carrier and marine terminal operator have cleared all roads at the port and the port is operating normally during this period, the ocean common carrier and marine terminal operator may not charge more than compensatory demurrage from October 6-7 and may charge normal demurrage after October 7. If a snowstorm blocks access to the port from October 8-10, the ocean common carrier or marine terminal operator may charge normal demurrage for October 6-7, compensatory demurrage for October 8-10, and normal demurrage thereafter until the cargo is removed. If a snowstorm occurs from October 4-7, a state of emergency is declared preventing trucks from accessing the port during this period, and the port is closed during this period, Paragraph (b) applies and free time must extend from October 6-9, after which normal demurrage may be charged.

Under the proposed policy, the compensatory rate that may be charged is limited to the amount needed to cover the costs of the port space or equipment. In this situation, demurrage and detention can achieve only their compensatory purpose; they cannot induce cargo pick up or equipment return. Thus, the demurrage and detention charges should not exceed the cost of port space or equipment.

For the purpose of determining compensatory detention, equipment costs include opportunity cost associated with the lack of use of equipment. A mechanism for assessing the ocean common carriers' opportunity cost of equipment should be developed in the context of the requested rulemaking.

V. THE COMMISSION'S ORDER TO FORM SUPPLY CHAIN INNOVATION TEAMS DOES NOT JUSTIFY DENIAL OR DELAY OF THE PROPOSED POLICY.

On February 1, 2016, the Commission issued an order directing Commissioner Dye to form Supply Chain Innovation Teams ("SCITs") in response to past congestion at major U.S. ports and to develop solutions to port congestion and related supply chain challenges. ¹⁵¹ In response, Commissioner Dye formed three teams of industry leaders from 35 major companies and representing nine key supply chain industries. ¹⁵² These teams meet regularly to identify and develop actionable supply-chain process innovations and improvements that would enhance national supply-chain reliability and effectiveness. ¹⁵³

The formation of SCITs has the potential to develop commercial solutions to supplychain challenges and related port congestion. These SCITs hopefully will develop strategies and actions to reduce the frequency and severity of port-congestion issues. Thus, Petitioners strongly support the Commission's action.

However, SCITs are unlikely to completely eliminate the possibility of port congestion.

And the Commission cannot simply wish away the consequences of port congestion in the form

¹⁵¹ Int'l Ocean Transportation Supply Chain Engagement, 81 Fed. Reg. 6263, 6264 (Fed. Mar. Comm'n Feb. 5, 2016).

¹⁵² Statement of Commissioner Dye on Supply Chain Innovation Teams to Chairman Cordero (July 20, 2016), available at

http://www.fmc.gov/statement_of_commissioner_rebecca_dye_on_supply_chain_innovation_tea ms_/.

¹⁵³ *Id*.

of detention and demurrage charges on shippers, consignees, and drayage providers when it does occur. A backstop is necessary to protect shippers, consignees, and drayage providers when commercial strategies and actions fail to prevent congestion. Thus, the Petitioners' request for an interpretive rule/policy statement is complementary with, and not contradictory to, the agency's formation of SCITs.

In fact, the issuance of a policy statement as requested by the Petitioners is likely to increase the likelihood for ocean common carriers and marine terminal operators to take action, via SCITs or otherwise, to reduce port congestion. The policy statement more fairly allocates the costs of congestion to those parties who can best avoid or mitigate congestion. Since ocean common carriers and marine terminal operators have more power over port activities, staffing, and other factors leading to congestion than shippers, consignees, or drayage providers, the policy will place on those parties a greater incentive to address the problem.

VI. CONCLUSION

Shippers, consignees, and drayage providers are experiencing demurrage and detention charges and practices that penalize them when they cannot retrieve cargo or return equipment for reasons beyond their control. These unfair practices allow carriers and terminal operators to generate revenue and profits that reduce their incentive to mitigate or avoid port congestion and disruption. Given these conditions and the primary purpose of demurrage and detention, which is to serve the public interest by securing an efficient port system, ¹⁵⁴ Commission action is necessary under § 41102(c). For the foregoing reasons, the Petitioners request that the Commission issue a notice of proposed rulemaking and, after receiving comments, adopt the proposed policy.

Respectfully submitted,

THE COALITION FOR FAIR PORT PRACTICES

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¹⁵⁴ See Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970) (recognizing that ports are charged with the public interest in efficient terminal operations, which is "unquestioned").

VERIFICATION

I verify under penalty of perjury that,	upon information and belief, the	foregoing is true and
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EXHIBIT A

EXHIBIT A

PROPOSED FMC STATEMENT OF POLICY ON OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR DEMURRAGE, DETENTION, AND PER DIEM CHARGES

- (a) Section 10(d) of the Shipping Act of 1984 (46 U.S.C. § 41102(c)) states that a common carrier or marine terminal operator may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.
- (b) The Federal Maritime Commission interprets this provision to mean that when an ocean common carrier or marine terminal operator is unable to tender cargo for delivery and/or to receive equipment ("disability"), and such disability is caused by any event or circumstance that is beyond the control of the shipper, receiver, or motor carrier, including but not limited to:
 - (1) port congestion;
 - (2) port disruption;
 - (3) weather-related events;
 - (4) delays as a result of governmental action or requirements, unless such delays could have been prevented by the shipper or receiver;

then, if the disability commences before the expiration of free time, it would be unreasonable for the common carrier or marine terminal operator to fail to extend free time for a period equal to the duration of such disability; and/or to assess demurrage, detention or per diem charges against any shipper, receiver, motor carrier or other person for such extended free time period.

- (c) If an ocean common carrier's or marine terminal operator's disability under paragraph (b) arises after free time expires and such disability is caused by any event or circumstance that is beyond the control of the shipper, receiver, or motor carrier, it would be unreasonable for an ocean common carrier or marine terminal operator to charge demurrage, detention, or per diem for the period of the ocean common carrier's or marine terminal operator's disability but demurrage, detention or per diem may be assessed for the period between the expiration of free time and the commencement of the ocean common carrier's or marine terminal operator's disability.
- (d) If an ocean common carrier or marine terminal operator is able to tender cargo for delivery and receive equipment, but shippers, receivers, or motor carriers are prevented from removing cargo and/or returning equipment after free time expires because of events or circumstances beyond their control affecting a substantial portion of the port area, it would be unreasonable for ocean common carriers or marine terminal operators to assess demurrage, detention or per diem charges against such shippers, receivers, or motor carriers at a rate exceeding a compensatory rate for the duration of the disability. A compensatory rate is a rate that does not exceed the ocean common carrier's or marine terminal operator's storage costs for the cargo or costs for equipment.

EXHIBIT B

EXHIBIT B PETITIONERS' STATEMENTS OF INTEREST

American Apparel & Footwear Association

Representing more than 1,000 world famous name brands, the American Apparel & Footwear Association ("AAFA") is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its four million U.S. workers, and its contribution of \$361 billion in annual U.S. retail sales. AAFA stands at the forefront as a leader of positive change for the apparel and footwear industry. With integrity and purpose, AAFA delivers a unified voice on key legislative and regulatory issues. AAFA enables a collaborative forum to promote best practices and innovation. AAFA's comprehensive work ensures the continued success and growth of the apparel and footwear industry, its suppliers, and its customers.

American Chemistry Council

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$797 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for fifteen percent of all U.S. exports.

American Import Shippers Association

The American Import Shippers Association ("AISA"), founded in 1987, negotiates for its members discounted ocean service contract rates as well as accessorial charges and other favorable shipping terms, covering imports from the Far East including China, the Indian Sub-Continent, the Middle East, as well as Central and south America. Its member companies are U.S. importers and retailers of apparel, footwear, and other consumer products. In addition to collective rate negotiations, AISA actively supports efforts aimed at shaping regulatory efforts aimed at meeting the challenges facing importers in an evolving ocean carrier industry.

Association of Bi-State Motor Carriers

The Association of Bi-State Motor Carriers was incorporated in 2002. It currently represents a majority share of port and container traffic at Port Newark, with more than 160 members from trucking and trucking-industry related companies doing business there. Our mission is to provide a forum in which truck operators, owners and businesses in trucking-related industries can share ideas, solve problems, and foster a continually improving intermodal transportation business environment.

The Association is dedicated to serving the interests of its members in Intermodal Transportation, especially at the Port of New York and New Jersey. This port handles over 80% of the world trade for a 10 state, 260-mile radius area, which represents 34% of the U.S. volume of trade. Our members are located throughout the U.S. and Canada.

Association of Food Industries

Created in 1906, the Association of Food Industries is the trade association for the U.S. food import industry. AFI, with more than 1,000 member companies worldwide, is committed to

encouraging free and fair trade and fostering compliance with U.S. laws and regulations.

Auto Care Association

Based in Bethesda, Md., the Auto Care Association has nearly 3,000 member companies that represent some 150,000 independent automotive businesses that manufacture, distribute and sell motor vehicle parts, accessories, tools, equipment, materials and supplies, and perform vehicle service and repair. Visit www.autocare.org

Foreign Trade Association

Foreign Trade Association ("FTA") is the oldest organization promoting the growth of international trade in Southern California. It acts as an informative resource and networking center for its members, and monitors and advocates legislative issues on a state and federal level. The membership is represented by a cross-section of major exporters, importers, manufacturers, customs brokers, freight forwarders, international bankers, attorneys and other prominent service industries.

Green Coffee Association, Inc.

The Green Coffee Association, Inc. established in 1923 is the leading trade association dealing exclusively with green coffee in the United States.

Harbor Association of Industry & Commerce

Harbor Association of Industry & Commerce ("HAIC") was established in 1975 to be a collective voice and advocate for the harbor business community. HAIC is a non-profit industrial and commercial trade association which serves as a united voice on trade, transportation, energy, environmental and land-use issues affecting the South Bay and harbor business communities.

Harbor Trucking Association

Harbor Trucking Association ("HTA") is a coalition of Los Angeles, Long Beach and Oakland intermodal carriers whose purpose is to advocate, educate and promote strategies with other goods movement stakeholders and policy makers that will sustain emission reductions, provide a dialog for intermodal truck efficiency, and to return cargo and jobs to California ports.

Intermodal Motor Carriers Conference

The Intermodal Motor Carriers Conference ("IMCC") is an affiliated organization of the American Trucking Associations ("ATA") representing motor carrier member companies and companies and organizations supporting intermodal freight transportation who operate in port, rail, distribution and customer logistic related facilities around the country. ATA is the largest national trade association for the trucking industry and through a federation of trucking groups, industry related conferences and its 50 affiliated state trucking associations represents more than 37,000 members covering every type of motor carrier transport in the United States.

International Association of Movers

The International Association of Movers ("IAM") is the moving and forwarding industry's largest global trade association. With more than 2,000 members, it comprises companies that provide moving, forwarding, shipping, logistics, and related services in more than 170 countries. Since 1962, IAM has been promoting the growth and success of its members by offering

programs, resources, membership protections, and unparalleled networking opportunities to enhance their businesses and their brands.

Juice Products Association

The Juice Products Association ("JPA") is the national trade association representing the juice products industry. Our membership represents a diverse spectrum of the industry and includes processors, packers, extractors, brokers and marketers of fruit or vegetable juices, drinks, and bases, as well as industry suppliers and food testing laboratories. Our manufacturers represent over 80% of the US volume of juice and fruit beverage production.

JPA's mission is to connect members by strengthening the juice products industry, providing a unified voice, serving as the expert resource, enhancing industry best practices, and promoting consumer benefits of juice products.

Juvenile Products Manufacturers Association

The Juvenile Products Manufacturers Association ("JPMA") is a non-profit association representing leading manufacturers who make prenatal to preschool products for the North American market. The JPMA serves as an advocate for the industry and is committed to ensuring the safe use and selection of juvenile products. Each September, the JPMA celebrates its Baby Safety Month initiative, heavily promoting the campaign's messages through its consumer brand, the Baby Safety Zone. To find out more information about the JPMA, its programs and its members, visit www.ipma.org. Follow JPMA on Twitter @JPMA, connect with JPMA on Facebook or on YouTube. Parents, caregivers and consumers should visit www.BabySafetyZone.org.

Meat Import Council of America

The Meat Import Council of America ("MICA") is an incorporated trade association, which represents the U.S. industry that imports fresh, chilled and frozen beef and sheep meat and pork into the United States. MICA's members include importers, who account for most of the non-NAFTA imports of these products, as well as end users. MICA's membership also includes organizations such as port authorities, refrigerated warehouses, customhouse brokers, etc. who provide services in connection with this imported product.

Motor & Equipment Manufacturers Association

The Motor & Equipment Manufacturers Association ("MEMA") and its four specialized divisions comprise the leading international trade association in the fast-changing mobility industry. Representing vehicle suppliers that manufacture and remanufacture components, technologies, and systems for use in passenger cars and heavy trucks, MEMA works to ensure that the marketplace and legislative and regulatory environment support the development and implementation of new technical capabilities transforming the automotive industry, including autonomous vehicles and vehicle connectivity. By directly employing more than 734,000 Americans and generating a total employment impact of 3.6 million jobs, MEMA's member companies are the largest sector of manufacturing jobs in the U.S. MEMA's members are represented through four divisions: Automotive Aftermarket Suppliers Association (AASA), Heavy Duty Manufacturers Association (HDMA), Motor & Equipment Remanufacturers Association (MERA) and Original Equipment Suppliers Association (OESA). For more

information on how MEMA is leading transformation in the mobility industry, visit www.mema.org.

National Customs Brokers & Forwarders Association of America, Inc.

The National Customs Brokers & Forwarders Association of America, Inc. ("NCBFAA") is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry. The NCBFAA's 1,000 members and the members of the Association's 28 affiliated regional associations are involved in handling the majority of international import and export cargo that moves in the ocean commerce of the United States. In particular, these members arrange for the movement and delivery of ocean cargo on behalf of their importer and exporter customers, are often the parties that directly contract with the shipping lines and are ordinarily the parties that are invoiced by the vessel operators and marine terminal operators for demurrage and detention charges.

National Pork Producers Council

The National Pork Producers Council is an association of 43 state pork producer organizations that serves as the global voice in Washington, D.C., for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agricultural economy and the overall U.S. economy. Nationwide, more than 68,000 pork producers marketed more than 110 million hogs in 2015, and those animals provided total gross receipts of more than \$21 billion. Overall, an estimated \$22 billion of personal income and \$35 billion of gross national product are supported by the U.S. hog industry. Iowa State University economists Daniel Otto, Lee Schulz and Mark Imerman estimate that the U.S. pork industry is directly responsible for the creation of nearly 35,000 full-time equivalent pork producing jobs and generates about 128,000 jobs in the rest of agriculture. It is responsible for approximately 111,000 jobs in the manufacturing sector, mostly in the packing industry, and 65,000 jobs in professional services such as veterinarians, real estate agents and bankers. All told, the U.S. pork industry is responsible for more than 550,000 mostly rural jobs in the United States.

National Retail Federation

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. NRF.com

New York/New Jersey Foreign Freight Forwarders and Brokers Association

The New York/New Jersey Foreign Freight Forwarders and Brokers Association ("NYNJFFFBA") is a trade association representing the interests of freight forwarders, nonvessel operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry located in the Port of New York and New Jersey. The NYNJFFFBA has over 100 members that are involved in handling containerized and break/bulk cargo that moves through the Port of New York and New Jersey, which is the largest port on the East Coast. The members of the NYNJFFFBA arrange for the movement and delivery of ocean cargo on behalf of their importer and exporter customers, and as such, are often the parties that have direct contact with

the shipping lines and marine terminals. They are also ordinarily the parties that are invoiced by the vessel operators and marine terminal operators for demurrage and detention charges.

North American Meat Institute

The North American Meat Institute ("NAMI") is a national trade association that represents companies that process 95 percent of red meat and 70 percent of turkey products in the US and their suppliers throughout America. Headquartered in metropolitan Washington, DC, NAMI keeps its fingers on the pulse of legislation, regulation and media activity that impacts the meat and poultry industry and provides rapid updates and analyses to its members to help them stay informed. In addition, NAMI conducts scientific research through its Foundation designed to help meat and poultry companies improve their plants and their products. The Institute's many meetings and educational seminars also provide excellent networking and information-sharing opportunities for members of the industry.

Retail Industry Leaders Association

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Tea Association of the USA, Inc.

Founded in 1899, the Tea Association of the USA, Inc., was formed to promote and protect the interests of the tea trade in the United States and is the recognized independent authority on Tea.

The National Industrial Transportation League

The League was founded in 1907 and represents companies engaged in the transportation of goods in both domestic and international commerce. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Competitive ocean transportation is vitally important to League members and their customers, and many League members depend highly upon efficient and effective ocean transportation services for both importing and exporting their goods.

Transportation Intermediaries Association

The Transportation Intermediaries Association ("TIA") is the professional organization of the \$160.2 billion third-party logistics industry in North America. Transportation intermediaries, or third party logistics companies ("3PL"), 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 1,600 member companies. Over 70 percent of these member companies are small, family-owned businesses. TIA is the only organization representing transportation intermediaries in all modes to shippers, carriers, government officials and international organizations and is the U.S. member of the International Federation of Freight Forwarders Associations ("FIATA").

U.S. Hide, Skin and Leather Association

The U.S. Hide, Skin and Leather Association ("USHSLA") is a full service industry organization devoted to the U.S. hides, skins and wet blue leather products industry. Founded in 1979, the association provides its members with government, public relations, and international trade assistance and support. The USHSLA is a cooperator under the U.S. Department of Agriculture's foreign market development programs, assisting U.S. firms develop new markets for U.S. agricultural exports. USHSLA is at the forefront of the industry's needs, providing members with service, information, and opportunities to compete in today's global marketplace.

EXHIBIT C

TABLE OF CONTENTS VERIFIED STATEMENTS

ТАВ	COMPANY	Name and Title
1	International Motor Freight, Inc.	Christopher Grato VP Administration
2	MacMillan-Piper, Inc.	Mark Miller President & CEO
3	Centric Parts	Steve Hughes VP Governmental Affairs, Supplier Development, Logistics
4	American Coffee Corporation	Donald Pisano President
5	Chico's FAS Inc.	Shana Riggs VP, Logistics & Customs Compliance
6	VLM Foods Inc.	Mark FeDuke
7	Budpak, Inc.	Gregg Singer Owner
8	Tea Importers, Inc.	Andrew Wertheim President
9	ContainerPort Group, Inc.	Robert Leef Senior Vice President, East Region
10	California Multimodal, LLC	Robert Loya Director of Operations
11	Seafrigo USA, Inc.	Al Raffa VP of Operations
12	All In One Customs Brokers Inc.	Jacqueline Dossantos Broker
13	Serra International, Inc.	Jeanette R. Gioia President
14	Mecca & Son Trucking Co., Inc.	Peggy Mecca Treasurer
15	Thunderbolt Global Logistics, LLC	Jim Shapiro Director

EXHIBIT C-1



INTERNATIONAL MOTOR FREIGHT, INC.

318 Port Street • Port Newark, N.J. 07114 • TEL: 973-589-4001 • FAX:

My name is Christopher Grato and I work for International Motor Freight (IMF), an import/export trucking company located in Port Newark, New Jersey. I am the V.P. Administration with various responsibilities pertaining to insurance, finance, sales, having direct interaction with the Operations/Dispatch/Customer Service areas of IMF.

International Motor Freight is a family owned, asset based company that has been in business over forty years. We have a fleet of 100 company trucks/drivers who are completely dedicated to our organization. IMF provides drayage services for a large number of companies that ship via the Port of NY/NJ and the Port of Philadelphia (Parker Terminal), moving on an annual basis between 45,000 and 50,000 containers. The service that we perform is the final transportation leg as international cargo. Our customer base includes furniture retailers, home improvement companies, household appliances, and the liquor industry, to name a few.

From the Fall/Winter of 2014 through all of 2015, we experienced severe detention and queue times at the ocean terminals due to terminal congestion which was caused by labor issues, inclement weather and equipment shortages. We incurred delays in the pick-up and delivery of freight, and the return of empty equipment to the piers. Throughout this time we realized exorbitant demurrage, per diem charges, and labor costs.

The West Coast labor situation accounted for cargo diversions to the East Coast from March 2015 to the end of September 2015 that resulted in higher than normal import volumes, both of which were contributing factors to the port congestion challenges that we faced on a daily basis. Some of the terminals opened on weekends to help relieve the situation, however, truck driver hours of service are federally regulated, and the extra day(s) did not necessarily help. During this time, IMF was directly invoiced by steamship lines over \$1,200,000 in per diem charges. IMF rebilled their customers for the charges, most of which were paid. However, IMF ended up having to pay approximately \$50,000-55,000 of the total per diem charges. This does not include those charges steamship lines billed the shipper directly. A secondary factor to the port congestion was the creation of the 2M Alliance. The terminals servicing these vessels were not prepared for the increase in volume that was created by the vessel sharing alliance.

Depending on the customer and steamship line per diem charges are invoiced differently. Many of our clients have extended free time because they are volume shippers. Free time in beneficial cargo owner (BCO) service contracts ranges from 10 calendar days up to 20 working days. Most of our customers share their contract terms with us and when we receive per diem invoices from the steamship lines we verify that the charges have been billed correctly. For customers without a service contract, IMF was billed the standard free time listed in the Uniform Intermodal and Interchange and Facilities Access Agreement (UIIA) along with the steamship lines' posted tariff rates. The standard free time is from 3 working days up to 7 calendar days. The daily per diem rates for standard dry containers start at \$85/day and go up from there.

In most cases the trucking company that interchanged the container from the terminal is the bill to party for all per diem. There can be instances where a BCO or a broker can get billed directly for per diem, and may even get the charges waived, but we would not necessarily be privy to that information. Our standard operating procedure for per diem billed to IMF is a simple process. We receive the bill and verify that all dates and amounts are correct and the per diem has been invoiced correctly. If any discrepancies are found then we dispute the bill with the steamship line directly. If the invoice is valid we bill our customers and pay the steamship line the charges. IMF experienced an increase in labor cost due to the administrative burden associated with providing its customers this service. As a result, IMF started charging its customers a \$15.00 administrative fee per invoice (which usually relates to 10-20 containers) to process per diem charges on their behalf.

International Motor Freight experienced a number of specific challenges during the freight surge of 2015, some of which were long standing issues while others were unique to the time period. Terminal hours of operation in the Port of NY/NJ have been a long standing problem because each terminal sets its own hours. Most terminals open at 6am and are open until at least 4pm with varying restrictions for double or single moves, and some terminals open at 8am and close at 4pm because they do not have the volume to support their labor costs. During the spring surge we were unable to return empty containers and complete double moves. As the volume of imports surged during this time, so too did the volume of empty returns. As a result, another major problem at two terminals in particular was long and excessive queues to return empty containers. Trucks would be lined up in a grid on terminal for up to 3-4 hours before getting serviced. In addition, there were queues several miles long outside of the terminals waiting to get inside to be serviced. One terminal's problems were caused by the increased volume of the 2M alliance, while another terminal's challenges were a result of technology upgrades and high volumes at the same time.

Approximately fifty percent of the \$1,200,000 in per diem charged to IMF was related to the steamship lines and terminals involved in the 2M Alliance. The terminal's inability to remove empties forced IMF and other trucking companies to stop doing double moves, which is the norm in our industry. That is, return an empty container and use the same chassis to pick up another load. Another negative factor was the steamship lines direction to return empty

containers to other terminal locations, again, not allowing the drayage community to do double moves. We were forced to spend hours on two different lines in order to pick up one container load.

Due to long turn times and lower productivity, many containers went into demurrage at the marine terminals. IMF's policy was not to advance any demurrage charges for our customers, and as a result, we had very little exposure in this area. Either our customers paid the charges directly to the terminal operators or they sent us a check which we submitted to the pier while picking up the container.

In order to alleviate congestion, some of the terminals opted to open on weekends. Depending on the circumstances there were Saturday or Sunday gates available. In many instances we participated in the weekend gates out of necessity. We were faced with DOT regulations relating to drivers Hours of Service, as well at the additional operating expense of overtime costs. Our primary concern is safety, and we would have to shut drivers down on Thursday or Friday, whether or not it was productive sitting in lines, in order to have enough hours to work on the weekend. The weekend truck turn times were at time 15-35% shorter than they were during the week. While weekend truck turn times were shorter, they were an additional expense that IMF would not usually incur if able to provide double moves during the week days.

The aftermath of the port congestion was the per diem bills. As previously stated, they amounted to around \$1,200,000 in charges. A significant amount of money was paid on behalf of our customers. The steamship lines allow a 30 day grace period to pay their invoices; however, in some instances we had to wait 30, 60, 90 days, or more to be paid by our customers. We were not able to negotiate per diem at our level; if the invoice was valid in the steamship lines eyes it had to be paid. We were unaware if our customers did any behind the scenes negotiating. If we were delinquent in paying the invoices to the lines we were threatened with shutout notices from individual lines as outlined in the UIIA agreement.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Christopher Grato

EXHIBIT C-2

MacMILLAN-PIPER, INC.

P.O. Box 3514 Seattle, WA 98124-3514 206-624-5135

May 13, 2016

Verified Statement to be attached to Petition for Rulemaking to the Federal Maritime Commission

I, Mark Miller, am the President and CEO of MacMillan-Piper, Inc., a freight transloader and motor carrier operating in the Seattle/Tacoma port area.

Established in 1969, MacMillan-Piper is the largest transloader in the Pacific Northwest. We transload a variety of import and export commodities (dry bulk and bagged agricultural products and fertilizers, lumber, clay, frozen meat/poultry, paper, pulp, rubber track, engines, metal sows/ingots/billets, hay, talc, etc.) to/from railcars, trailers, and steamship line containers. We also dray the containers we load and unload between our facilities and the local port terminals and rail ramps. We operate a dedicated fleet of approximately 55 trucks, split between Seattle and Tacoma to service our warehouses. During 2014 and 2015, we operated three facilities in Seattle and two in Tacoma.

As President and CEO, I oversee all financial, transloading, trucking, and labor functions for MacMillan-Piper.

In 2014, the contract negotiations between the ILWU and PMA resulted in labor unrest and work slowdowns at the port terminals in Seattle and Tacoma, beginning around Memorial Day and significantly worsening from October 2014 through May 2015. The limited gate hours (usually 0700 to 1600 with closures for lunch and breaks), slow longshore work pace, long truck lines into and within the terminals, and steamship lines rolling and cancelling bookings greatly impacted our operations. Some truck turn times to deliver one container and pick up another exceeded eight hours. This immensely reduced the efficiency of our fleet and made it impossible for us to transload freight in a timely manner, resulting in additional exorbitant costs for trucker standby, railcar demurrage, container detention, and warehouse overtime.

With the volume of freight we transload, we are dependent on fast turn times at the terminals. About 90 percent of the steamship line containers we load and unload are picked up and returned to the port terminals. The attached spreadsheets show that, from July 2014 through August 2015, we transloaded product from railcars (via BNSF and TMBL) into more than 20,300 steamship line containers. That equates to more than 40,600 truck moves (empty out, load in) through the port terminals in Seattle and Tacoma in a 14-month period – just for freight moving in railcars. In addition, we also transloaded freight moving in trailers and on flatbeds to/from steamship line containers, which increased our total port drays for that time period to approximately 70,000.

Due to the labor and congestion issues at the terminals, we paid exorbitant amounts of truck standby during 2014 and 2015. The attached spreadsheet shows the standby hours paid in Tacoma, broken

down by the four terminals called. The first hour in the terminal or in line is free, so those hours are not included in the totals. In a little over a year, we accrued more than 11,000 hours of standby time in Tacoma alone at a cost of more than \$550,000 (paid at \$50/hour).

The bottleneck at the Pacific Northwest ports caused severe network congestion for BNSF Railway and Union Pacific Railroad, the two Class 1 railroads in the area. BNSF held trains on spot as far east as Montana. Because we were not able to unload railcars fast enough during the port slowdowns, both BNSF and UP embargoed us from November 2014 until March 2015, at which time they again allowed unrestricted traffic. The attached spreadsheets show the railcar demurrage that we paid due to our inability to get containers in and out of the ports. In a little over a year, we accrued more than \$1.55 million in railcar demurrage, which was mitigated to \$1.12 million. BNSF reduced its rates from \$75/railcar/day plus penalty charges to \$40/railcar/day during the embargo months due to force majeure conditions at the ports.

To support our normal volume of business, trucks leased to us need to each move an average of eight containers a day through the ports. This was not possible during much of 2014 and 2015, during which trucks often had no more than two moves per day. We had great difficulties returning containers to the ports, not only due to slow turn times, but because the terminals refused to receive containers, citing congestion, rolled/cancelled bookings, and delayed vessel loading. As a result, we incurred detention charges from 17 different steamship lines in Seattle and Tacoma. From May 2014 through August 2015, for 953 containers, we were billed nearly \$1.25 million in detention charges by steamship lines as outlined on the attached spreadsheet. That amount was eventually reduced to approximately \$250,000. However, it has taken nearly a year's worth of disputes to get those charges waived. Many of the invoices were paid initially to keep the lines from cancelling our equipment interchange agreements and were reimbursed to us later. We spent a lot of time disputing invoices that should never have been issued in the first place due to conditions beyond our control.

The attached spreadsheet itemizes the steamship lines involved at the Ports of Seattle and Tacoma, the free time each line allowed, the applicable detention rates, the amounts charged, the amounts waived, and the number of containers charged per month. All of the charges were billed to us directly by the steamship lines.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Sincerely,

Mark Miller

President & CEO

my Bangit

MacMillan-Piper, Inc.

mmiller@macpiper.com

Ph: 206-624-5135

Fax: 206-624-2449

www.macpiper.com

MacMILLAN-PIPER, INC.

Steamship Line detention charges

Port	Steamship line	Date	Free Time (days) dry & reefer	Rate	# of cntrs	Amt. invoiced	Amt. paid	Amt. waived
SEATTLE	ANL - USL	Feb 2015	5 dry	\$165/day dry	8	\$10,560.00	\$0.00	\$10,560.00
		Mar 2015			1	\$165.00	\$0.00	\$165.00
	APL	May 2014	6 dry	\$94/day	19	\$722,500.00	\$85.00	\$722,415.00
		June 2014			13	\$10,370.00	\$4,420.00	\$5,950.00
		Dec 2014			5	\$1,996.00	\$1,056.00	\$940.00
	China Shpg	June 2014	4 dry	\$85/day 1-5	1	\$3,285.00	\$3,285.00	\$0.00
		Feb 2015		\$100/day 6+	14	\$7,010.00	\$0.00	\$7,010.00
		Mar 2015			1	\$425.00	\$425.00	\$0.00
	CMA-CGM	June 2014	4 dry/rf	\$90/day dry	2	\$420.00	\$420.00	\$0.00
		Oct 2014		\$200/day rf	9	\$1,620.00	\$1,620.00	\$0.00
		Jan 2015			28	\$6,390.00	\$180.00	\$6,210.00
		Feb 2015			135	\$124,640.00	\$0.00	\$124,640.00
		Mar 2015			21	\$4,850.00	\$500.00	\$4,350.00
		Apr 2015			43	\$11,320.00	\$10,060.00	\$1,260.00
	Cosco	Nov 2014	4 dry	\$85/day	9	\$2,040.00	\$2,040.00	\$0.00
		Dec 2014			6	\$6,205.00	\$6,205.00	\$0.00
		Jan 2015		<u>-</u>	1	\$1,190.00	\$0.00	\$1,190.00
		Feb 2015			13	\$32,130.00	\$680.00	\$31,450.00
	Hanjin	Dec 2014	4 dry	\$100/day 1-5	10	\$1,300.00	\$1,300.00	\$0.00
		Feb 2015		\$140/day 6+	1	\$640.00	\$0.00	\$640.00
	Hyundai	Sept 2014	5 dry	\$90/day dry	6	\$665.00	\$665.00	\$0.00
		Oct 2014	4 rf	\$175/day rf	1	\$540.00	\$540.00	
	-	Dec 2014	1	<u> </u>	6	\$4,950.00	\$0.00	

	Steamship		Free Time (days) dry			·		
Port	line	Date	& reefer	Rate	# of cntrs	Amt. invoiced	Amt. paid	Amt. waived
	Maersk	May 2014	4 dry/rf	\$95/day dry 1-4	1	\$95.00	\$95.00	\$0.00
		June 2014		\$140/day dry 5-8	1	\$285.00	\$285.00	\$0.00
-		Aug 2014		\$175/day dry 9+	20	\$7,410.00	\$7,410.00	\$0.00
		Sept 2014			16	\$5,320.00	\$5,320.00	\$0.00
		Oct 2014		\$289/day rf 1-3	11	\$1,330.00	\$1,330.00	\$0.00
		Nov 2014		\$400/day rf 4+	41	\$12,990.00	\$12,990.00	\$0.00
		Dec 2014			5	\$1,655.00	\$1,655.00	\$0.00
		Jan 2015			41	\$12,330.00	\$2,395.00	\$9,935.00
		Feb 2015			13	\$9,085.00	\$2,425.00	\$6,660.00
		Mar 2015			13	\$14,070.00	\$1,415.00	\$12,655.00
		Apr 2015			8	\$3,250.00	\$1,400.00	\$1,850.00
		May 2015			4	\$1,185.00	\$1,185.00	\$0.00
		June 2015			6	\$855.00	\$855.00	\$0.00
	MOL	May 2014	5 dry	\$85/day	1	\$680.00	\$680.00	\$0.00
		June 2014			1	\$680.00	\$680.00	\$0.00
						• • •		
	MSC	May 2014	4 dry/rf	\$90/day dry 1-4	3	\$1,200.00	\$1,200.00	\$0.00
		June 2014		\$140/day dry 5+	1	\$60.00	\$60.00	\$0.00
		Jul 2014			15	\$2,780.00	\$2,780.00	\$0.00
		Aug 2014		\$300/day rf 1-4	35	\$12,260.00	\$12,260.00	\$0.00
		Sept 2014		\$400/day rf 5+	31	\$3,460.00	\$3,460.00	\$0.00
		Oct 2014			5	\$1,080.00	\$1,080.00	\$0.00
	:	Nov 2014			38	\$21,710.00	\$13,210.00	\$8,500.00
		Dec 2014			38	\$22,990.00	\$22,990.00	\$0.00
		Jan 2015			40	\$36,620.00	\$36,620.00	\$0.00
		Mar 2015			30	\$22,890.00	\$22,260.00	\$630.00
		Apr 2015			3	\$560.00	\$560.00	\$0.00
		May 2015			12	\$4,340.00	\$0.00	\$4,340.00
		June 2015			7	\$9,950.00	\$9,950.00	\$0.00
		Jul 2015			2	\$180.00	\$180.00	\$0.00
		Aug 2015			4	\$1,770.00	\$1,770.00	\$0.00

Port	Steamship line	Date	Free Time (days) dry & reefer	Rate	# of cntrs	Amt. invoiced	Amt. paid	Amt. waived
	NYK	Feb 2015	5 dry	\$100/day	8	\$1,800.00	\$300.00	\$1,500.00
		Mar 2015	3 rf	\$150/day	1	\$100.00	\$100.00	\$0.00
		May 2015			1	\$700.00	\$700.00	\$0.00
	PIL	July 2014	5 dry	\$85/day	1	\$255.00	\$255.00	\$0.00
		Feb 2015			1	\$85.00	\$85.00	\$0.00
	Safmarine	Apr 2015	SEE MAERSK	C FREETIME	1	\$1,990.00	\$1,990.00	\$0.00
	Yang Ming	Apr 2015	5 dry	\$85/day	1	\$170.00	\$170.00	\$0.00
				TOTALS	813	\$1,173,381.00	\$205,581.00	\$967,800.00
Port	Steamship line	Date	Free Time (days)	Rate	# of cntrs	Amt. invoiced	Amt. paid	Amt. waived
TACOMA	APL	Dec 2014	6 dry	\$94/day	1	\$940.00	\$0.00	\$940.00
17.0011.71		+	0 017	75 17 44 7				
	I	Apr 2015			4	\$3,854.00	\$0.00	\$3,854.00
		Apr 2015			4	*		
	CMA-CGM	Apr 2015 Jan 2015	4 dry/rf	\$90/day dry \$200/day rf	5	*		
	CMA-CGM		4 dry/rf	\$90/day dry \$200/day rf		\$3,854.00	\$0.00	\$3,854.00
						\$3,854.00 \$1,170.00	\$0.00	\$3,854.00
	CMA-CGM Evergreen	Jan 2015	4 dry/rf 5 dry	\$200/day rf	5	\$3,854.00	\$0.00 \$0.00	\$3,854.00 \$1,170.00
		Jan 2015 Nov 2014		\$200/day rf \$95/day dry 1-5	5	\$3,854.00 \$1,170.00 \$1,660.00	\$0.00 \$0.00 \$1,660.00	\$3,854.00 \$1,170.00 \$0.00
		Jan 2015 Nov 2014 Dec 2014		\$200/day rf \$95/day dry 1-5	5 1 15	\$3,854.00 \$1,170.00 \$1,660.00 \$7,395.00	\$0.00 \$0.00 \$1,660.00 \$0.00	\$3,854.00 \$1,170.00 \$0.00 \$7,395.00
		Jan 2015 Nov 2014 Dec 2014 Jan 2015	5 dry	\$200/day rf \$95/day dry 1-5 \$135/day dry 6+	1 1 15 8	\$3,854.00 \$1,170.00 \$1,660.00 \$7,395.00 \$6,795.00	\$0.00 \$0.00 \$1,660.00 \$0.00 \$4,705.00	\$3,854.00 \$1,170.00 \$0.00 \$7,395.00 \$2,090.00
		Jan 2015 Nov 2014 Dec 2014 Jan 2015 Feb 2015	5 dry	\$200/day rf \$95/day dry 1-5 \$135/day dry 6+ \$185/day rf 1-5	1 15 8 24	\$3,854.00 \$1,170.00 \$1,660.00 \$7,395.00 \$6,795.00 \$12,700.00	\$0.00 \$0.00 \$1,660.00 \$0.00 \$4,705.00 \$11,920.00	\$3,854.00 \$1,170.00 \$0.00 \$7,395.00 \$2,090.00 \$780.00
		Jan 2015 Nov 2014 Dec 2014 Jan 2015 Feb 2015 Apr 2015	5 dry	\$200/day rf \$95/day dry 1-5 \$135/day dry 6+ \$185/day rf 1-5	5 1 15 8 24 3	\$3,854.00 \$1,170.00 \$1,660.00 \$7,395.00 \$6,795.00 \$12,700.00 \$2,135.00	\$0.00 \$0.00 \$1,660.00 \$0.00 \$4,705.00 \$11,920.00 \$390.00	\$3,854.00 \$1,170.00 \$0.00 \$7,395.00 \$2,090.00 \$780.00 \$1,745.00

Dowt	Steamship		Free Time (days) dry	Data	4 -6	A mak immedia ad	Ama maid	Amaaiad
Port	line	Date	& reefer	Rate	# of cntrs	Amt. invoiced	Amt. paid	Amt. waived
	Hanjin	Mar 2015	4	\$100/day 1-5	1 1	\$2,460.00	\$2,460.00	
·		Apr 2015		\$140/day 6+	1	\$300.00	\$300.00	
		May 2015		<u></u>	2	\$200.00	\$200.00	<u> </u>
		June 2015	-		2	\$1,000.00	\$1,000.00	\$0.00
	Hapag-Lloyd	Jan 2015	5	\$105/day	5	\$5,670.00	\$0.00	\$5,670.00
	Hyundai	Nov 2014	5 dry	\$90/day dry	4	\$750.00	\$750.00	\$0.00
		Dec 2014	4 rf	\$175/day rf	7	\$1,170.00	\$1,170.00	\$0.00
		Feb 2015			16	\$4,115.00	\$4,115.00	\$0.00
		Mar 2015			3	\$2,350.00	\$2,350.00	\$0.00
	MOL	Dec 2014	5	\$85/day	1	\$850.00	\$0.00	\$850.00
	NYK	Sept 2014	5 dry	\$100/day	1	\$150.00	\$150.00	\$0.00
		Nov 2014	3 rf	\$150/day	1	\$300.00	\$300.00	\$0.00
		Dec 2014			1	\$300.00	\$300.00	\$0.00
		Jan 2015			3	\$1,050.00	\$1,050.00	\$0.00
		Feb 2015			6	\$3,750.00	\$1,500.00	\$2,250.00
		Mar 2015			1	\$1,800.00	\$0.00	\$1,800.00
		Aug 2015			2	\$1,050.00	\$1,050.00	\$0.00
	Yang Ming	Dec 2014	5 dry	\$85/day dry	3	\$1,530.00	\$1,530.00	\$0.00
		Feb 2015			8	\$4,165.00	\$4,165.00	\$0.00
		Mar 2015			1	\$110.00	\$110.00	\$0.00
		Apr 2015			1	\$85.00	\$85.00	\$0.00
				TOTALS	140	\$74,224.00	\$45,430.00	\$26,019.00

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EXHIBIT C-3

Centric Parts

21046 S. Figueroa Street Carson, CA 90745

Phone: (310) 218-1082 Fax: (310) 218-1093







November 18, 2016

To Whom It May Concern:

My name is Steven Hughes, Vice President in charge of Governmental Affairs – Logistics – Supplier Development for Centric Parts. Centric is a leading manufacturer and supplier of replacement brake components for import and domestic motor vehicles. It imports approximately 6,000 TEUs per year. I oversee ocean cargo transportation logistics for Centric and was directly and constantly involved with representatives from Evergreen, COSCO, Hanjin and CMA-CGM, along with the marine terminal operators (MTOs) and our drayage company during the entire period of the port labor disruption on the West Coast, beginning in early 2014, all the way through 2015.

The port labor disruption had a significant impact on our business. Overall, we had 82 shipments affected by the port disruption from August 2014 through February 2015, forcing an outlay of over \$60,000 in demurrage payments. We filed detailed complaints for each of these instances with the Federal Maritime Commission (FMC) Consumer Affairs and Dispute Resolution Services (CADRS) division. Our demurrage issues halted almost immediately after the contract between the International Longshore and Warehouse Union and Pacific Maritime Association was ratified in 2015, with no discernable problem with delays or demurrage since then.

Centric's inability to pick up its containers during the disruption was beyond its control. First, there was no way to avoid the congestion that the disruption caused. Before the disruption, we would pick all of our containers up during the night gate to avoid congestion and traffic mitigation fees from PierPass. However, the entire day and night gate system was brought to its' knees at virtually every terminal due to the disruption. Consequently there were massively long lines waiting to pick up containers. Also, quite often after waiting hours in line to pick up our containers our trucker would be turned away because the yard was closed. When the whole situation came to a critical mass, our trucker started to charge us for wait times.

Second, for those terminals where there was an appointment system, we had significant problems scheduling appointments to pick up our containers. For example, I sat with our drayage company while he attempted multiple times to make an appointment on the Seaside Transportation Services (STS) terminal website after we received arrival notices for our containers. The system would not accept any appointments. I personally witnessed this several times. This problem persisted throughout the period of port disruption. More often than not, when we could finally book an appointment, it was scheduled long after our last free day.

The terminals were reluctant to waive demurrage charges when they arose for reasons beyond our control. For example, I reached out to both the general manager and the terminal manager at STS to complain about being charged demurrage when in fact we had made all practical efforts to book a pickup before free time was up. They both stated that unless we could prove that we had made attempts they would make no adjustments. I requested that they produce the logs from their system proving that we had signed on. They claimed that retrieving the logs was not possible. Thus, there was no way to prove that we attempted to make an appointment, because their system did not record the attempt or provide any confirmation that we had made an attempt. Another example is an instance where our trucker was attempting to pick up two containers from the same Bill of Lading (BOL). Both containers had accrued demurrage. He explained to the demurrage desk clerk at the terminal that he had been attempting to make appointments for days and this was the earliest available time. The clerk







excused himself and went back to have someone sign off on the waiver. When he came back he only had a waiver for one of the two containers. When our driver asked about the other container, the desk clerk said he didn't have time to go back and ask for a waiver for the second container!

Carriers also were reluctant to waive demurrage charges that accrued for reasons beyond our control. It took almost 7 months of negotiations with the steamship lines to get any refunds on demurrage charges we paid. Even after filing complaints with CADRS at the FMC, we were only able to negotiate an overall 50% recovery of the demurrage charges accrued during the disruption.

The demurrage practices of the carriers and terminals also resulted in significant indirect costs. The time spent by myself and our staff on the phone with the terminals, our drayage company and the sales people from the various steamship lines to try to mitigate the demurrage issues and attempts to pick up cargo was substantial.

Charging shippers demurrage when they cannot retrieve their containers during free time due to port disruptions beyond their control and being uncooperative in resolving the disruption is unfair. The FMC should take measures to eliminate this practice.

I verify under penalty of perjury that the foregoing is true and correct.

Steve Hughes

Vice President - Governmental Affails - Supplier Development - Logistics

EXHIBIT C-4



AMERICAN COFFEE CORPORATION

30 Montgomery Street Suite 215 Jersey City NJ 07302 www. amcof .com t: 201.433.2500 f: 201.433.2501

May 10, 2016

To whom it may concern,

The American Coffee Corporation has imported green coffee beans into the U.S. since 1992. On average, the company imports approximately 1,800 containers a year of green coffee into most major U.S. ports on all three coasts. Imported primarily from Mexico, Central and South America, South East Asia and East Africa, the green coffee beans are sold to large and small U.S. manufacturing clients whose "roast and ground" "or "whole bean" coffee products are commonly found on the supermarket shelves throughout the country.

As president of American Coffee, I am responsible for overseeing the daily activities of the company including, but not limited to, all logistical operations, service contract negotiations with our ocean carriers, Customs and FDA clearances, and transactions with local drayage companies and port area warehouses in which we store coffee inventories.

Like most importers, American Coffee has suffered through numerous instances of service disruptions at marine terminals caused by labor disputes between the carriers and stevedoring unions on all three coasts. These situations are totally beyond the control of the shipper and beneficial cargo owner. However, the disruptions on the west coast during the period of late 2014 to early 2015 caused particularly severe hardships, including delays in deliveries to our customers, degradation of quality to our products, strain on our cashflow, and direct costs associated with contingency planning and diversion of cargo. We were further harmed by the inexplicable and unpredictable manner in which terminal gates were closed without notice while our truckers had already been dispatched and were waiting in line to enter the terminal. They were thus prepared pick up containers that were previously vetted as available for delivery. On the east coast, disruptions have been caused by weather-related shutdowns, such as during Superstorm Sandy and winter snowstorms, as well as labor actions and other unforeseeable events.

We have also incurred demurrage charges when holds are placed by U.S. Customs while the containers are awaiting examinations at the marine terminals or are pending Customs authorization to move the containers to off terminal Customs Exam Sites (CES). We must state that we do find it quite unfair that demurrage is charged, and at punitively high rates, while we as importers are cooperating with US government inspection requirements.

Perhaps even more concerning has been the increased terminal congestion we are seeing as a result of larger vessels, the bunching of calls, poor planning and coordination between the carriers and the MTO, and the lack of investment and focused attention on the land side of the terminal operations. Unfortunately, we suspect that matters will continue to worsen as the industry anticipates still larger vessels, increased vessel sharing agreements, and shifting carrier alliances.



AMERICAN COFFEE CORPORATION

30 Montgomery Street Suite 215 Jersey City NJ 07302 www. amcof .com t: 201.433.2500 f: 201.433.2501

At American Coffee, we negotiate and maintain service contacts directly with a number of large ocean carriers serving routes from coffee growing regions around the world into the U.S. on a port-to-port basis. Each service contract includes defined free time at the port terminals ranging from four (4) working days to ten (10) calendar days. Our contracts also specify the amount of equipment free time which is allowed off-terminal before container detention charges (per diem) would be assessed.

We are generally able to pick up containers and return them empty within our allowed freetime privileges. However, over the years we have experienced numerous instances where we had cargo fully released and our contracted draymen had trucks ready and available to pick up our containers within the free time, but were prevented from doing so due to terminal congestion, gate closures and other causes beyond our control. We were then forced to pay demurrage charges while waiting to make another attempt the following work day. One of the most egregious instances occurred in April 2014 at APM Terminal in Los Angeles, which had previously adopted an appointment system for picking up import containers.

Briefly stated, American Coffee Corp. imported a container# MRKU9500778 containing 275 Bags of Colombian Arabica Coffee Beans shipped with Maersk Line from Buenaventura, Colombia under B/L# MAEU867479701 to Los Angeles. Customs entry was made on March 31, 2014 through our customs broker Thruport International. The vessel Maersk Wolfsburg arrived/discharged on April 2, 2014. The container was held by U.S. Customs and designated for a USDA inspection. On Thursday, April 10, Customs ordered the container released to the local Customs Exam Site (CES), Price Transfer. APM Terminals Pacific requires truckers, including CES customs bonded draymen, to access its website to make appointments for container pickups. Upon receipt of the Customs-issued "Permit to Transfer," Price Transfer immediately attempted to make an appointment to pick up the container while it was still within the free time allowed under our service contract; however, the terminal was not accepting any additional appointments at that time. Our terminal free time expired on Friday, April 11, and demurrage began to be charged on that Saturday. Price Transfer made repeated efforts to secure an appointment with APM Terminals, but no appointments were available until Wednesday, April 16. Price Transfer finally secured an available appointment on Wednesday, April 16.

During this period, both the carrier Maersk Line and APM Terminal refused to extend the free time, despite the fact that we took all necessary steps in a timely manner to pick up the container before our original free time expired. American Coffee Corp was charged with and paid "under protest" a total of \$1,175 for the five days the container remained at the terminal beyond the free time and through the date of removal of the container for USDA examination by order of U.S. Customs.

American Coffee made appeals for a refund through our carrier, Maersk Line, but we were directed to take the matter up directly with APM Terminals, which also refused our appeals. We then brought the matter to the FMC CADRS office for mediation, but APM Terminals rejected FMC mediation and refused any further dialogue.



AMERICAN COFFEE CORPORATION

30 Montgomery Street Suite 215 Jersey City NJ 07302 www. amcof.com t: 201.433.2500 f: 201.433.2501

While the amount of \$1,175 may not sound very significant, we do believe that this particular occurrence demonstrates clearly the unfair business practices exhibited by both the terminal operator APM Terminals and our carrier Maersk Line in assessing demurrage charges against us, although we were acting properly, expeditiously and in good faith. As noted, these circumstances were totally beyond our control and, in fact, caused by active prevention by the terminal operator itself. In short, American Coffee was precluded by the terminal operator itself from picking up the container within our free time due. This situation is paradigmatic of the Catch-22 experienced by importers, who are then unjustifiably subjected to undeserved demurrage penalties.

Thank you for your kind consideration on this matter. Please don't hesitate to contact me with questions.

Sincerely,

AMERICAN COFFEE CORPORATION

Donald A. Pisano

President

Encl.

Don Pisano

From:

Rebecca Fenneman [rfenneman@fmc.gov]

Sent:

Wednesday, May 14, 2014 3:11 PM

To:

Don Pisano

Subject:

Re: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 :

Pending pick up for USDA examination at Price Transfer: URGENT!

Hi Don,

Yes, I'm disappointed APMT chose not to participate, too, but there you have it. I'd love to have a conversation with you about what else you might think about with other offices here (FMC, other than CADRS). I think there are other possibilities for addressing the issue -- of course, none as "low key" as what you had first proposed to APMT. Please let me know if you'd have some time in the next couple of days to chat.

Best,

Rebecca

On Tue, May 13, 2014 at 9:43 PM, Don Pisano < donp@amcof.com > wrote:

Actually Rebecca, I have to ask before I put this file away a lick my wounds, in consideration that:

we have no direct commercial relationship with the terminal operator,

yet we are subject to their charges as they themselves deem warranted regardless of the circumstances, while

the carrier who does have the direct relationship with both the terminal operator and the shipper (in this case ourselves) can remove itself from the dispute,

and the terminal operator can decide for themselves that they do not want to allow the FMC CADRS office to mediate a valid dispute,

where can a shipper go for relief, short of filing a lawsuit against the terminal operator, other than the FMC?

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Don Pisano [mailto:donp@amcof.com]

Sent: Tuesday, May 13, 2014 2:54 PM

To: 'Rebecca Fenneman'

Subject: RE: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up

for USDA examination at Price Transfer: URGENT!

Very disappointing but thank you for your efforts.
Regards,
AMERICAN COFFEE CORP.
Don Pisano
Tel <u>201-433-2807</u>
From: Rebecca Fenneman [mailto: <u>rfenneman@fmc.gov</u>] Sent: Tuesday, May 13, 2014 2:49 PM To: Don Pisano Subject: Re: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11: Pending pick up for USDA examination at Price Transfer: URGENT!
Dear Don,
I have just heard back from APMT. Unfortunately, they have declined to participate in the process we had proposed. I am sorry I could not be of more assistance in this matter.
Sincerely,
Rebecca Fenneman
On Mon, May 5, 2014 at 2:59 PM, Don Pisano < donp@amcof.com > wrote:
Great. Many thanks for your interest in this matter.
Regards,
AMERICAN COFFEE CORP.
Don Pisano
Tel <u>201-433-2807</u>

From: Rebecca Fenneman [mailto:rfenneman@fmc.qov]

Sent: Monday, May 05, 2014 2:33 PM

To: Donald A Pisano

Subject: Re: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up

for USDA examination at Price Transfer: URGENT!

Don,

Great to talk to you today. As we discussed, I will reach out to APMT and we will get the ball rolling. I will stay in touch.

Best,

Rebecca

On Fri, May 2, 2014 at 4:29 PM, Rebecca Fenneman < rfenneman@fmc.gov> wrote:

Great. I will call you at 2 on Monday afternoon. Thanks and have a good weekend.

From: Don Pisano [mailto:donp@amcof.com]

Sent: Friday, May 02, 2014 04:11 PM

To: 'Rebecca Fenneman' < rfenneman@fmc.gov>

Subject: RE: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up

for USDA examination at Price Transfer: URGENT!

Rebecca,

Monday afternoon or Tuesday morning would be fine.

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Rebecca Fenneman [mailto:rfenneman@fmc.qov]

Sent: Friday, May 02, 2014 2:06 PM

To: Don Pisano

Subject: Re: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for USDA examination at Price Transfer : URGENT!

Dear Mr. Pisano,

With apologies, events have overtaken me! I would like to have another discussion with you on this -- I have some ideas. Could we set up a phone call for sometime next week? Please let me know when might be convenient.

Thanks,

Rebecca

On Tue, Apr 29, 2014 at 10:34 AM, Don Pisano < donp@amcof.com > wrote:

Dear Ms. Fenneman,

Further to our today's conversation, please see below string of communications with Maersk Line.

Our Maersk Line representative is Tony Pacchiano

Office: 800-854-6553 ex 8102

Mobile: 973-879-5043

Email: anthony.j.pacchiano@maersk.com

If you would like to gain some direct information on the appointment process, perhaps you can converse with the folks at Price Transfer or our usual commercial draymen, Ramirez Trucking Co., who would be happy to discuss the procedures and recent experiences with you:

Ramirez Trucking Co., Los Angeles, CA

Contacts: Rebecca or Roger Ramirez

Tel. 323-263-3185

We very much appreciate your attention in this matter.

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Tonya.Brown@maersk.com [mailto:Tonya.Brown@maersk.com]

Sent: Friday, April 18, 2014 1:17 PM

To: donp@amcof.com; Fran.Ohlheiser@apmterminals.com; Pedro.Fierro@apmterminals.com; <a href="mailto:Double-padding

Subject: RE: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for

USDA examination at Price Transfer: URGENT!

Importance: High

Good Afternoon Don

Fran and Peter are managers at APM terminals I would ask that they provide you with a direct contact that can assist you with the below concern.

Fran / Peter

Due to the lack of available appointments caused the above container to accumulate storage charges. Don disputes these charges and requesting a refund. Can you provide a name and number that could assist Don with resolving this issue. He would like to speak with someone directly.

Thanks and Best Regards, Tonya Brown Care Business Partner 9300 Arrowpoint Blvd. Charlotte, NC 28273 1-877-338-0165 www.maerskline.com From: Don Pisano [mailto:donp@amcof.com]

Sent: Friday, April 18, 2014 11:01 AM

To: Brown, Tonya

Cc: jackied@amcof.com; 'Anthony.J.Pacchiano@maersk.com'; Sandillo, Dawn

Subject: RE: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for

USDA examination at Price Transfer: URGENT!

Tonya,

Please advise a specific contact.

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Tonya.Brown@maersk.com [mailto:Tonya.Brown@maersk.com]

Sent: Thursday, April 17, 2014 5:41 PM

To: donp@amcof.com

Cc: jackied@amcof.com; 'Anthony.J.Pacchiano@maersk.com'; Dawn.Sandillo@maersk.com

Subject: RE: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for

USDA examination at Price Transfer: URGENT!

Hello Don.

The below number is for their customer group, they should be able to direct you to the appropriate department.

310-221-4100 (Customer Service)

I hope this information is helpful, please feel free to reach out to me for assistance.

Thanks and Best Regards, Tonya Brown Care Business Partner 9300 Arrowpoint Blvd. Charlotte, NC 28273 1-877-338-0165 www.maerskline.com

From: Don Pisano [mailto:donp@amcof.com]
Sent: Thursday, April 17, 2014 5:13 PM

To: Brown, Tonya

Cc: 'Jackie Doray Amcof'; 'Anthony J. Pacchiano@maersk,com'; Sandillo, Dawn

Subject: RE: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for

USDA examination at Price Transfer: URGENT!

Hello Tonya,

Was hoping to have a resolution on the matter.

As you know, we have no commercial relationship with APM Terminals as they work on behalf of Maersk Line and other carriers. But if we need to be speaking with APM directly, please provide an appropriate contact person and phone number, one that can effectively deal with this matter and make a decision on refunding the full \$1.175.00 in charges wrongly assessed against us.

Thanks in advance.

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Don Pisano [mailto:donp@amcof.com]
Sent: Thursday, April 17, 2014 9:01 AM

To: 'Tonya.Brown@maersk.com'

Cc: 'Jackie Doray Amcof'; 'Anthony.J.Pacchiano@maersk.com' Subject: RE: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11: Pending pick up for USDA examination at Price Transfer: URGENT!
Tonya,
Freight released Monday, April 7, 2014 but on USDA hold.
Container selected by customs for agricultural examination to be performed at CES Price Transfer.
Attempts at making appointments by Price Transfer beginning Thursday, April 10, 2014.
Free-time expired Friday, April 11, 2014
Daily attempts continued through April 16, 2014 – appointment finally granted for 2:00 PM PDT
Container gated out April 16, 2014 at 16:10 hours
Regards,
AMERICAN COFFEE CORP.
Don Pisano
Tel <u>201-433-2807</u>
From: Tonya.Brown@maersk.com [mailto:Tonya.Brown@maersk.com] Sent: Wednesday, April 16, 2014 5:38 PM To: donp@amcof.com; 'jackied@amcof.com' Subject: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11: Pending pick up for USDA examination at Price Transfer: URGENT!
Hello Don.

I am working on this in Dina's absence.

Can you provide more details on this issue,

Can you advise a timeline starting from the first attempt made to get an appointment, if you have any supporting documents that you send that will be great.

I have reached out to the terminal as well for more details.

I hope to get this resolved soon, I will keep you updated.

Thanks, Tonya

From: Sandillo, Dawn

Sent: Thursday, April 17, 2014 12:21 AM

To: USAImport

Subject: FW: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11: Pending pick up for

USDA examination at Price Transfer: URGENT!

Can you urgently assist on below?

From: Don Pisano [mailto:donp@amcof.com]
Sent: Wednesday, April 16, 2014 11:49 AM

To: 'Anthony. J. Pacchiano@maersk.com'; 'DINA. WRACHFORD@maersk.com'

Cc: 'jackied@amcof.com'; 'John.Joyce@Maersk.com'; 'Dawn.Sandillo@maersk.com'

Subject: P006767 RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11: Pending pick up for USDA

examination at Price Transfer: URGENT!

Dina,

We have been advised that Price Transfer has just obtained an appointment for pickup today 2:00 PDT and charges paid through today.

We will be looking for a full refund of the \$1,175.00 paid to date as Price Transfer has been trying to obtain appointment since April 10th, before the expiry of our free-time.

Copies of the three invoices attached:

- \$ 675.00 Receipt# CCLS258002 4/12-4/14 3 days
- \$ 225.00 Receipt# CCLS258243 4/15 1 day
- \$ 275.00 Receipt# CCLS258557 4/16 1 day
- \$1,175.00 Total demurrage charges paid to date

Please advise how or with whom we should proceed.

Regards.

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Anthony.J.Pacchiano@maersk.com [mailto:Anthony.J.Pacchiano@maersk.com]

Sent: Wednesday, April 16, 2014 11:26 AM

To: donp@amcof.com; DINA.WRACHFORD@maersk.com

Cc: jackied@amcof.com; John.Joyce@Maersk.com; Dawn.Sandillo@maersk.com

Subject: RE: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for USDA

examination at Price Transfer: URGENT!

Don, if this is an appointment terminal and the appointment is provided after the LFD than they freetime should be extended. I have copied in Dina so see can coordinate and advise.

Kind Regards

Tony PacchianoSenior Account Executive- East Region

Maersk Line 2 Giralda Farms, Madison, NJ USA 07940 Office <u>+1-800-854-6553</u> ex 8102 Mobile <u>+1-973-879-5043</u> <u>anthony.j.pacchiano@maersk.com</u> www.maerskline.com

From: Don Pisano [mailto:donp@amcof.com]
Sent: Wednesday, April 16, 2014 11:17 AM

To: Pacchiano, Anthony J

Cc: 'Jackie Doray Amcof'; Joyce, John

Subject: FW: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for USDA

examination at Price Transfer: URGENT!

Tony,

We are now paying at the higher rate of \$275 per day! This is not right and our payment will indicate "PAID UNDER PROTEST". The terminals can not deny appointments and continue to charge demurrage all the while! We will demand for refund for all demurrage charges paid against this container MRKU9500778 totaling \$1,175.00.

Please advise with whom this matter should be addressed to obtain full refund.

Regards,

AMERICAN COFFEE CORP.

Don Pisano

Tel 201-433-2807

From: Jackie Doray [mailto:jackied@amcof.com]
Sent: Wednesday, April 16, 2014 10:12 AM

To: <u>Pier400Imports@apmterminals.com</u>; <u>Fran.Ohlheiser@apmterminals.com</u>; <u>LorrainePonce@pricetransfer.com</u>; <u>LorenaCervantes@pricetransfer.com</u>; <u>Pedro.Fierro@apmterminals.com</u>; Carrier - Maersk Sales Tony Pacchiano; Carrier -

Maersk Dawn Sandillo Cc: Amcof - Don Pisano Subject: MRKU9500778 - 1 x 20ft discharged L.A. April 2 Last fre day April 11 : Pending pick up for USDA examination at

Price Transfer: URGENT!

Good morning Dawn / Tony

MRKU 9500778: 1 x 20ft discharged L.A. April 2: USDA Hold

This container discharged on April 2 with last free day of April 11.

It has been flagged for off-dock examination at the customs designated facility Price Transfer Warehouse.

The PTT (permit to transfer) was not issued by customs till April 10 mid afternoon.

Price Transfer has been trying to get an appointment for this box since April 11. (see communication below between Price and APM Terminal)

We have already paid the demurrage of \$900 from April 12 till April 15. (\$4 days at \$225 each = \$900)

The last message from APM terminals last evening mentions that they are capacity for appointment today and tomorrow.

We need to get this container out as we cannot be expected to keep paying demurrage for a situation beyond our control (USDA Hold and lack of appointment at APM terminal)

Please help!

Regards

Jackie Doray

American Coffee Corporation

30 Montgomery Street Suite 215

Jersey City, New Jersey 07302 USA

Tel: 201 433 2500 Fax: 201 433 2501

From: Pier400Imports@apmterminals.com [mailto:Pier400Imports@apmterminals.com]

Sent: Tuesday, April 15, 2014 7:22 PM

To: Fran.Ohlheiser@apmterminals.com; LorrainePonce@pricetransfer.com; LorenaCervantes@pricetransfer.com;

Pedro.Fierro@apmterminals.com

Cc: jackied@amcof.com

Subject: RE: Maersk Contact MRKU9500778

Lorraine,

We are at capacity for appointments for both shifts today and tomorrow. As of now we

will not be adding any more appointments.

I do not show any records of this container having a prior appointment. I also do not show

any records of it being UTL. UTL's are usually reported when driver comes in to pick it up

and can not find it. I do not see record of that.

You will have to keep checking Term Point for possible cancellations.

Regards,

Sandy Skelton

Import Customer Service

APM Terminals, Pier 400

2500 Navy Way

Terminal Island, CA 90731

(310) 221-4496

Pier400Imports@APMTerminals.com

Lifting Global Trade

From: Ohlheiser, Fran

Sent: Tuesday, April 15, 2014 3:58 PM

To: Lorraine Ponce; Lorena Cervantes; Fierro, Peter; Imports Pier 400 APM Terminals

Cc: Jackie Doray

Subject: RE: Maersk Contact MRKU9500778

My apologies, I'm adding the import team and C.S. Management team.

Fran Ohlheiser

Lorrain.

Manager Key Client Services

They will be in touch with you.

APM Terminals Los Angeles

2500 Navy Way

Terminal Island CA 90731

310-221-4262 office

562-577-2732 cell

Fran.ohlheiser@apmterminals.com

Lifting Global Trade

www.apmterminals.com

From: Lorraine Ponce [mailto:LorrainePonce@pricetransfer.com]

Sent: Tuesday, April 15, 2014 3:36 PM

To: Lorraine Ponce; Lorena Cervantes; Ohlheiser, Fran

Cc: Jackie Doray

Subject: RE: Maersk Contact MRKU9500778

3rd request. Please assist below.

Regards,

Lorraine Ponce

Price Transfer, Inc. - Dispatch 2790 E. Del Amo Boulevard Rancho Dominguez, CA 90221 Tel: 800.397.7423 Opt. 4

Fax: 310,817.2184

Email: Dispatch@pricetransfer.com

OUR FUEL SURCHARGE IS SUBJECT TO CHANGE WITHOUT NOTICE - PLEASE CHECK WITH A REPRESENTATIVE FOR ACTUAL PERCENTAGES.

From: Lorraine Ponce

Sent: Tuesday, April 15, 2014 12:22 PM

To: Lorraine Ponce; Lorena Cervantes; 'Fran.Ohlheiser@apmterminals.com'

Cc: 'Jackie Doray'

Subject: RE: Maersk Contact MRKU9500778

Fran,

Your assistance is greatly appreciated.

I have added our Customer to this email as well.

Regards,

Lorraine Ponce

Price Transfer, Inc. - Dispatch 2790 E. Del Amo Boulevard Rancho Dominguez, CA 90221 Tel: 800,397,7423 Opt. 4

Fax: 310.817.2184

Email: Dispatch@pricetransfer.com

OUR FUEL SURCHARGE IS SUBJECT TO CHANGE WITHOUT NOTICE - PLEASE CHECK WITH A REPRESENTATIVE FOR ACTUAL PERCENTAGES.

[&]quot;Please visit our website @ www.pricetransfer.com for C.E.S. exam process and service information"

[&]quot;Please visit our website @ www.pricetransfer.com for C.E.S. exam process and service information"

From: Lorraine Ponce

Sent: Tuesday, April 15, 2014 10:20 AM

To: Lorena Cervantes; 'Fran.Ohlheiser@apmterminals.com'

Subject: RE: Maersk Contact

Fran.

Good morning, I have been trying to get an appointment on container MRKU9500778 since Thursday, it was UTL and located yesterday. My broker has been paying demurrage ever since Friday due to no appointments being available. Its there any thing you can do to accommodate this container and the cost of the customer?

Regards,

Lorraine Ponce

Price Transfer, Inc. - Dispatch 2790 E. Del Amo Boulevard Rancho Dominguez, CA 90221 Tel: 800.397.7423 Opt. 4

Fax:

310.817.2184

Email: <u>Dispatch@pricetransfer.com</u>

OUR FUEL SURCHARGE IS SUBJECT TO CHANGE WITHOUT NOTICE — PLEASE CHECK WITH A REPRESENTATIVE FOR ACTUAL PERCENTAGES.

From: Lorena Cervantes

Sent: Tuesday, April 15, 2014 10:17 AM To: 'Fran.Ohlheiser@apmterminals.com'

Cc: Lorraine Ponce Subject: Maersk Contact

Regards.

Lorena Cervantes

Customer Service Supervisor Price Transfer, Inc. - Dispatch 2790 E. Del Amo Boulevard Rancho Dominguez, CA 90221 Tel: 800.397.7423 Opt. 4

[&]quot;Please visit our website @ www.pricetransfer.com for C.E.S. exam process and service information"

Fax: 310.817.2184

Email: <u>Dispatch@pricetransfer.com</u>

"Please visit our website @ www.pricetransfer.com for C.E.S. exam process and service information"

OUR FUEL SURCHARGE IS SUBJECT TO CHANGE WITHOUT NOTICE - PLEASE CHECK WITH A REPRESENTATIVE FOR ACTUAL PERCENTAGES.

Rebecca A. Fenneman

Director, Office of Consumer Affairs and Dispute Resolution Services

Federal Maritime Commission

(202) 523-5807

email: rfenneman@fmc.gov

website: www.fmc.gov

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Rebecca A. Fenneman

Director, Office of Consumer Affairs and Dispute Resolution Services

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Rebecca A. Fenneman Director, Office of Consumer Affairs and Dispute Resolution Services Federal Maritime Commission (202) 523-5807

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Donald Pisano

From: Sent:

Harvey Chavez [harvey@thruport.com]

To:

Cc: Subject: Thursday, April 10, 2014 3:19 PM
'*priceMET'; '*Dispatch'
'Jackie Doray'; Pier400Customs@apmterminals.com DO FOR CONTAINER #MRKU9500778 FOR EXAM AQL

Attachments:

DeliveryOrder_DeliveryOrderNo00001008300001_635327395502330000.pdf

Importance:

High

Good afternoon,

Please find attached the D/O for the movement of the above container to Price Transfer.

APM Terminal,

I have included the broker authorization form below.

BROKER AUTHORIZATION FORM ******************

Please have the form below completed by the Broker only and returned via email for processing. Do not send as an attachment we need the below authorization In it's original format.

Type of Hold: MET EXAM

Name of the Broker: THRUPORT INTERNATIONAL

Address: 2204 MORRIS AVENUE, SUITE 309, UNION, NJ 07083

Phone number: 908-867-8478

E/mail Address: HARVEY@THRUPORT.COM Container Number(s): MRKU9500778 BL Number(s): MAEU67479701

Vessel and Voyage: MAERSK WOLFSBURG 1408

Trucking Company authorized to dray this container: PRICE TRANSFER

Exam site (warehouse) to be drayed to: PRICE TRANSFER

Harvey Chavez

Senior CHB Entry Writer



2204 Morris Avenue #309 Union, NJ 07083

908 867 THRU (8478) 908 867 8477 Tax

www.thruport.com

Delivery Order



Page 1 of 1

MAERSK SEALAND - APM TERMINALS P400 2500 NAVY WAY TERMINAL ISLAND, CA 90731

DATE 4/10/2014

OUR REF. NO. 000010083

THE MERCHANDISE DESCRIBED BELOW **WILL BE ENTERED AND FORWARDED** AS FOLLOWS:

IMPORTING CARRIER

LOCATION

FROM PORT OF ORIGIN AIRPORT

MAERSK WOLFSBURG (MAEU)

BL OR AWB NO. ARRIVAL DATE

W185-MAERSK SEALAND - APM TERMINALS P400 FREE TIME EXP.

MAEU867479701

4/2/2014

PRICE TRANSFER

LOCAL DELIVERY OR TRANSFER BY (DELIVERY ORDER ISSUED TO)

DELIVER TO

HAWB NO.

ENTRY NO.

CUST. REF. NO.

FOR DELIVERY TO

E4A-0010083-0 P008767

PRICE TRANSFER

2711 E DOMINGUEZ LONG BEACH, CA 90810 ROUTE

NO, OF PKGS.

DESCRIPTION OF ARTICLES, SPECIAL MARKS & EXCEPTIONS

WEIGHT

275 PCS

MASTER NO.:MAEU867479701 CONTAINER NO.: MRKU9500778 CNI/20 SEAL NO. CO0010785

19577.00 Kg 43159.45 Lb

AND ADVISE US IMMEDIATELY REGARDING ANY PROBLEMS

W185-2500 NAVY WAY, TERMINAL ISLAND, CA 90731

ORIGINAL DELIVERY ORDER

INLAND FREIGHT

PREPAID / COLLECT PrePaid

DOC. No.: 000010083-00001

Received in Good Order

SERGIO MOUTELA DBA THRUPORT INTL 2204 MORRIS WENUE Union No 07083

ph: 908-867-8478 fax: 908-867-8477

HARVEY CHAVEZ

Liability, including negligence is limited to the sum of \$50.00 per shipment, unless a greater valuation shall be paid for or agreed to be paid in writing prior to shipping.

DELIVERY CLERK: DELIVER TO CARRIER SHOWN ABOVE

IMPORTANT: NOTIFY US AT ONCE IF DELIVERY CANNOT BE EFFECTED AS INSTRUCTED.

U.S.DEPARTMENT OF HOMELAND SECURITY

Form Apprecade 0340 No. 1451 4024

ENTRY/IMMEDIATE DELIVERY GRECULTURE

ISINH

CBP Form 3481 (01/09)

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APM Terminals Pacific Ltd

Payee: American Coffee Corporation

Receipt Number: CCLS258002

DEMURRACE

30 Monigomery Street

Date: 4/11/2014

P006767

Jersey City, NJ 07302

PO Number: P008767

COLOM BIA

Contact: Don Pisano

Paid to the Order of:

MANS ARRU

Attn: Pler 400 Demurrage Department

LSA Contact (310) 221-4498 Info:

2500 Navy Way

PRICE

Terminal Island, CA 90731

APRIL 12. 190816-14

Please print this receipt out and keep for your records.

Item Description **Product Total Price** MRKU9500778 - Paid Thru: 04/14/2014 in Los Angeles Domurrage BOL: 867479701 \$675.00 Total: \$675.00

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A.P. Moller Maersk Group

Logoul Home Demo Contact Exam Rates

2043

APM Terminals Pacific Ltd

POOG16-1

Payee: American Coffee Corporation

Receipt Number: CCLS258243

(OLONBIA

30 Montgomery Street

Date: 4/14/2014

USDA @ PRICE

Jersey City, NJ 07302

PO Number: P006767

Contact: Don Pisano

Paid to the Order of:

Atln: Pler 400 Demurrage Department

LSA Contact (310) 221-4498 Info:

2500 Navy Way

Torminal Island, CA 90731

Please print this receipt out and keep for your records.

Item Description	Product		Total Price	
MRKU9500778 - Pald Thru: 04/15/2014 in Los Angeles	Demurage	BOL: 867479701	\$225.00	
			Total: \$225.00	Part of the Control o

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A.P. Moller Maersk Group

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APM Terminals Pacific Ltd

Payoe: American Coffee Corporation

Receipt Number: CCLS258557

30 Montgomery Street

Dato: 4/16/2014

Jersey City, NJ 07302

PO Number: P006767 - PAID UNDER PROTEST

Contact: Don Pisano

Paid to the Order of

Altn: Pier 400 Demurrage Department

LSA Contact (310) 221-4498

2500 Navy Way

Terminal Island, CA 90731

Please print this receipt out and keep for your records.

Itom Description	Product		Total Price	
MRKU9500778 - Paid Thru: 04/16/2014 in Los Angeles	Demurrage	BOL: 887479701	\$275.00	
te gering (East)			Total: \$275.00	

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A.P. Moller Maersk Group

POOKS-16-1

COLOMBIA

USDA & PRICK.

VERIFICATION

I verify under penalty of perjury that the foregoing letter dated May 10, 2016 is true and correct.

Donald A. Pisano

EXHIBIT C-5

November 18, 2016

To Whom It May Concern:

On behalf of Chico's FAS Inc., I urge the Federal Maritime Commission to limit the ability of ocean carriers to charge demurrage when a consignee cannot receive its goods at a port due to port congestion.

Chico's FAS Inc. is a specialty retailer of private label women's apparel, accessories, and related products. Annually, it imports approximately 850 FEU containers of these items from various Asia origins. It sells these items via the internet and in 1,518 boutiques and outlets throughout the U.S. and Canada. As Vice President-Logistics & Customs Compliance, I am responsible for managing the flow of our merchandise from factories in Asia to our distribution center in Atlanta, GA and ultimately to our stores and customers.

Recent labor issues at the ports of Los Angeles and Long Beach have had a disruptive effect on Chico's FAS's business. Beginning around October 2014, labor issues at these ports caused significant congestion, delaying hundreds of Chico's FAS containers and, thus, disrupting the flow of 8-10 million Chico's FAS garments. In one instance in late October 2014, 18 containers were held at the port, resulting in a 30% increase in freight costs and late deliveries to Chico's FAS stores.

This congestion was beyond the control Chico's FAS. Not only did Chico's FAS not have a role in the labor disputes at Los Angeles and Long Beach, but also in many instances the ports would not allow drivers to access containers awaiting pickup. In fact, a key cause of the congestion was the unannounced closing of port areas where containers were awaiting pickup. This made pickup impossible and required multiple pickup attempts. Also, workers at the ports took longer to perform chassis inspections, deepening congestion.

No carrier extended free time at these ports to address the congestion, even though it was beyond Chico's FAS's control. Before the congestion issues arose, Chico's FAS had four days of free time to retrieve its containers, which was sufficient. But when the congestion began, the time needed to retrieve containers more than doubled to 7-9 days. As a result, Chico's incurred approximately \$80,000 in demurrage.

Although the congestion at Los Angeles and Long Beach subsided in the Summer of 2015, it still remains an issue. Productivity, measured in container moves per hour, at Los Angeles and Long Beach is below many other ports. Thus, dwell times for containers is almost equivalent to the free time that the carriers make available, leaving no margin for error. As vessel sizes increases, Chico's FAS expects dwell times at the ports to increase, resulting in shippers being unable to retrieve their goods within their allotted free-time period and incurring demurrage, through no fault of their own.

Through their handling of demurrage related to the port congestion at Los Angeles and Long Beach, carriers have demonstrated that they are not willing to provide consignees a fair opportunity to retrieve their containers during the free time period. This practice forces shippers like Chico's FAS to incur unexpected demurrage charges and business disruption. By curtailing

this practice, the Commission will incentivize the timely resolution of congestion at the ports and minimize the cascading effects of port congestion on shippers and consumers.

11.21-16

I verify under penalty of perjury that the foregoing is true and correct.

Shana Rigg

Vice President - Logistics, Customs Compliance and Supply Chain Operations

EXHIBIT C-6



November 18, 2016

To Whom It May Concern:

Subject: Petition for Rulemaking on Demurrage Practices

VLM Foods Inc. is a frozen fruit and vegetable importer supplying top quality products to food processors, foodservice distributors and retailers across North America. As a long standing partner in CBP's C-TPAT supply chain security program, we have piloted numerous CBP trade facilitation initiatives. We fully appreciate our responsibilities in ensuring that shipping containers are picked up and returned to carriers in a timely fashion.

While the vast majority of our shipments benefit from prompt and problem free cargo clearance and empty container return, port delays have a severe impact on VLM's business. Because the margins in our business are razor thin, demurrage and other delay costs usually results in VLM taking a loss on delayed shipments.

As a responsible importer we appreciate that carriers and terminal operators face both real and opportunity costs when containers needlessly idle at ports of entry. Having said this, terminals and carriers alike use demurrage to engage in opportunistic "taxing." The Federal Maritime Commission should take action to curb this practice.

VLM has experienced multiple situations where it incurred delays and demurrage charges through no fault of its own. Often, carriers will hold our containers at a port pending additional payment after discovering that they underbilled VLM. Because carriers rarely verify that they billed and collected the proper amount until a container is ready to be released, rectifying their billing issue usually results in delays and demurrage charges. Imposing demurrage charges on VLM for these delays is unfair, because the delays are the direct result of carrier billing errors and the carriers choose not to audit their billings early enough to avoid delay.

VLM also incurs demurrage because many terminals do not properly sequence its containers for Customs inspections. To avoid port delays for its containers, VLM has obtained C-TPAT status from U.S. Customs and Border Protection (CBP). This status reduces the likelihood that CBP will examine VLM's containers and gives the container's "front-of-line" status for CBP exams. But many terminals do not move VLM's containers to the front of the line for CBP exams, often resulting in the container's exceeding free time.

VLM has also incurred demurrage for a day in which a terminal was closed. Over a July 4th weekend, VLM containers arrived at the port of New York and New Jersey. The terminal was closed for July 4th and had issued notice that July 4th would count as a "free day." The ocean carrier, however, refused to extend free time, which ended on the 4th, to July 5th, when the port reopened. Thus, VLM incurred demurrage for picking up the containers on July 5th, even though it did not have the benefit of the full free-time period. Moreover, the carrier incurred no real

costs and zero opportunity costs due to the July 5th pickup, because the terminal extended free time to the carrier for July 4th. This is a prime example of how carriers are using demurrage to generate revenue.

We ask the Federal Maritime Commission to address situations where carriers charge demurrage, but shippers, like VLM, have done everything reasonably possible to retrieve their containers during free time. Moreover, carriers should be required to extend free time where a terminal is closed during the original free time period.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Sincerely

Mark FeDuke

EXHIBIT C-7



100 North Drive

Ronkonkoma, NY 11779

November 30, 2016

Federal Maritime Commission 800 North Capital Street, NW Washington DC 20573

Re: Petition for Rulemaking on Demurrage Practices

Our company is an importer moving goods through the Port of New York & New Jersey.

Over the past two years, we have paid exorbitant charges for demurrage and detention when equipment could not be picked up or dropped off at the terminals due to circumstances that were completely out of our control.

For instance, during the winter months of 2014-2015, when we had inclement weather and the ports were closed, we were penalized for those days, and had to incur fees and demurrage charges on our containers. Although the transportation of our cargo between the Customs exam site and terminal was also delayed by many days due to the weather, which was beyond our control, we incurred demurrage charges on this cargo at normal rates. Overall, during the winter of 2014-2015, we had been hit with fees on almost all of our containers, adding up to tens of thousands of dollars, all which could be avoidable. This directly affected our bottom line profits dramatically.

The carriers and terminals cite their "tariffs" as justification for their detention charges, without any consideration of whether we had any control over our ability to picked up our cargo before free time expired. They also insist on payment of demurrage charges before freight will be released, even where we dispute the demurrage charges. This places considerable strain on our business while we work through disputes with the carriers.

We believe the Commission is in a unique position to ensure that the regulations do not work to favor one industry participant over another and instead promote fairness.

Thank you for your attention to this matter.

Sincerely,

Gregg Singer Owner, EVP Budpak, Inc.

VERIFICATION

I verify under penalty of perjury that the foregoing is true and correct.

Gregg Singer

Owner, EVP Budpak, Inc.

EXHIBIT C-8

December 2, 2016

To Whom It May Concern:

Subject: Verified Statement of Andrew Wertheim in Support of Petition for Rulemaking on Demurrage and Detention Practices

My name is Andrew Wertheim. I am the President of Tea Importers, Inc., which is located at 47 Riverside Avenue, Westport, Connecticut 06880. Tea Importers is an importer of tea, hop twine and activated charcoal. In the course of our business, I have become familiar with the fees charged by vessel operating common carriers (VOCCs), marine terminal operators (MTOs), and other transport providers.

During the period of labor unrest on the West Coast in 2014 and 2015, my company was charged demurrage by a VOCC on a shipment of hop twine from Colombo, Sri Lanka to Seattle, Washington. The amount was \$225 and assessed on a daily basis. We were charged this demurrage even though the delay was not our fault, but solely a result of labor actions at the port. In fact, we attempted to pick up the shipment before free time expired. Ultimately, we were not able to have this fee waived.

During the same period, the same VOCC charged our trucker detention on a shipment of hop twine from Colombo, Sri Lanka, to Newark, New Jersey. The amount was \$800 and assessed on a tier basis per day. Our trucker was charged this detention even though the delay in returning the container was not their fault, but solely a result of congestion at the port due the overflow of cargo from the West Coast labor actions. Our trucker agreed to not charge us for the detention.

We also incurred "congestion" charges by truckers on door shipments as a result of the delays at West Coast ports from the labor actions during the period of 2014 and 2015. At the port of Los Angeles, the "congestion" charges totaled \$2,682 and involved a single VOCC, who also operated the terminal involved. Nevertheless, the VOCC's designated trucker charged us these fees, and we were not able to have these charges waived. We have never experienced such extra charges on a door delivery. Moreover, at the same time, we had other door deliveries by a different VOCC and we were never asked to pay any congestion surcharges by their designated trucker.

VERIFICATION

I verify under penalty of perjury that the foregoing is true and correct.

Andrew Wertheim

EXHIBIT C-9



ContainerPort Group, Inc. 1340 Depot Street, 2nd Floor Cleveland, Ohio 44116 P: 440-333-1330

www.containerport.com

5/2/2016

The statements below are respectfully submitted by Robert Leef, ContainerPort Group, Inc., Senior Vice President, East Region.

Through its fleet of nearly 600 independent contractors, ContainerPort Group, Inc. ("CPG") provides local, regional and long haul container trucking services. CPG hauls over 50,000 loads of international cargo, in and out of the above ports annually. As Senior Vice President of the East Region, I am directly responsible for 250 trucks that interchanged international cargo in and out of the East Coast ports in NY, NJ, MD, PA and VA, in 2014 and 2015.

In 2014 and 2015, CPG, and the independent contractors who haul on our behalf, experienced a constant battle with the impacts of port delays. These delays, caused by factors such as labor disruption, weather, road construction, system failures, and port congestion, were beyond the control of the motor carriers interchanging international cargo at the port facilities. While there are numerous examples of the causes for these delays, the following are just a few to illustrate the point:

- January 2015 Winter Storm Marcus hit 1/26/15. The impacts of this storm continued for a
 month and eventually resulted in the NS embargo which closed the Norfolk International
 Terminal (NIT), Virginia Port Authority's largest terminal, as well as other NS facilities
 around the country.
- Spring of 2015 As fallout from the series of winter storms continued the queue at the Port
 of NY/NJ extended over 3 miles outside the facility entrance. The backup was so significant
 that the issue received media attention.
- January 2016 Winter Storm Jonas causes closures for the better part of three business days. As the Ports begin to recover from this storm there was the ILA labor stoppage on 1/29/16.
- April 14,2014 the beginning of work on the Pulaski Skyway in New Jersey causing major traffic delays and congestion to one of the major terminals in the area. This is a two year project still going on.

Despite the various factors that were beyond the control of the motor carriers, many VOCCs and MTOs still assessed both per diem and demurrage fees in accordance with the Uniform Intermodal Interchange and Facilities Access (UIIA) Agreement and the MTO schedules, respectively. The UIIA provides the VOCCs a basis to assess per diem charges against a motor carrier as a party in physical possession of a container, chassis or other related intermodal freight equipment during an interchange. Each VOCC files an "Addendum" to the UIIA that specifies that carrier's allotted free time and per diem rates. Contracts between our customers and VOCCs also address similar terms involving free time and per diem rates which may be different from those provided under the UIIA.



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Despite not being privy to those contract terms, the common practice today is for VOCCs to invoice motor carriers for per diem charges, forcing the motor carriers to endure the administrative burden of processing and collecting appropriate amounts due under the applicable terms.

As you will see in the examples to follow, per diem is generally invoiced to the motor carrier within 60 days of container termination while MTO demurrage is generally due at the time of pick-up.

Exhibit A

On 5/1/2015 VOCC "A", billed CPG \$2,090 in per diem relative to 3 export containers that were delayed due to the NS embargo.

CPG terminated these 3 export containers at the NS in Columbus, OH (within the allotted free time). From there the containers were railed to the Port of Virginia - which was closed due to the extensive snowfall from winter storm Marcus. As the Port was closed VOCC "A" argued that the "time clock" continued to run on these loads.

Despite the fact that CPG terminated these containers within the allotted free time in Columbus, OH, VOCC "A" was adamant that CPG (or someone) should be liable for per diem incurred while the units sat at a CLOSED Port of Virginia.

After months of back and forth discussions, the shipper begrudgingly agreed to pay the \$2,090 to VOCC "A" to satisfy these seemingly absurd charges.

Exhibit B

Over the course of a three month period CPG was invoiced \$25,610 in per diem charges by VOCC "B", specific to door moves that were performed in Norfolk, VA during a time of heavy Port Congestion triggered by two winter storms in 2015.

Due to the congestion the independent contractors were sitting in lines for hours which had a number of effects. The drivers were not able to complete their normal amount of moves in one day due to lost hours of productivity waiting in line, or the drivers simply refused to make multiple turns in a day due to the time and resources required to pull a load. Ultimately the congestion compromised our ability to move freight in a timely manner.

VOCC "B" Per Diem/EDI Coordinator rejected our dispute stating: "We do not waive [per diem] due to congestion we encourage the truckers to e-mail for the [last free day] so they can plan ahead. The best I can do is offer you a payment plan for the invoice in March/April because unfortunately you will get shut out [for non-payment]."

Exhibit C

In March 2016, CPG was invoiced \$22,410 in per diem from VOCC "C" for 27 containers. The per diem was due to Winter Storm Jonas which closed the NY/NJ/BAL ports from 1/22/16-1/26/16. Severe congestion followed once the ports reopened, incurring additional charges.



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CPG disputed the charges due to Force Majeure/weather beyond our control and the disputes were initially denied. The VOCC's reason was because the free time was calculated as calendar days (vs. working days); therefore they would not extend due to port closures and weather. CPG usually gets customers involved in disputing the invoices for these charges, especially when a particular customer has potential negotiating power due to the amount of volume it ships. After several further emails/requests for assistance, they eventually waived most of the charges.

Exhibit D

Routine delays caused by the implementation or failure of a terminal's internal systems that are beyond the control of the motor carriers are also a source for charges. For example, Exhibit D includes an email notification from a terminal that it was experiencing truck processing issues because it was implementing new technology. While charges resulting from delays due to these types of instances are not as significant as ones mentioned above, they continue to be assessed against CPG and its customers on a regular basis.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Robert Leef

Exhibit A of Exhibit C-9

Cindy Szabo

Ephian A

From:

Cindy Szabo

Sent:

Friday, April 29, 2016 9:09 AM

To:

Cindy Szabo

Subject:

Attachments:

IV. A.2., GF \$2090 perdiem due to NS Embargo 2015

RE: Inquiry on two containers; RE: Virginia Terminals; Congestion Mitigation at The Port of Virginia; RE: Inquiry on two containers; Congestion Mitigation Update - March 16, 2015; Congestion Mitigation Update - March 18, 2015; ALERT-Weather Contingencies at The Port of

Virginia; Inquiry on two containers; DOC062615.pdf

Importance:

High

billed CPG perdiem for 3 export containers that were booked as port bookings. Although CPG ingated the loads to the local rail timely, perdiem incurred in Norfolk, VA due to the NS embargo which resulted from Winter Storm Marcus, 2015. The containers were railed via NS from Columbus to Norfolk. The Port of Norfolk was closed so the containers sat outside the gate.

CPG disputed, I directly to I

cancelled and then reissued the invoices. Total charge: \$2090 (paid by

From: Cindy Szabo

Sent: Friday, June 26, 2015 7:54 AM

To: Hammac, Paula < Paula Hammac@:

Cc: cpgcol < cpgcol@containerport.com>

Subject: FW: perdiem charges

Importance: High

Good morning Paula. cancelled their previous invoice after we disputed with your attachments but reissued under invoice 190302 (attached) dated 5/1/15. We never rec'd this reissued invoice but our account is now past due. We accept responsibility for the perdiem on SUDU7541011 – please provide approval to rebil for CADU2008848 and SUDU1741814. Thank you.

<u>om]</u>

From: Hammac, Paula [mailto:PaulaHammac@[

Sent: Thursday, May 07, 2015 10:14 AM

To: Cindy Szabo Cc: cpgcol

Subject: RE: f

___perdiem charges

Hi Cindy

Keith suggested I send you all the info I have on the two containers mentioned below.

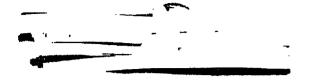
There is a lot of info - but plenty to prove that it was definitely at no fault of ours getting these to the port in time.

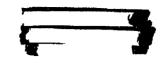
Hope this helps

Let me know if I can get involved in anyway

Thanks

Paula





CONTAINER PORT GROUP, INC

PAGE

1

INVOICE DATE

05/01/15

INVOICE NO.

190302

....n----.

INVOICE	·	PAYMENT I	S DUE WITHII	V (15) FI	FTEEN DAYS OF BILLIN	IG DATE
CONTAINER	FROM TO START DATE	DUE DATE	END DATE	DAYS	CHARGE DESCRIPTION	AMOUNT
CADU2008848 MOROS 055 S	ORF IOA 02/20/15 250012498L8X	02/27/15	7.	PINC. O.T.Des		990.00
SUDU1741814 MOROS 055 S	250012498L87	_02/27/15 554 ANDUD		9 INC. ÆCIO		990.00
SUDU7541011 MOTAM 064 S	ORF IOA 03/09/15 250012707286	03/16/15	03/ <u>17/15</u>	, INC.	DETENTION DC 20	110.00

TOTAL

USD

2090.00

Molices of dispute of charges must be presented by the party involced within filtern (18) business days of the involce date.

From: Hammac, Paula Sent: Wednesday, May 06, 2015 10:59 AM To: 'Cindy Szabo' Cc: cpgcol Subject: RE:
Sorry - had to investigate what happened. Two was during the snow storm and our containers sat outside the gates when they closed the port of Norfolk so it missed the vessel.
That said,
Our work order CADU2008848 AND SUDU1741814 was for the empty to be dropped 2/23 with a load date of 2/24 - this invoice shows start date 2/20 - dispatched 2 days early? We will pay for 7 days \$770.00 x 2 = \$1540.00
Our work order for SUDU7541011 was to drop 3/10 for 3/11 loading but your invoice shows start date of 3/9. Nothing due from us on this one. Dispatched a day before our request date.
These are port to port moves so we are responsible for the time the container is out from when we ask to be dropped to when we return the full container.
However, we do not feel we are responsible if CPG dispatched the empty earlier than the date requested for say convenience. As mentioned above, all it takes is a snow storm and we end up paying a lot of money so every day counts for us and days it is out and not provided to us as requested is not fair to ask us to pay.
Please send us an invoice for the ones mentioned above and we will pay the \$1540.00.
Thank you
Paula Hammac Export Services Manager Telephone. Fax: 11
From: Cindy Szabo [mailto:Cindy.Szabo@containerport.com] Sent: Wednesday, May 06, 2015 10:23 AM To: Hammac, Paula Cc: cpgcol Subject: RE:
Good morning – Have you had a chance to review? We only have 15 days to dispute. Invoices so I don't mean to push, but we are already over that limit. I've attached my original email with the backup for your review. Thank you.
Cindy Szabo, Supervisor - Equipment Cost Management - <u>ContainerPort Group, Inc.</u> Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116 P: 440-895-8124 F: 440-333-9413 Cindy.Szabo@containerport.com Container Office Container Fort
GROUP

From: Cindy Szabo Sent: Thursday, April 30, 2015 9:34 AM To: Hammac, Paula
Cc: cpgcol Subject: RE: perdiem charges
Understood. Thanks for acknowledging and we'll await your findings.
From: Hammac, Paula [mailto:PaulaHammac@ Sent: Thursday, April 30, 2015 9:21 AM To: Cindy Szabo Cc: cpgcol
Subject: RE: perdlem charges
Will need a couple of days to investigate.
Due to an absence here, I am doing the job of two people so may not get to this until early next week
Thanks
From: Cindy Szabo [mailto:Cindy.Szabo@containerport.com] Sent: Wednesday, April 29, 2015 3:10 PM To: Hammac, Paula Cc: cpgcol Subject: Importance: High
Good afternoon Paula. We received perdiem charges from for three containers (CADU2008848, SUDU1741814, and SUDU7541011). I disputed the charges with them because the dates we ingated did not match the dates they were billing. I received a call from to explain that these three containers were booked as port bookings, and we are responsible for the perdiem until the containers reached the port. We've never run into this situation before so that is why I am reaching out to you for assistance. I have attached the invoice. Can you please review and advise how we are to handle? Thank you.
Cindy Szabo, Supervisor - Equipment Cost Management - <u>ContainerPort Group, Inc.</u> Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116 P: 440-895-8124 F: 440-333-9413
Cindy.Szabo@containerport.com ContainerPort GROUP Intermodal Container and Cargo Solutions
Click here to report this email as spam.
This message has been scanned for malware by Websense. www.websense.com

From: Hammac, Paula < Paula Hammac@ ?com> Sent: Monday, March 09, 2015 6:55 AM IM Traffic Delivery; 'Carol Holloway'; Mulligan, Kathleen A.; Knudson, Mark K.; 'Jeanne Heilman'; To: CU VIT Cueta it C- " -- All'; CU NIT Admins; 'Hartkorn-ONeal, Maggie (Maggie.Hartkorn-ONeal@ (com)'; 'Fields, Sharon (Sharon.Fields@{______kom}'; 'Temple, Carl (Carl.Temple@ 'xcom)' Subject: RE: Inquiry on two containers Importance: High I See these FINALLY made it in but not until March 8th- the day the vessel was to sail - shows in the yard

- any chance these made the booked vessel?

Cindy Szabo





http://track.portofvirginia.com/Track/Console



View

Favorites

Tools Help



Home **Tracking** Reports -

Support

Glossary of Terms

Container Numbers

Enter container numbers: (filtering & check-digit calculation enabled)

SUDU1741814 CADU2008848

Limit 50 Containers

Get Unit Visi

Get Gate Transactions

For Date:

29'-8'6" DR NIT HSD Export Yard

Created: 02/24/2015 14:2 m Yard: 03/08/2015 03:34

HAMBERO SCO

HAMBURG >500

SINX 1741814

20'-8'6" DR NIT HSD Export Yard

Created: 02/24/2015 11:0

In Yard: 03/08/2015 03:2

↑ Track Selected Units in other Systems

VIG System Equipment History

VKG System Import Availability

limit one equipment #

















----Original Message-----

From: Hammac, Paula

Sent: Friday, March 06, 2015 12:26 PM

To: IM Traffic Delivery; 'Carol Holloway'; Mulligan, Kathleen A.; Knudson, Mark K.; 'Jeanne Hellman'; CU VIT Customer Service

Oldegie	wcom); Fields, Snaron (Snaron.Fields@	ns; 'Hartkorn-ONeal, Maggie (Maggie.Hartkorn- com)'; 'Temple, Carl (Carl.Temple@)	
Subject: RE: Inquiry	on two containers		.com)
Please advise.		-	
Sent: Friday, March	elivery [IMTrafficDelivery@nscorp.com] 106, 2015 7:39 AM ; 'Carol Holloway'; IM Traffic Delivery; Mullig	an, Kathleen A.; Knudson, Mark K.; 'Jeanne Heilman'	'· CU VIT
ONeal@¶ Subject: RE: Inquiry	com)'; 'Fields, Sharon (Sharon.Fields@'	: ": O NIT Admins; 'Hartkorn-ONeal, Maggie (Maggie (Maggie (Carl.Temple@)	gle.Hartkorn- com)'
NIT in copy to advis	e		
Thank you,			
Janet F. Van Effen			
Intermodal Custome	er Service		
g ~ . , 74510			
, 7457(1			
From: Hammac, Pau Sent: Friday, March	la [mailto:PaulaHammac@	#.com]	
To: 'Carol Holloway'; (VIT) CustomerService	IM Traffic Delivery; Mulligan, Kathleen A.; K ce@vit.org; 'Intermodal - All'; CU NIT Admins	inudson, Mark K.; 'Jeanne Heilman'; CU VIT Custome s; 'Hartkorn-ONeal, Maggie (Maggie.Hartkorn-	r Service
Olyeal@	com)'; 'Fields, Sharon (Sharon.Fields@. RE: Inquiry on two containers	&com)'; 'Temple, Carl (Carl.Temple@	com)'
Still showing no mov [cid:image001.png@	ement - cut is today. Please advise status. 01D057E0.B3F827E0]	Thank you	
From: Hammac, Paul Sent: Thursday, Marc To: 'Carol Holloway';	:h 05, 2015 2:35 PM	'Knudson, Mark K.'; 'Brown, Glen A.'; 'Jeanne Heilm	
		ly'; 'Hartkorn-ONeal, Maggie (Maggie Hartkorn-	an';
(Sharon.Fields@= (Carl.Temple@i Subject: RE: Inquiry o	tom <mailto:sharon.fields@tr → com<mailto:carl.temple@tr< td=""><td>com>)'; 'Fields, Sharon "com>)'; 'Temple, Carl com>)'</td><td></td></mailto:carl.temple@tr<></mailto:sharon.fields@tr 	com>)'; 'Fields, Sharon "com>)'; 'Temple, Carl com>)'	
	THE CONCORNERS		
	ty since this morning. Any news?		
Thanks Paula			
From: Hammac, Paula	a		

ONeal@com <mailto:maggie.hartkorn-oneal@rn>); Flelds, Sharon (Sharon.Fields@om<mailto:sharon.fields>); Temple, Carl (Carl.Temple@n<mailto:carl.temple(n>) Subject: Inquiry on two containers</mailto:carl.temple(n></mailto:sharon.fields></mailto:maggie.hartkorn-oneal@rn>	Sent: Thursday, March 05, 2015 8:19 AM To: 'Carol Holloway'; 'IM Traffic Delivery'; Mulligan, Kathleen A.; Kn	3M==1
### Card Holloway Imalito: Card. Temple Subject: RE: Inquiry on two containers THANK YOUI From: Carol Holloway Imalito: Cholloway@vit.org Sent: Thursday, March 05, 2015 8:07 AM To: Hammac, Paula; 'IM Traffic Delivery'; Mulligan, Kathleen A.; Knudson, Mark K.; Brown, Glen A.; Jeanne Heilman; Customer Service; Intermodal - Ali; Intermodal Admins - NIT Only; Hartkorn-Oneal, Maggie (Maggle. Hartkorn-Oneal) Sharon. Fleids Sharon. Fleids Sharon. Fleids Sharon. Fleids Subject: RE: Inquiry on two containers Let me keep an eye on these 2 and get back with you this afternoon. From: Hammac, Paula [mailto:PaulaHammac@FranklinInternational.com] Sent: Thursday, March 05, 2015 7:35 AM To: Carol Holloway; 'IM Traffic Delivery'; Mulligan, Kathleen A.; Knudson, Mark K.; Brown, Glen A.; Jeanne Heilman; Customer Service; Intermodal - Ali; Intermodal Admins - NIT Only; Hartkorn-Oneal, Maggie (Maggle. Hartkorn-Oneal) Scharon. Fleids "One-Reldse" "One-Reldse	ONeal@ Fom <mviviaggie hartkorni="" meal@<="" td=""><td>nvedi, Maggie (Maggie.Hartkorn-</td></mviviaggie>	nvedi, Maggie (Maggie.Hartkorn-
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Do we have a chance of making the booked vessel? Cut is tomorrow at 17:30 We are so close they are right there [cld:lmage002.png@01D057E0.83F827E0] From: Carol Holloway [mailto:cholloway@vit.org] Sent: Thursday, March 05, 2015 7:32 AM To: Hammac, Paula; 'IM Traffic Delivery'; Mulligan, Kathleen A.; Knudson, Mark K.; Brown, Glen A.; Jeanne Heilman; Customer Service; Intermodal - Ali; Intermodal Admins - NIT Only; Hartkorn-ONeal, Maggle (Maggle.Hartkorn-ONeal) [Sharon.Fields@!	• • •	
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(Carl.Temple@ n <mailto:carl.temple(m="">) Subject: Inquiry on two containers</mailto:carl.temple(>	(Sharon Fields@' Lom <mailto:sharon fields<="" td=""><td></td></mailto:sharon>	
Subject: Inquiry on two containers		
		C HIZ
	Importance: High	•

Hello Realize you all are quite buried at the moment after receiving the attached e-mail. I do, however, have two containers I need status on please. These are booked on vessel Monte Aconcagua V058 due to sall Sunday. They were turned into the Columbus Ohio rail ramp last Tuesday, February 24th so figured for sure they made it in before your e-mail but now I am not so sure. We are talking over a week on the rail. They are now showing "Arrival at Intransit Location" since Monday, March 2nd at 05:29am.
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Please advise as these two containers are so close - they are right there. They really need to make the booked vesse Thank you and Best Regards Paula Hammac	١.
Telephone: حمد	

This message has been scanned for malware by Websense. www.websense.comhttp://www.websense.com/>

From:

The Port of Virginia <carla@portofvirginia.ccsend.com> on behalf of The Port of Virginia

<marketingnews@portofvirginia.com> Wednesday, March 18, 2015 10:49 AM

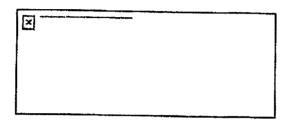
Sent: To:

Hammac. Paula

Subject:

Congestion Mitigation Update - March 18, 2015

Having trouble viewing this email? Click here



To: All Port Users

From: Port Operations Team

Date: March 18, 2015

Subject: Congestion Mitigation Update #5

The Port of Virginia is continuing to take immediate action to reduce the congestion and stack density at Virginia International Gateway (VIG) as heavy volumes continue at that terminal. Today, the port operations team has taken the following action:

- Beginning at the start of business on Thursday, March 19, VIG will reduce the window for delivery of exports to seven (7) from nine (9) days. This temporary measure will allow the VIG operations team time to reduce the density in that terminal's stacks, which are currently at capacity.
- Additionally, port partners, stakeholders and users are reminded that
 Portsmouth Marine Terminal (PMT) is accepting export cargo. In order to
 optimize cargo handling assets at PMT, the terminal's operations team is
 working the gate / motor carriers during the normal operating hours (8 a.m. 5 p.m., hard-stop at 7 p.m.) and working vessels during the evening and
 overnight.

On March 16, the port announced these measures:

- Optimizing vessel arrivals at VIG to control inventory and better balance resource demand.
- The port will maintain its Saturday gate hours at VIG, NIT and PPCY through Saturday, June 27; PMT will have Saturday gates on March 28.

- The port will maintain Sunday gate hours at VIG and the PPCY through Sunday, April 26, at which point the need will be re-evaluated.
- At VIG, the operations team is grounding select containers outside RMG stacks to reduce density in the stacks.
- The port is encouraging logistics and dray companies and cargo owners with containers at NIT to direct motor carriers to that terminal, if possible.

On March 13, the port announced these measures:

- The shift of two vessel services, ZIM's ZCP and Maersk's SAE to PMT from VIG: On Saturday, March 21, the ZIM Halfa will call PMT and on Saturday, March 28, the terminal will receive the Maersk Varamo. The terminal is open to receive exports for those services.
- Begin receipt of 400, 40-foot chassis that will be integrated into HRCPII
 during the next five weeks. Once here, the units will undergo an inspection
 and immediately be placed into service. The port will continue to add more
 assets to its chassis fleet in the coming months.
- In order to further increase chassis supply, the port is implementing a
 program to recover chassis from its terminals. When and where possible,
 operations team members will be grounding empty containers on wheels to
 better utilize the chassis. In this port-wide effort, the first area of focus will be
 those damaged empty containers that are mounted on a chassis, but can be
 grounded without interruption of service / repairs.
- Use of an inter-terminal barge during the weekend to reduce drayage between the terminals and stack density at VIG and NIT.

On March 12, the port announced these measures:

- Implementation of a policy to reduce the number of days an export container can dwell on all terminals to 9 from 10.
- For ocean carriers, an extension of free-time for all containers at VIG by two days.
- Sunday gate hours at VIG and PPCY.

On March 11, the port announced these measures:

- Extended evening gate hours until 9 p.m., March 11-13 (EXPIRED).
- Keeping empty container moves out of the gates at both VIG and Norfolk International Terminals (NIT).
- A project to segregate rall and truck cargo at VIG.
- Requesting that ocean carriers evacuate as much of their cargo from the terminals as possible.

Forward this email

From:

The Port of Virginia <carla@portofvirginia.ccsend.com> on behalf of The Port of Virginia

<marketingnews@portofvirginia.com> Thursday, March 05, 2015 4:27 PM

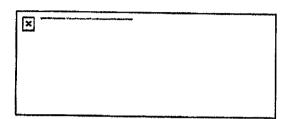
Sent: To:

Hammac, Paula

Subject:

ALERT-Weather Contingencies at The Port of Virginia

Having trouble viewing this email? Click here



MEMORANDUM

To: Port Customers and Partners

From: Ops Team Date: March 5, 2015

Subject: Port Monitors Approaching Weather System and

Announces Contingencles

Southeastern Virginia, including the Hampton Roads Region, is under a Winter Weather Advisory from 4:00 p.m. today, March 5, through 3:00 a.m. Friday, March 6. During this period, a mixture of snow and sleet may create dangerous travel conditions. Accumulations of 1-2 inches are possible, with temperatures forecast to fall below freezing Thursday afternoon and remain there throughout the day on Friday (March 6).

With safety as our overriding goal, the port operations and maintenance teams are prepared to respond to this weather event. Proactive measures are being taken today, March 5, to insure the positioning of assets and materials, with a goal of minimizing, or avoiding, operational impacts at our marine terminals.

The near certainty of accumulating snow and ice, combined with sub-freezing temperatures over the next 24 hours, prompt the following contingencies:

- All terminal work continues, per posted operating hours, on Thursday, March 5, as long as safe operations can be sustained
- All terminal truck gates will observe a delayed start 8:00 a.m. on Friday, March 6
- Our terminal operations and facilities teams will closely monitor the effects of the weather tonight, March 5
- Based on the forecast timing of the storm, our teams will make a final assessment (after 10:30 p.m. on March 5) regarding the safety and feasibility of an 8:00 a.m. start on March 6
- A public message will be distributed following that 10:30 p.m. conference on March 5
- The Port of Richmond will open two hours late 10:00 a.m. on Friday, March 6
- The Virginia Inland Port in Front Royal will be CLOSED on Friday, March 6

As with all weather systems, a high degree of variability exists. Please continue to monitor the port website, as well as alternative messaging platforms (Twitter, Facebook, text alerts) for the most current information.

Forward this email



This email was sent to paulahammac@franklininternational.com by <u>marketingnews@portofvirginia.com</u> | <u>Update Profile/Email Address</u> | Rapid removal with <u>SafeUnsubscribe</u> | <u>Privacy Policy</u>.



The Port of Virginia | 600 World Trade Center | Norfolk | VA | 23510

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Exhibit B of Exhibit C-9

Exhibit B

F	o	m:	

Cindy Szabo

Sent:

Friday, April 29, 2016 9:00 AM

To:

Cindy Szabo

Subject:

IV. C.1., G.

... Perdiem due to Port Congestion/Norfolk 2015, \$25k

Attachments:

RE: CPG perdiem due to weather

5.13.15.pdf

Importance:

High

CPG requested discount from

for perdiem incurred due to Norfolk port congestion, resulting from winter storms

(Winter Storm Marcus, NS embargo) 2015. See graph below.

From: Cindy Szabo

Sent: Thursday, May 14, 2015 3:52 PM

To: James Lee < James.Lee@

Subject: FW: CPG requesting assistance with perdiem due to port congestion in Norfolk

Importance: High

James, we understand it is standard policies, but as you know these port congestion issues are not standard. We are not asking China Shipping to waive all of the charges - we are asking for assistance in the form of a discount. We respectfully request that you review and advise.

Thank you.

Clndy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413 Cindy.Szabo@containerport.com



ContainerPort

Intermodal Container and Cargo Solutions

From: Alexius Moore [mailto:alexius.moore ? Sent: Thursday, May 14, 2015 3:33 PM

To: Cindy Szabo; James Lee; /

Cc: Jordan Hunt

Subject: RE: CPG requesting assistance with perdiem due to port congestion in Norfolk

Cindy,

Dispute denied we do not waive due to congestion we encourage the truckers to email for the LFD so they can plan ahead. The best I can do is offer you a payment plan for the invoice in March - April because unfortunately you will get shut out because of the ones over 60 days old.

Regards. Alexius Moore

Per Diem /EDI Coordinator, National Customer Service and Operations Center

Toll: 888-868-4751 - option 6 Tel: 678-355-4865; Fax: 678-355-4808

Email: alexius.moore@csna.net WEB: www

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Please consider the environment before printing this email

From: Cindy Szabo

Sent: Thursday, May 14, 2015 2:22 PM

To: James Lee < James.Lee@

;h

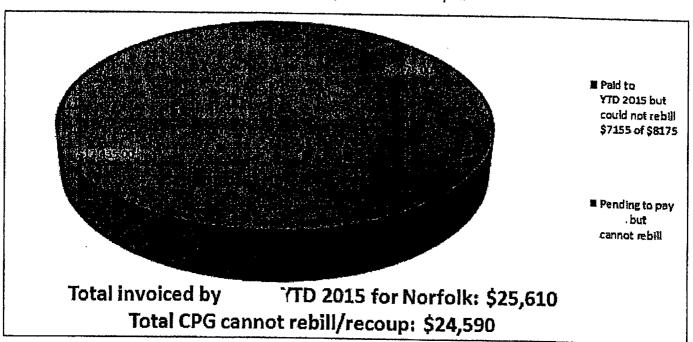
ma nats

Cc: Jordan Hunt <jordan.hunt@containerport.com>

Subject: CPG requesting assistance with perdiem due to port congestion in Norfolk

Importance: High

Good afternoon. We are reaching out to prequest assistance with \$17,435 in pending perdiem invoices. The perdiem was caused by the port congestion in Norfolk which can be verified in the news articles of the 3 links below. CPG cannot rebill these charges and we cannot continue losing money on every move due to perdiem. We would appreciate any assistance can provide in waiving or reducing perdiem for the below invoices while the port congestion issue remains such a problem. To date, has invoiced CPG \$25,610 in perdiem just for our Norfolk Terminal. We have paid \$8175 so far (today's check is attached). Please review and advise if s able to offer any assistance. Thank you.



By Robert McCabe The Virginian-Pilot © March 19, 2015

PORTSMOUTH

A month after back-to-back snowstorms closed the port for nearly four days, a logistical meltdown is continuing to unfold at Virginia International Gateway, one of its two main container terminals.

Last week, the congestion there was so bad that trucks were backed up onto the shoulder of Va. 164.

Vaughn Wilson, a local trucker, was driving one of them. By the time he got to the end of the ramp, where he would ordinarily turn into the terminal, Wilson saw police officers directing traffic.

His dispatcher told him not to bother trying to get in.

"It was so jam-packed that she told me to take my box back," Wilson said. "That's unprecedented."

http://hamptonroads.com/2015/03/congestion-headaches-remain-ports-facilities

http://www.suffolknewsherald.com/2015/03/21/congestion-snarls-ports/

http://www.portofvirginia.com/congestion-mitigation-update-march-20-2015/

Invoice Number	Invoice Date	Terminal	Amount due by	Total Involce Amount	Import/Export
		.5\\$1,#\\$2,4\\$2\$			
PD00128861	3/9/2015	NOR.	\$775.00	\$2700.00	IMPORT
PD00128861	3/9/2015	NOR	\$525.00	\$2700.00	IMPORT
PD00128861	3/9/2015	NOR	\$1400.00	\$2700.00	IMPORT
PD00129868	4/6/2015	NOR	\$1525,00	\$6730.00	IMPORT
PD00129868	4/6/2015	NOR	\$1025.00	\$6730.00	IMPORT
PD00129868	4/6/2015	NOR	\$1900.00	\$6730.00	IMPORT
PD00129868	4/6/2015	NOR	\$2025.00	\$6730.00	IMPORT
PD00129868	4/6/2015	NOR	\$255.00	\$6730.00	IMPORT
PD00130488	4/20/2015	NOR	\$170.00	\$4380.00	IMPORT
PD00130488	4/20/2015	NOR	\$340.00	\$4380.00	IMPORT
PD00130488	4/20/2015	NOR	\$725.00	\$4380.00	IMPORT
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PD00130488	4/20/2015	NOR	\$315.00	\$4380.00	IMPORT
PD00130488	4/20/2015	NOR	\$255.00	\$4380.00	IMPORT
PD00130755	. 4/27/2015	NOR	\$625.00	\$2785.00	IMPORT
PD00130755	4/27/2015	NOR	\$925.00	\$2785.00	IMPORT
PD00130755	4/27/2015	NOR	\$725.00	\$2785.00	IMPORT
PD00130755	4/27/2015	NOR	\$85.00	\$2785.00	IMPORT
PD00130755	4/27/2015	NOR	\$425.00	\$2785.00	IMPORT
PD00131003	5/4/2015	NOR	\$105.00	\$525.00	IMPORT
PD00131003	5/4/2015	NOR	\$210.00	. \$525.00	IMPORT
PD00131003	5/4/2015	NOR	\$105.00	\$525.00	IMPORT

PD00131003	5/4/2015	NOR	\$105.00	\$525.00	IMPORT
PD00131216	5/11/2015	NOR	\$315.00	\$315.00	IMPORT

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc. Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413
Cindy.Szabo@containerport.com

ContainerPort GROUP

Intermodal Container and Cargo Solutions

From:

Cindy Szabo

Sent:

Tuesday, May 12, 2015 2:15 PM

To: Cc:

James Lee Jordan Hunt

Subject:

RE: CPG perdiem due to weather

Good afternoon. Have you had a chance to review? We are awaiting your response and have not sent payment to for these two invoices yet. Thank you.

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413 Cindy.Szabo@containerport.com



Brezze ContainerPort

Intermodal Container and Cargo Solutions

From: Cindy Szabo

Sent: Wednesday, April 29, 2015 11:06 AM

To: James Lee Cc: Jordan Hunt

Subject: CPG perdiem due to weather

Good morning James. CPG has been very diligent in keeping our per diem account up to date with have a couple of invoices that are starting to age () 1 for \$2,700 and 1 ---3 for \$6,730).

ाइ. Currently we

Both invoices are comprised of charges that were incurred due to weather related delays, etc. We previously disputed these as we felt these were legitimate issues we could not control, but our appeals were denied. Additionally, our with . customer(s) have refused to provide any type of reimbursement of these expenses given the weather inflicted delays. As you can understand \$9,430 is quite a large sum for any Motor Carrier to absorb.

I am respectfully asking for your consideration in reducing the amount due on these invoices. Again, this is a total loss to our company.

Thank you for your time and attention. It is truly appreciated.

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413 Cindy.Szabo@containerport.com



a was Container

Intermodal Container and Cargo Solutions

Exhibit C of Exhibit C-9

Exhibit C

From:

Cindy Szabo

Sent: To:

Friday, April 29, 2016 8:14 AM

Subject

Cindy Szabo

Attachments:

IV. A.2., C.1, G. '

J, Perdiem due to blizzard Jan 2016, port closures

RE: Can they do this??; Maryland Port Administration: Port of Baltimore Blizzard Watch;

Maryland Port Administration: Port of Baltimore Hauling Permit Weather Update; FW: Baltimore closing; BAL ports closed 1.25.16 FW: Maryland Port Administration: Port of Baltimore terminal schedule for 1/25/16; Maryland Port Administration: Port of Baltimore post blizzard schedule for Tuesday 1/26/16; Maryland Port Administration: Port of Baltimore Schedule Change for 1/26/16;

Dispute

. Inv CHS9160407394P; Dispute

Inv CHS9160410563P;

RE: Dispute

v CHS9160370278P (now CHS9160383929P); RE: Dispute '

inv CHS9160370270P (now CHS9160383962P); FW: Dispute '

CHS9160370364P (now CHS9160383832P)

\$22,410 in perdiem due to Winter Storm Jonas, January 2016. Port closures 1/22-1/26 & resulting congestion (BAL). Required many disputes/emails to get perdiem waived/reduced.

CARU5736517: \$1340 MEDU1670524: \$730 CRXU9149170: \$1340 GLDU7455867: \$950 MEDU8090507: \$950 MEDU8119220: \$1145 MSCU8169056: \$595 MSCU9225236: \$950 MSCU9744057: \$950 TGHU8668694: \$1145 MEDU7349620: \$950 MSCU7905846: \$365 MSCU9256767: \$1145 TCLU9488635: \$595

TCNU9920371: \$755 DFSU6593503: \$595 FSCU8336433: \$595 GLDU7388835: \$435 MSCU5050021: \$595

TCNU7163833: \$595

MSCU5728783: \$950 MSCU7077715: \$595 TTNU5788249: \$595 SCZU3949939: \$1340 TGHU4678457: \$1340

GLDU0934071: \$435 MSCU9176830: \$435

Disputed due to weather and were told that because the free time is calculated as calendar days, they would not extend due to port closures and weather.

This has a happy outcome as they cancelled the majority of the charges after several disputes.

invoices I told you about last week where they initially billed over \$11k per invoice; after Jordan - this is one example of the many disputes, I got the invoices down to several hundred to a couple thousand.

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413 Cindy.Szabo@containerport.com

ContainerPort

Intermodal Container and Cargo Solutions

From:

Cindy Szabo

Sent:

Tuesday, April 05, 2016 3:45 PM

To:

perdiemdisputes@

Subject:

Dispute

Inv CHS9160407394P

Attachments:

Maryland Port Administration: Port of Baltimore Blizzard Watch; Maryland Port Administration: Port of Baltimore Hauling Permit Weather Update; FW: Baltimore closing; BAL ports closed 1.25.16 FW: Maryland Port Administration: Port of Baltimore terminal schedule for 1/25/16; Maryland Port Administration: Port of Baltimore post blizzard schedule for Tuesday 1/26/16; Maryland Port Administration: Port of Baltimore Schedule Change for 1/26/16; Dispute 2

inv CHS91603881870, CHS9160397968P

Importance:

High

I had previously disputed these containers under inv. 7968P because they were billed with the wrong free time. These containers were also affected by Winter Storm Jonas which began 1/22. The ports were also closed 1/25 and 1/26 which then created a backlog and congestion at the ports.

I've attached documentation of the port closures. Please advise if any assistance can be given due to this Force Majeure situation. Thank you.

CRXU9149170

GLDU7455867

MEDU8090507

MEDU8119220

MSCU8169056

MSCU9225236

MSCU9744057

TGHU8668694

I had also disputed the convenience.

ູ່ container this morning – MSCU7204506. I've attached the dispute for your

Thank you,

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413

Cindy.Szabo@containerport.com

ContainerPort Group

Intermodal Container and Cargo Solutions

From:

Cindy Szabo

Sent:

Friday, March 25, 2016 11:47 AM

To:

Bob Leef; Karen Bush

Subject:

RE: Can they do this??

s. Karen, to clarify, the SSL will extend free time IF the closures occurred during the free time period. These closures occurred after the free time ended and lapsed into the billable days. That is why they will not waive. Someone may want to give them a heads up so they don't short-pay and dispute the perdiem. Thanks!

From: Bob Leef

Sent: Friday, March 25, 2016 11:26 AM

To: Karen Bush <karen.bush@containerport.com> Cc: Cindy Szabo < Cindy. Szabo@containerport.com>

Subject: RE: Can they do this??

Bill

Robert Leef, Senior Vice President, East - Container Port Group, Inc. Newark Office: 99 East Peddie Street - Newark, NJ 07114

P: 973-733-4990 x 3228 | C: 973-271-7546

Bob.Leef@containerport.com



ContainerPort GROUP

Intermodal Container and Cargo Solutions

From: Karen Bush

Sent: Friday, March 25, 2016 11:24 AM

To: Bob Leef Cc: Cindy Szabo

Subject: RE: Can they do this??

Sorry, I didn't fully read your email ,, Of course they were advised by email, they also had a blizzard and were closed as will

Cindy,

) is saying no extensions were given due to the blizzard and closures? Correct? Please clarify "

Kaven Bush, Transportation Manager - ContainerPort Group, Inc.

Baltimore Office: 8208 Fischer Rd. - Baltimore, MD 21222

P: 410-477-0702 x 6202 | F: 410-477-0707

Karen, Bush@containerport.com



Intermodal Container and Cargo Solutions

From: Bob Leef

Sent: Friday, March 25, 2016 11:11 AM

To: Karen Bush Cc: Cindy Szabo

Subject: RE: Can they do this??

Please review with Cindy on the phone and see if we can bill this

Robert Leef, Senior Vice President, East - Container Port Group, Inc.

Newark Office: 99 East Peddie Street - Newark, NJ 07114

P: 973-733-4990 x 3228 | C: 973-271-7546

Bob.Leef@containerport.com



ContainerPort GROUP

Intermodal Container and Cargo Solutions

From: Karen Bush

Sent: Friday, March 25, 2016 11:10 AM

To: Bob Leef Cc: Cindy Szabo

Subject: RE: Can they do this??

I would not think so II Makes no sense to me,,

Karen Bush, Transportation Manager - Container Port Group, Inc.

Baltimore Office: 8208 Fischer Rd. - Baltimore, MD 21222

P: 410-477-0702 x 6202 | F: 410-477-0707

Karen, Bush@containerport.com



Temp ContainerPort

Intermodal Container and Cargo Solutions

From: Bob Leef

Sent: Friday, March 25, 2016 10:37 AM

To: Karen Bush Cc: Cindy Szabo

Subject: FW: Can they do this??

Karen,

Please look in your emails and see if you notified (; of the weather issues, if you did we should rebill them since we could return the boxes

bob

Robert Leef, Senior Vice President, East - ContainerPort Group, Inc. Newark Office: 99 East Peddie Street - Newark, NJ 07114 P: 973-733-4990 x 3228 | C: 973-271-7546

Bob.Leef@containerport.com



Intermodal Container and Cargo Solutions

From: Cindy Szabo

Sent: Friday, March 25, 2016 9:11 AM

To: Bob Leef

Subject: Can they do this??

I disputed some " s because they were billed with the wrong free time. When they sent the revised invoices, I realized that the LFD fell during winter storm Jonas (or the day of) so I redisputed because the ports were closed. Their response is that because the free time is calendar days, they won't extend. Example is the LFD was Jan 22, Friday, the day the storm started. Ports were closed Monday & Tuesday so we terminated Weds/Thurs.

I can try to rebill it to t 5 but I know they will not pay. Opinions?

Cindy Szabo, Supervisor - Equipment Cost Management - ContainerPort Group, Inc.

Corporate Office: 1340 Depot Street Ste 200 - Cleveland, OH 44116

P: 440-895-8124 | F: 440-333-9413 Cindv.Szabo@containerport.com

ContainerPort

Intermodal Container and Cargo Solutions

From:

broadcastemail@emodal.com

Sent:

Friday, January 22, 2016 10:55 AM

To:

Corporate ECM

Subject:

Maryland Port Administration: Port of Baltimore Hauling Permit Weather Update



1/22/2016 Snow Emergency Declaration for Entire State

A snow emergency declaration is being issued for the entire State of Maryland. Movement of loads requiring a hauling permit are therefore STRICTLY PROHIBITED FROM NOON TODAY UNTIL FURTHER NOTICE. Emergency move requests should be directed to the Statewide Operations Center at 410-582-5650. SOC will contact on call Division personnel to handle the request. Permit loads already in transit should make immediate plans to lay over at a safe location.

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From:

Cindy Szabo

Sent:

Monday, January 25, 2016 6:59 AM

Ta:

Cindy Szabo

Subject:

BAL ports closed 1.25.16 FW: Maryland Port Administration: Port of Baltimore terminal schedule

for 1/25/16

From: broadcastemail@emodal.com [mailto:broadcastemail@emodal.com]

Sent: Sunday, January 24, 2016 5:10 PM

To: Corporate ECM

Subject: Maryland Port Administration: Port of Baltimore terminal schedule for 1/25/16

Please be advised of the following schedule for port of Baltimore terminals and processors for Monday 1/25/16:

CNH: closed

Ceres: open normal hours

Balterm: closed at Dundalk and South Locust Point

Amports: open for truck away only

MAT: open normal hours

WW VSA: open

Ports America: closed at Seagirt and Dundalk

Project Stevedoring: open normal hours

Westway: open normal hours Amports Chesapeake: closed

AWC: closed

Mercedes Benz: open at 830 am

snow removal is on-going around the clock after a historic snowfall and normal operations will resume as quickly as possible

thank you for your patience

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From:

broadcastemail@emodal.com

Sent:

Monday, January 25, 2016 6:55 PM

To:

Corporate ECM

Sublect:

Maryland Port Administration: Port of Baltimore Schedule Change for 1/26/16

Please be advised Balterm will now be closed at both Dundalk & South Locust Point marine terminals

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From:

broadcastemail@emodal.com

Sent:

Thursday, January 21, 2016 4:30 PM

To:

Corporate ECM

Subject:

Maryland Port Administration: Port of Baltimore Blizzard Watch



The Maryland Port Administration is closely monitoring a potentially severe winter storm that is forecast to hit our area beginning Friday evening and possibly through early Sunday morning. We are already underway with storm preparations that include:

Coordinating vessel arrivals and preparing for possible delayed berthing of ships due to the weather;

Mobilizing snow team personnel who will work 12-hour shifts beginning Friday 0001 hrs;

Preparing snow removal equipment for the plowing and salting of the marine terminals.

We will keep you updated throughout this storm event on any changes to general Port of Baltimore public marine terminal operations through this e-broadcast messaging.

Thank you for your business and your support of the Port of Baltimore.

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From:

Jordan Hunt

Sent:

Friday, January 22, 2016 3:23 PM

To: Subject: Corporate Operations FW: Baltimore closing

----Original Message-----

From: Bob Leef

Sent: Friday, January 22, 2016 3:00 PM

To: IT Group; DAP; Commercial; Glenn Fehribach; Russ Graef

Cc: Karen Bush

Subject: Baltimore closing

All

It is starting to snow in Baltimore. The piers are getting ready to close and no more trucks are going in. Baltimore and the area are in a state of emergency.

We will be closing the office in the next 30 minutes. All our trucks are back Bob

Sent from my iPhone

From:

broadcastemail@emodal.com

Sent:

Monday, January 25, 2016 3:50 PM

To:

Corporate ECM

Subject:

Maryland Port Administration: Port of Baltimore post blizzard schedule for Tuesday 1/26/16

Follow Up Flag:

Follow up

Flag Status:

Completed

×

> CNH: open

> Ceres: open

> Balterm DMT/SLP: open

> Amports DMT: open 8 am

MAT: open

> WW VSA: open 8 am

> Ports America: open at DMT & SMT

> Project Stevedoring: open

> Westway: open

> Amports FMT: closed

> AWC: open 8 am

> Mercedes Benz: open 8 am

This will be the last update from this storm as full operations are expected to resume on Wednesday 1/27/16. Please contact terminal operators directly for any changes

Thanks for your patience while we continue to dig out!

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Exhibit D of Exhibit C-9

Bob Leef

Subject:

FW: Maher Terminal Truck Processing Issues

----Original Message-----

From: PAalerts [mailto:alerts@paalerts.com]

Sent: Monday, June 27, 2016 7:36 AM

To: Bob Leef

bob.leef@containerport.com>

Subject: Maher Terminal Truck Processing Issues

Maher Terminal is experiencing truck processing issues. Please follow directions of PAPD.

To unsubscribe: https://urldefense.proofpoint.com/v2/url?u=http-3A__paalerts.com_loginpage.aspx-3Fem-3Dleefb-

 $40 container port. com\&d=CwIGaQ\&c=Cw6jQ1O21v_aGXA_UaKobx5Hu7RYVWKFNSkSTAdyM40\&r=ao3-GgO9A-iSocRjoaNkTVvESlyfapcdfz8vUCDLZP0\&m=48 moxT7z_5-ZCZs65Uk-$

vwQ2EnrrX9xg18p57OOYUs4&s=j5XhK6Ruomogkm3AdJBVj4fqmKjJ8dwvteecY1RyShI&e=

EXHIBIT C-10



Cmi) California Multimodal, LLC

May 9, 2016

Chairman Mario Cordero Federal Maritime Association 800 North Capital Street, NW, Suite 1000 Washington, D.C. 20573

RE: Per Diem, Demurrage, and Detention

Dear Chairman Cordero:

The California Cartage Family of Companies is an integral organization that plays a significant role within the intermodal industry. We have been in business since 1944 and offer a variety of services within the supply chain. We own and operate six drayage firms with 1,200 units and 3 warehouse brands with a nationwide footprint of 4.5 million square feet of warehouse space. We have the largest cross-dock transload network on the West Coast and the largest fleet of specialized equipment.

My name is Robert Loya and I am the Director of Operations for California Multimodal, LLC (CMI) which is part of the California Cartage Family of Companies. I am responsible for all intermodal dravage activities in Southern California for CMI. My responsibilities include: safety; P&L financial responsibilities; ensuring compliance with all Federal, State and local laws; the evaluation of all business growth and revenue opportunities; manage all vendor relations; manage and foster Independent Contractor relations; and foster business relations and integration with our family of companies.

On behalf of the California Cartage Family of Companies, this "Verified Statement" represents the collective occurrences that were experienced by our family of companies at the Ports of Los Angeles and Long Beach during the 2014-2015 labor negotiations between the Pacific Maritime Association (PMA) and International Longshoremen Warehouse Union (ILWU). These prolonged discussions and negotiation tactics that were deployed by each of the respective parties led to months of significant delays and congestion at the marine terminals that were beyond the control of the draymen. From September 2014 to March 2015, there was substantial congestion and backlog of cargo that ultimately led to the unreasonable levy of demurrage/detention/per diem charges by the Steamship Lines (SSL) and Marine Terminals Operators (MTO) to all of our customers and drayage companies.

We contract with more than 300 Independent Contractors on a daily basis to move intermodal cargo in and out of the ports for our customers through San Pedro Port complex. The business practices that were deployed by the West Coast marine terminals during this 2014/2015 time period created undue expense to our drayage companies and customers. Collectively, we

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moved several thousand shipments during this specified period of which several hundred were levied per diem, demurrage and/or detention charges. We are providing a sample of these shipments to demonstrate the severity of the situation during this timeframe. The administrative burden and costs associated with every shipment in these instances were not factored into our calculations, but were in the thousands.

The largest issues you will note by the monthly incremental increase in Port Congestion related billing to both the Beneficial Cargo Owners and the Steamship Lines were:

- a) Driver Standby
- b) Demurrage
- c) Per Diem

Financial records from one of our companies, Container Freight/EIT, LLC, provides that from January 2014 through October 2015, total demurrage outlay for Container Freight/EIT was \$2,698,616. From September 2014 through March 2015 alone, demurrage outlaid for Container Freight/EIT's customers was in excess of \$2,500,000. The strife caused by the ILWU/PMA negotiations can be directly correlated to 92.5% of these costs (\$2,500,000 divided by 2,698,616 equals .925). See Exhibit A. These costs would not have existed during normal operating conditions. See Exhibit A. In addition, the total per diem costs paid by Container Freight/EIT was \$1,770. See Exhibit A. Similarly, among all of our drayage companies I have estimated that a total of approximately \$50,000 in per diem charges were paid by our companies during this time. Again, I would like to reiterate the fact that these are a small fraction of the total costs associated with the ILWU/PMA contract strife of 2014/2015, e.g. administrative cost (mentioned above), driver standby, and per diem. See Exhibit A.

There were obvious travesties associated with the manner in which these demurrage charges were invoiced and paid during this period.

One of the most egregious practices by both the MTO's and the Steamship Lines was the untimely notification by the SSL of contractual free time to the MTOs. Below is an example that played out routinely. Keep in mind that, it was common and routine for one of our major BCO's to have 150 to 500 containers on a single vessel.

- a) Customer "A" has a contract with a particular SSL of ten working days of free time on the Port.
- b) Marine Terminal system would reflect free time as "five calendar days."
- c) First available appointment on the "Availability Notification" from the MTO would be after the MTO's system reflected container on demurrage.
 - The drayage provider would not be allowed to request an extension of the free time, until the MTO's system reached it Last Free Day (LFD).
- d) It would take two to four working days after the free time extension request was sent before it was actually extended.

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During this period, the dray provider could not make an appointment in the MTO system due to containers having a "demurrage hold" because the expiration of their free time. All this transpired prior to the dray operator having a single opportunity to pick up the container. Additionally, the fact that there are various appointment systems and business rules in effect by each terminal in the Ports, complicated matters further. For example:

a) Drayage providers could not make appointments until containers were reflecting "Available" in the MTO's system.

During the period, once a container was "Available" in the MTO's system, an attempt to secure an appointment would be made. However, unfortunately, due the limited number of appointments and/or the lack thereof, it was rare that an appointment was secured on the 1st day that the containers became "available." In addition, appointments could be arbitrarily cancelled by the MTO's for any of the following reasons; Area or gate closed by the MTO due to congestion in yard creating a safety concern, MTO equipment malfunction, drivers arriving late due to long queue times at the MTO gates, Containers were Unable to locate (UTL). As a result, appointments typically took 4 to 5 days after cargo became available to attain the first appointment. This became the norm during the 5 to 6 month ILWU/PMA strife period in the Port.

- b) A missed appointment, for whatever reason, would put the container back in the queue of another 4 to 5 day cycle to attain a second appointment.
- c) Contractual free time was a myth, since the free time did not automatically extend when appointments were not available. In essence, you cannot pick up a container without an appointment and appointments were not available, but the "free-time" clock never stops ticking and the MTOs continued to levy demurrage against the cargo owner and/or trucker...
- d) The MTOs that had/have appointment systems in place had/have various operating constraints that made/make it impossible to optimize your fleet. Assuming you could obtain an appointment, Terminal "A," gave you a 2-hour window to arrive for your appointment. If you missed the window, your appointment was cancelled, irrespective of the fact that you were in line well within your window time. You simply failed to reach the pedestal to enter the terminal in time. Terminal "B" on the other hand, you would have a 4-hour window block to arrive for your appointment. Terminal B's policy was more flexible, but it would drive poor behavior by truckers and it would create severe congestion because the likelihood of making your window was greater. Each terminal acted and continues to act independent of each other and as a result, these inconsistent practices affected and continue to affect each other's gates negatively.

Marine terminals restricted transactions at the Port. The following describes restrictions on transactions at the Ports that also occurred during this time:

a) Typical restrictions by the terminals were that there could be no empty receiving at the Port. Dual transactions were the only transactions allowed. A dual transaction is

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where you need to bring a load or empty and pick up a load or empty. While there was no empty receiving, you had to bring a chassis in order to pick-up an import load.

b) Daily or multiple advisories were sent throughout a day by the MTOs indicating that they were no longer accepting a particular piece of equipment and/or a piece of equipment from a particular SSL diverting equipment from one terminal to another.

These diversion notices would be container/chassis type specific, creating a scramble amongst drayage providers to locate a marine terminal or off dockyard that would accept the equipment. The additional drayage costs to the draymen were well into the thousands of dollars.

During this period, drayage providers refused to pick up empties from their customers because of the additional drayage charges they would incur to shuttle empties between terminals and their yards. Assuming they had yard to return to empty back to. In addition, no truckers wanted to be responsible for failing to return the empty back to the marine terminals and be left holding the bag with per diem charges.

This was a double edge sword, no chassis to move imports because we could not return the empties. In general, the marine terminals were well over 100% capacity with imports and empties. They were not evacuating empties out of the terminals because they were not ordering labor due to negotiating tactics, etc.

c) Terminals were closing a large number of blocks within their yards for vessel operations. At certain times, discharging entire vessels into yard blocks and sailing the vessel without loading any empties back to the vessel. Once again, artificially creating their own congestion.

The scenarios above only scratches the surface of the issues associated with the period in question. Most if not all of these practices persist in the Port of LA/LB today. While not as costly due to productivity levels returning to some level of new normalcy, the contractual arrangement between the Lines and the Cargo owners for the transit and delivery of cargo at U.S. Ports are egregious as they tear at the very base of the economic engine that are the Ports of LA/LB.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Robert Loya

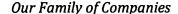


















Exhibit A of Exhibit C-10

ContainerFr	eight/EIT,	LLC		i i													
·				Inc	cremental incre	ase	in Port Conge	stio	n related Rev	enu	ie						
FY2014																	
Month	Containers		Demurrage Expense	De	murrage Robiil		Per Diem Expense	Pe	r Diem Rebiil	•	Standby Time	Po	ort Congestion Fees		Totals	Co	st per Container
January	9,048	\$	5,205.00	\$	3,366.00			\$	8,845.00	\$	74,654.00			\$	92,070.00	\$	10.18
February	7,099	\$	100.00	\$	3,499.00			\$	3,180.00	\$	61,764.00			\$	68,543.00	\$	9.66
March	6,859			\$	4,547.32			\$	1,885.00	\$	66,723.00			\$	73,155.32	\$	10.67
April	10,048	\$	375.00	\$	2,800.00	\$	85.00	\$	2,792.00	\$	76,382.00			\$	82,434.00	\$	8.20
May	9,669	\$	10,092.00	\$	2,053.00	\$	438.00	\$	4,220.00	\$	80,356.00			\$	97,159.00	\$	10.05
June	9,616	\$	4,259.00	\$	9,137.00			\$	2,510.00	\$	101,260.00			\$	117,166.00	\$	12.18
July	8,950	\$	5,650.00	\$	12,718.00			\$	2,790.00	\$	132,832.00	\$	61,625.00	\$	215,615.00	\$	24.09
August	8,400	\$	2,425.00	\$	4,720.00			\$	870.00	\$	107,511.00	\$	115,510.00	\$	231,036.00	\$	27.50
	8,495	\$	625.00		· · · · · · · · · · · · · · · · · · ·					\$	127,982.00		118,675.00	\$	285,105.00	\$	33.56
	9,057	\$	304.00							\$	139,364.00	\$	102,545.00	\$	475,236.00	\$	52.47
	7,450	\$	430.00			\$	1,770.00			\$	203,451.00	\$	114,270.00	\$	598,420.00	\$	80.32
	7,468	\$	1,375.00				•			\$	214,659.00		120,000.00	\$		\$	270.02
Total:		\$	30,840.00	\$	2,171,255.32	\$	2,293.00	\$	128,476.00	\$	1,386,938.00	\$	632,625.00	\$	4,352,427.32		
FY2015]		Ė			,	Ė			· · · · · · · · · · · · · · · · · · ·	_			
Month	Containers	em	urrage Expens		Demurrage Rebill		Per Diem Expense	Pe	er Diem Rebill	9	Standby Time	Po	ort Congestion Fees		Totals		
t. 14	6,559	\$	275.00							\$	161,344.00	\$	128,900.00	\$	651,757.00	\$	99.37
	5,074	Ė						· · · · · ·		\$	125,784.00		82,920.00	\$	214,549.00		42.28
0) 	7,838	\$	220.00			-				\$	173,122.00	<u> </u>	103,595.00	\$	331,474.00	s	42.29
April	7,440	\$	5,465.00	\$	35,886.00					\$	196,934.00		78,835.00	\$	317,120.00	\$	42.62
May	7,280	\$	10,113.00	\$	23,635.00			\$	29,570.00	\$	219,718.00		79,540.00	\$	362,576.00	\$	49.80
June	7,510		*	\$	6,262.00			\$	13,855.00	\$	236,551.00		76,340.00	_	333,008.00	\$	44.34
July	7,760	\$	6,856.00	\$	27,111.00	-		\$	2,025.00	\$	292,890.00	\$	66,900.00	\$	395,782.00	\$	51.00
August	7,518	\$	1,038.00	\$	14,514.00			\$	16,555.00	\$	238,180.00	\$	58,470.00	\$	328,757.00	\$	43.73
September	6,918	\$	1,200.00	\$	10,519.00		* *	\$	57,220.00	\$	246,051.00		52,275.00	\$	367,265.00	\$	53.09
October	7,589	\$	750.00	\$	4,000.00			\$	52,035.00	\$	265,924.00		57,660.00	\$	380,369.00	\$	50.12
Total:				\$	527,361.00				187,446.00				· · · · · · · · · · · · · · · · · · ·		· · · · · · · · · · · · · · · · · · ·		
				De	smurrage Rebili		<u> </u>	Pe	r Diem Rebill								
								L_									
		Jan	. 2014-Oct. 2015		\$2,698,616.32	·		<u> </u>	315,922.00	-							
	Total:									_				_			
				_	94%				37%	L.,						L	

CMI LA

			Per Diem		Demurrage			Cost Per
	Containers	Per Diem	Rebiffed	Demurrage	R ebille d	Standby Time	TOTAL	Container
1/2014	11884	450.00	10,360.00	510.00		25,725.00	48,929.00	\$4.12
2/2014	11034	410.00	19,745.00	1,580.00	1,545.00	22,002.00	56,316.00	\$5.10
3/2014	10931	1,918.00	15,015.00	2,400.00		22,862.00	53,126.00	\$4.86
4/2014	12843	7,435.00	8,916.00	4,420.00	590.00	24,704.00	58,908.00	\$4.59
5/2014	12280	4,210.00	14,868.00	1,370.00	1,810.00	21,857.00	56,395.00	\$4.59
6/2014	11352	2,330.00	37,493.00	11,160.00	3,552.00	28,488.00	94,375.00	\$8.31
7/2014	12369	1,977.00	49,931.00	-929.30	145.00	35,862.00	99,354.70	\$8.03
8/2014	11372	101,485.14	141,757.80	10,381.00	11,710.50	32,163.00	308,869.44	\$27.16
	11396	-55,060.00		9,189.11		43,216.00	170,750.51	\$14.98
	10902	-33,790.00		-5,370.00		61,314.00	432,569.45	\$39.68
	7189	8,653.00		22,645.12		92,419.00	411,522.77	\$57.24
	7683	2,567.50		27,938.00		72,355.00	361,291.15	\$47.02
Total	131,235	42,585,64	1 004 430 40	85.293.93	22C 20E 0E	482.967.00	2 452 403 00	4.0
10(0)	131,233	42,383.04	1,084,120.40	85,293.93	326,205.05	482,967.00	2,152,407.02	\$16
Jotan	131,233	42,383.04	1,084,120.40 Per Dism	85,293.93	Demurage	482,967.00	2,152,407.02	\$16 Cost Per
Total	Containers	Per Diem		Demurrage		Standby Time	Z,152,407.02	Cost Per Container
Total	·		Per Diem	·	Demurage		TOTAL	Cost Per Container
1000	Containers	Per Diem 0.00 1,155.00	Per Diem	Demurrage	Demurage	Standby Time 56,737.00 38,483.00	TOTAL 429,240.85 207,970.15	Cost Per Container \$59.87
	Containers 7169	Per Diem 0.00	Per Diem	Demurrage 2,740.00	Demurage	Standby Time 56,737.00	TOTAL 429,240.85 207,970.15	Cost Per Container \$59.87
	Containers 7169 5600	Per Diem 0.00 1,155.00	Per Diem	Demurrage 2,740.00 8,035.90	Demurage	Standby Time 56,737.00 38,483.00	TOTAL 429,240.85 207,970.15	Cost Per Container \$59.87 \$37.14 \$59.19
· · · · · · · · · · · · · · · · · · ·	Containers 7169 5600 9282	Per Diem 0.00 1,155.00 540.00	Per Dism Rebilled	Demurrage 2,740.00 8,035.90 0.00	Deminyage Publified	Standby Time 56,737.00 38,483.00 53,987.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97
4/2015	Containers 7169 5600 9282 10258	Per Diem 0.00 1,155.00 540.00 660.00 190.00 7,040.00	Per Diam Rebilled 80,393.00	Demurrage 2,740.00 8,035.90 0.00 5,977.80	Pubilled 233,244.86	Standby Time 56,737.00 38,483.00 53,987.00 48,667.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97
4/2015 5/2015	Containers 7169 5600 9282 10258 9098	Per Diem 0.00 1,155.00 540.00 660.00 190.00	Per Dism Rebilled 80,393.00 81,200.00	Demurrage 2,740.00 8,035.90 0.00 5,977.80 8,280.68	233,244.86 50,062.95	Standby Time 56,737.00 38,483.00 53,987.00 48,667.00 54,033.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66 202,864.63	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97 \$22.30 \$17.45
4/2015 5/2015 6/2015 7/2015 8/2015	Containers 7169 5600 9282 10258 9098 9672	Per Diem 0.00 1,155.00 540.00 660.00 190.00 7,040.00 10,332.00 13,950.98	80,393.00 81,200.00 99,269.00	Demurrage 2,740.00 8,035.90 0.00 5,977.80 8,280.68 -30,589.22	233,244.86 50,062.95 22,533.53	Standby Time 56,737.00 38,483.00 53,987.00 48,667.00 54,033.00 60,835.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66 202,864.63 168,760.31	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97 \$22.30 \$17.45 \$23.04
4/2015 5/2015 6/2015 7/2015	Containers 7169 5600 9282 10258 9098 9672 9979	Per Diem 0.00 1,155,00 540,00 660,00 190,00 7,040,00	80,393.00 81,200.00 99,269.00 133,254.00	Demurrage 2,740.00 8,035.90 0.00 5,977.80 8,280.68 -30,589.22 16,230.00	233,244.86 50,062.95 22,533.53 12,685.89	\$tandby Time 56,737.00 38,483.00 53,987.00 48,667.00 54,033.00 60,835.00 47,388.00 36,333.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66 202,864.63 168,760.31 229,868.89 228,614.58	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97 \$22.30 \$17.45 \$23.04 \$22.22
4/2015 5/2015 6/2015 7/2015 8/2015	Containers 7169 5600 9282 10258 9098 9672 9979 10287	Per Diem 0.00 1,155.00 540.00 660.00 190.00 7,040.00 10,332.00 13,950.98	80,393.00 81,200.00 99,269.00 91,506.00 36,531.20	Demurrage 2,740.00 8,035.90 0.00 5,977.80 8,280.68 -30,589.22 16,230.00 23,313.28	233,244.86 50,062.95 22,533.53 12,685.89 53,224.32	\$tandby Time 56,737.00 38,483.00 53,987.00 48,667.00 54,033.00 60,835.00 47,388.00 36,333.00	TOTAL 429,240.85 207,970.15 549,444.79 379,200.66 202,864.63 168,760.31 229,868.89 228,614.58	Cost Per Container \$59.87 \$37.14 \$59.19 \$36.97 \$22.30 \$17.45 \$23.04 \$22.22 \$14.19

		Per Diem	Demurrage
		Rebilled	Rebilied
Total:	Jan. 2014-Oct. 2015	2,078,398.60	1,292,892.09
Total:			
_		58%	69%

			Per Diem		Demurrage		·	Cost Per
	Containers	Per Diem	Rebilled	Demurrage	Rebilled	Standby Time	TOTAL	Container
1/2016	8110	220.00	51,925.00	2,770.00	508.80	31,449.00	94,982.80	\$11.71
2/2016	8656	3,468.00	149,074.00	-4,195.00		40,406.00	197,409.00	\$22.81
3/2016	7996	2,065.00	26,453.00	1,770.00		29,227.00	67,511.00	\$8.44
4/2016	7833	2,032.00	12,333.00	1,595.00	1,220.00	29,595.00	54,608.00	\$6.97
5/2016	7892	470.00	17,815.00	3,465.00	2,000.00	17,991.00	49,633.00	\$6.29
6/2016							0.00	
7/2016							0.00	
8/2016							0.00	
9/2016							0.00	
10/2016							0.00	
11/2016							0.00	
12/2016							0.00	
Total	40,487	8,255.00	257,600.00	5,405.00	3,728.80	148,668.00	464,143.80	

Does not include port congestion fees

Per Diem and Demurrage is based off of P&Ls

Per Diem Rebilled (ARPERDIE) and Demurrage Rebilled (ARDEM, ARDEMSRV) is from Ops Margin Report

EXHIBIT C-11



May 5, 2016

Federal Maritime Commission 800 North Capital Street, NW Washington DC 20573

Re: Petition for Rulemaking on Demurrage Practices

Seafrigo USA, Inc. is an CHB/FF/NVO moving and clearing goods through ALL USA ports, including the Port of New York & New Jersey.

Over the past two years, we and/or our clients have paid exorbitant charges for demurrage and/or detention when equipment could not be picked up or dropped off at the terminals due to circumstances that were completely out of our control.

Such instances include massive port congestion due to various sub-par port conditions (overloaded workload, lack of equipment to name a couple), vessel delays by the carriers causing imbalanced work flow at the ports, labor disputes / slow downs, increased CBP exams.

The carriers and terminals cite their "tariffs" and insist on payment before freight will be released. We believe the Commission is in a unique position to ensure that the regulations do not work to favor one industry participant over another and instead promote fairness.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Thank you for your attention to this matter.

Sincerely,

Al Raffa Vice President of Operations





SEAFRIGO USA, Inc 735 Bound Avenue, Elbaheth NJ 07201 Tel: (201 770 1143 www.sexfried.com

EXHIBIT C-12

All In One Customs Brokers Inc. 331 Second Street Elizabeth NJ 07206 Tel 908-820-9443

May 5, 2016 Federal Maritime Commission 800 North Capital Street, NW Washington DC 20573

Re: Petition for Rulemaking on Demurrage Practices

Our firm is a Customs broker moving goods through the Port of New York & New Jersey.

Over the past two years, our clients have paid exorbitant charges for demurrage or detention when equipment could not be picked up or dropped off at the terminals due to circumstances that were completely out of our control.

We had one particular client who's container was sent to East Coast Warehouse for a Customs exam on 3-24-2016. The exam was completed on 4-5-2016. The container was picked up on 4-7-2016 and returned empty to the terminal on 4-8-2016. On 4-19-2016, the steamship line sent an invoice for detention charges of \$1,115. How can a steamship line get away with sending an invoice for detention charges 11 days after the container was returned empty and the same container was being held by U.S. Customs for an exam. There was no way the importer could of picked up this container any earlier. Yet, importers and trucking companies are forced to pay these charges.

The carriers and terminals cite their "tariffs" and insist on payment before freight will be released. We believe the Commission is in a unique position to ensure that the regulations do not work to favor one industry participant over another and instead promote fairness.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Thank you for your attention to this matter.

Sincerely.

Jacqueline Dossantos, Broker

EXHIBIT C-13



75 Montgomery Street, Suite 300 Jersey City, NJ 07302 Tel: 201-860-9600 Fax: 201-860-9686 www.serraintl.com Headquarters: Jersey City

US Offices: New York Los Angeles Miami

May 9, 2016

Federal Maritime Commission 800 North Capitol Street, N.W. Washington D.C. 20573

Subject: Petition for Rulemaking on Demurrage Practices

As a licensed Customs Broker (Lic. No. 4053) and OTI (Lic. No. 0282F and Serra Shipping, Inc. Lic. No. 16314N), our company has suffered from trying to help our customers cope with the problems, delays, and costs stemming from port congestion and service disruption, most notably in Los Angeles / Long Beach and New York / New Jersey.

We are far less efficient and able to respond quickly in our processing of ocean freight shipments then we were two years ago, quite simply because we must be constantly tracking free time, working to extend it if possible, pausing from what we are doing to arrange and update demurrage payments in order to obtain freight release, and communicating with frantic customers about the status of their shipments. Our clients have borne the tremendous financial penalty of having to pay demurrage or detention for use of equipment even when circumstances were outside of their control. Our import and export customers want to move their freight to and from the port as quickly as possible. They have no incentive to keep it tied up and sitting at a terminal. In contrast, steamship lines and their appointed terminals are protected by the present system from working efficiently to move containers off the port. Demurrage is automatically triggered within a limited number of days once a container is grounded. An importer, for example, must pay demurrage even if they are not at fault or responsible for the movement of the container off the pier.

A typical example of this resulted in one of our custom brokerage clients having to pay almost \$17,000 in demurrage for six 40' containers that arrived at Los Angeles port on September 18, 2015. The overseas shipper had booked with the steamship to deliver the containers to door in Southgate, CA on a prepaid basis. On the same vessel they shipped two 40' Flat Racks and asked our company to have the pieces stripped and delivered to the same receiver. We arranged pick up of the flat racks, stripping, delivery and return of equipment within the free time. The receiver requested that the

steamship line drop the container for unloading and pick up the next day. Because this created an unexpected cost, the steamship line needed to get the approval to do so from the overseas shipper. On Monday, September 28, 2015, the steamship line received the approval for the additional cost. Instead of immediately engaging the truckers to deliver the six containers, on Thursday, October 1, 2015, the steamship line notified us that demurrage would have to be paid through October 7 for all six containers. At \$2,928 per container this totaled \$16,952.00. On October 2, 2015 our company paid that amount to the terminal on behalf of the overseas shipper. We believe it was unreasonable for the steamship line and terminal to require advance payment of demurrage through October 7th. If the steamship line and terminal had to bear the cost of keeping those containers at the port, they would have found a way to move them to the receiver by September 30th. They had no incentive to do so because their tariffs and the regulatory system allow them to work slowly and pass the costs to the shipper/ importer. Since this was a door movement, neither the shipper nor the importer could control when the containers would depart from the port. We find this to be an unconscionable abuse.

This is just one example of many that take place every day. We believe it is time for a review of these practices and the regulations that inadvertently encourage them. The FMC has the authority, knowledge, and experience to address this situation, which is harmful to the shipping public. We support the petition for a rulemaking to prohibit the automatic pass through of demurrage and detention charges in circumstances that are beyond the control of the shipper / importer. Thank you for your serious consideration of this matter.

The undersigned verifies that the information provided is true and correct and thanks you for your serious consideration of this matter.

Respectfully,

SERRA INTERNATIONAL, INC.

Jeanette R. Gioia

President

EXHIBIT C-14



My name is Peggy Mecca and I am the treasurer of Mecca & Son Trucking Co. located at 580 Marin Blvd. Jersey City, NJ 07310. Mecca & Son Trucking Co. is a family owned asset based drayage carrier operating since 1950. Our operations involve 25 to 35 trucks that service the port of NY/NJ, moving approximately 7,000-8,000 containers each year.

My job responsibilities include managing corporate finances and overseeing company operations.

Some of my daily responsibilities involve corresponding with MTOs and VOCCs to extended free time, seek waivers of demurrage charges, and/or request additional time to pay per diem charges until such charges are resolved by negotiated settlements. Based on my experience, the VOCC and MTOs appear to be financially benefiting from their own inability to properly service the drayman and their customers.

During 2014 and 2015, our company of 25 to 35 drivers paid over \$300,000 in demurrage and per diem charges. To my best qualified estimation, a minimum of 50% (\$150,000) of these charges were directly due to congestion not caused by trucker, but due to an inability to promptly ingate, outgate, and return empties. Although we tried to rebill our shippers for this cost, many did not pay leaving it a trucker responsible.

MTOs assess demurrage charges if a container is not removed from the terminal after the specified amount of free time provided in their tariffs. Per diem is charged by a VOCC per the Uniform Intermodal Interchange and Facilities Access (UIIA) Agreement. MTOs and VOCCs servicing the port of NY/NJ are able to assess charges against drayage carriers and their customers under the UIIA Agreement, VOCC tariff, NY terminal conference tariff, and Maher Terminal tariff. I have attached relevant pages of the Maher Terminals tariff which indicate the allotted amount of free time and demurrage rates at its terminal. See Exhibit A.

All containers, and product in those containers, being drayed are effected by port congestion causing a domino effect that impacts the ability to timely outgate and ingate containers at the port. When a container is unable to be picked up, it leaves the next day with double the amount of work, and so on. In 2014 and 2015, our operations were significantly impacted due to port congestion at the port of NY/NJ which was caused by a variety of reasons, including:

- 1. Weather, such as a snow storm that occurred in February 2015.
- 2. Labor slowdowns at the Maher Terminal,
- 3. The shift of imports to the port of NY/NJ from West Coast ports due to their own labor related congestion,
- 4. Terminal computer issues,
- 5. Poor internal systems within the terminals,
- 6. Chassis issues, including shortages,



- 7. Shorter working weeks due to holidays or weather related closures, and
- 8. The overall domino effect of congestion issues.

The following is a specific incident at the Maher Terminal which was caused by a 2015 snow storm occurring during a shorter working week due to a Monday holiday. See Exhibit B. Ultimately, we were forced to pay \$2,640.00 for 2 dry coffee containers, EISU2015571 and MAGU2354055, that were unable to outgate during the week of February 16-20, 2015 with the containers' last free day being Friday, February 20th. The following Monday, February 23rd, we were forced to pay the terminal \$2,640.00 (\$1,320.00 for each container) in demurrage. See Exhibit C. The demurrage charges included charges for Saturday and Sunday when terminal was not open. We were not able to get reimbursed by our shipper for any of these charges.

The following includes a timeline of events for the week February 16-20, 2015:

- a. Monday, February 16th, Maher Terminals closed for Presidents Day. See Exhibit B.
- b. Tuesday, February 17th, there was a snowstorm, chassis shortage and severe delays at terminal and portwide. See Exhibit B.
- c. Wednesday, February 18th, there was a chassis shortage and severe delays at terminal. See Exhibit B.
- d. Thursday February 19th, there was extremely cold weather, continuing chassis shortages. Maher Terminal ceased allowing drivers to make double moves at the terminals. See Exhibit B.
- e. Friday, February 20th, the congestion remained and it was the last free day for many of our containers. See Exhibit B, including Maher emails on Friday indicating "heavy" inbound and outbound traffic. As a result, on Friday morning, I emailed the terminal notifying them of the congestion issues throughout the week, and requested assistance if we were not able to pick up some containers that were on their last free day. A copy of this email is attached as Exhibit D. Throughout the day, our drivers worked many hours. It was not unusual for drivers to leave the terminal after 8 PM, after waiting in long lines. The Trailer Inspection Receipts (TIR), attached as Exhibit E show three of our drivers were outgated on Friday as late as:
 - 8:13 PM (20:13) 2833970
 - 9:05 PM (21:05) 2834281
 - 8:25 PM (20:25) 2834233

Despite all of our efforts, 2 of our containers, with Friday as their last free day, could not be outgated in time due to the congestion caused by the week's prior events, as set forth above. The attached delivery order from one of our customers and TIR corresponding with container number EISU2015571 shows an outgate was attempted, but voided out on February 20th at 6:46 (18:46). See Exhibit F.



f. Two months later, after many emails and a meeting the Vice President of Maher Terminals for his consideration to waive the assessed demurrage charges, I was advised that the terminal was fluid that week – see attached. See Exhibit G.

Unfortunately, the terminal conduct described above is a common practice. Occasionally the terminals in the port of NY/NJ may waive the demurrage and per diem charges after time consuming requests, pressure from negative publicity and at their individual discretion. Many steamship lines would not waive the charges, but may give a slight discount with repeated disputes. Disputing these charges, however, is time consuming to small operations that work with small margins and limited staff.

There is no economic justification of the level of charges that are assessed. Per diem and demurrage charges ranging from \$100 to \$500 per day is unconscionable. A study should be done to see the true cost of the value of the penalty. What is a reasonable daily per diem charge for a container worth \$5,000? What is the true land cost of the container when it sits in the terminal?

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Leggy Lecca
Peggy Markica

Exhibit A of Exhibit C-14

MAHER TERMINALS LLC	Page 1 of 41
	Revised Date: 28 August 2014

Rates effective October 1, 2014

Marine Terminal Schedule No. 010599

NAMING RULES, REGULATIONS AND COMMODITY RATES ON CARGO MOVING IN CONTAINERS/BREAKBULK

This schedule is issued by Maher Terminals LLC hereafter referred to as "MTL" under authority of the Federal Maritime Commission and supersedes all previously issued schedules.

This schedule shall be applicable at any terminal facility within the Port of Greater New York and New Jersey and vicinity in which MTL operates.

Maher Container Terminal, Port Elizabeth Berths 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80

PUBLISHED BY:

Maher Terminals LLC 1210 Corbin Street Elizabeth, NJ 07201

PHONE: (908) 527-8200 FAX: (908) 436-4812

WEB PAGE ADDRESS: http://www.maherterminals.com

MAHER TERMINALS LLC		Page 21 of 41
	Revised Date:	28 August 2014

1. Containerized Cargo (house containers)

Until further notice MTL at its discretion may honor a containership line's demurrage provisions as published in its tariff. For any free time extension of ten (10) or more days, demurrage will accrue from the expiration of free time at the third tier rate. If the containership line's tariff provisions are not acceptable or do not provide appropriate coverage, then the following schedules will apply. Any extended periods of free time granted by a containership line's tariffs will be at the responsibility and liability of the containership line and/or the cargo.

2. General cargo containers:

Four (4) days free time exclusive of Saturdays, Sundays and non worked ILA holidays will be allowed for the removal of containers discharged from vessels in the Port of New York.

3. Refrigerated containers (House Containers) and special equipment.

Two days free time, exclusive of Saturdays, Sundays and non worked ILA holidays will be allowed for the removal of containers discharged from vessels in the Port of New York.



- Containers of green coffee beans in bags and cocoa beans in bags will be allowed ten days free time exclusive of Saturdays, Sundays and non worked ILA holidays.
- 5. All cargo that is entitled to additional free time must be received by MTL one day prior to the arrival of a vessel (in the case of holidays and weekends, the last work day before).

3. COMPUTATION OF FREE TIME PERIOD

Free time on import cargo/containers shall commence at 8:00 a.m. on the first business day following completion of discharge of the vessel and will expire on the last day of free time (Saturdays, Sundays and non-worked ILA holidays excluded). If terminal is open on an ILA holiday and is processing gate transactions, the day will be treated as a business day.

4. SCALE OF DEMURRAGE CHARGES

The following scale of demurrage rates and provisions will apply to cargo remaining undelivered after the expiration of free time:

A. Breakbulk Cargo

1st Period Demurrage:

4 cents per 100 lbs. or 3 cents per cubic foot, whichever is greater, per day, or fraction thereof, for the first five (5) calendar days after the expiration of free time. Minimum charge \$25.00.

MAHER TERMINALS LLC		Page 22 of 41
	Revised Date:	28 August 2014

2nd Period Demurrage:

6 cents per 100 lbs. or 4 cents per cubic foot, whichever is greater, per day, or fraction thereof, for the next five (5) succeeding days. Minimum charge \$45.00.

3rd Period Demurrage:

10 cents per 100 lbs. or 5 cents per cubic foot, whichever is greater, per day, or fraction thereof, for each succeeding day. Minimum charge \$55.00.

B. Merchant Haulage Containers:

1. General cargo containers of all dimensions after the expiration of free time:

1-4 days \$164.00 per calendar day \$214.00 per calendar day \$214.00 per calendar day \$374.00 per calendar day

2. Temperature controlled containers of all dimensions after expiration of free time:

1 - 3 days \$400.00 per calendar day 4 days and above \$575.00 per calendar day

3. Special Equipment, Platforms, Flatracks, Open tops, etc., of all dimensions after expiration of free time:

1 – 3 days 4 days and above \$315.00 per calendar day \$495.00 per calendar day

4. Tanks

1 – 3 days \$237.00 per calendar day 4 days and above \$412.00 per calendar day

An additional charge of \$54.00 per container per calendar day after expiration of electricity free time for electricity usage.

5. UNDELIVERED CARGO

- A. Cargo which is undelivered and remains at the terminal beyond the expiration of free time, may be placed in public storage at any time thereafter, at the option of MTL and at the risk and expense of the cargo.
- B. Cargo remaining on the terminal in excess of 30 days, will be considered as abandoned and sold for collection of demurrage charges due MTL. At the time of sale, MTL makes no

Exhibit B of Exhibit C-14

Peggy Mecca

From:

Maher Terminals Burst Notification <mburstnotification@maherterminals.com>

Sent:

Friday, February 13, 2015 8:35 AM

To:

Mecca & Son

Subject:

President's Day 2-16-15



President's Day 2-16-15

BURST NOTIFICATION

To: Maher Terminals Customers

As a reminder, all Maher Terminals facilities including the Empty Depot located at Columbia will be closed for business on Monday, February 16, 2015 (President's Day).

Thank you,

Maher Terminals Management

*This is an automatically generated e-mail sent from an unmonitored alias. Please do not reply.

Edit your subscription * Unsubscribe

Mahor Terminals LLC 1210 Certin Street Richards NT 07001

Maher Terminals

Daily Terminal Gate Conditions

Date: Tuesday, February 17, 2015

Time: 9:00 a.m.

Main Terminal

Inbound:

Heavy

Outbound:

Heavy

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

MARKET COMMITTEE AND SERVICE COMMITTEE OF THE COMMITTEE O

Chassis Depot

For chassis availability please utilize the below contact information.

Reference the daily TRAC Intermodal chassis availability Metro NY/NJ email notification or contact TRAC Intermodal Customer Service at customerservice@tracintermodal.com Or (877) 987-2226 Option 2

- Status updates
 - Add anyone to the daily blast

Columbia Empty Depot

Truck Queue: Light

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Special Notes:

Total snowfall accumulations / amounts in "inches" reported on February 16 and February 17, 2015

Dell.com - Official Site

Experience the Dell Difference. Shop Laptops & PCs w/ Intel Core.



NEW JERSEY

...BERGEN COUNTY...

ALLENDALE 3.0 700 AM 2/17 PUBLIC

RIDGEWOOD 1.9 902 AM 2/17 TRAINED SPOTTER BERGENFIELD 1.8 730 AM 2/17 TRAINED SPOTTER

FRANKLIN LAKES 1.8 930 AM 2/17 PUBLIC

MIDLAND PARK 1.3 710 AM 2/17 TRAINED SPOTTER

...ESSEX COUNTY...

NEWARK AIRPORT 3.2 100 PM 2/17 FAA CONTRACT OBSERVER

WEST ORANGE 3.0 900 AM 2/17 PUBLIC CEDAR GROVE 2.7 930 AM 2/17 PUBLIC

...HUDSON COUNTY...

JERSEY CITY
3.5 742 AM 2/17 BROADCAST MEDIA
HARRISON
3.1 922 AM 2/17 TRAINED SPOTTER
HOBOKEN
3.0 900 AM 2/17 EMERGENCY MNGR

...PASSAIC COUNTY...

WAYNE 1.9 930 AM 2/17 TRAINED SPOTTER BLOOMINGDALE 1.7 858 AM 2/17 TRAINED SPOTTER

...UNION COUNTY...

ROSELLE PARK 4.6 1000 AM 2/17 PUBLIC

PLAINFIELD 4.5 820 AM 2/17 TRAINED SPOTTER

...ATLANTIC COUNTY...

EGG HARBOR CITY
HAMMONTON
EGG HARBOR TWP
PLEASANTVILLE

6.1 1155 AM 2/17 TRAINED SPOTTER
4.8 700 AM 2/17 SOCIAL MEDIA
3.9 705 AM 2/17 TRAINED SPOTTER

ATLANTIC CITY INTL A 3.9 705 AM 2/17 ASOS

COLLINGS LAKES
3.8 930 AM 2/17 SOCIAL MEDIA
MULLICA TWP
VENTNOR CITY
ESTELL MANOR
POMONA
3.6 725 AM 2/17 SOCIAL MEDIA
3.7 725 AM 2/17 TRAINED SPOTTER
3.8 930 AM 2/17 SOCIAL MEDIA
3.5 555 AM 2/17 SOCIAL MEDIA
3.6 725 AM 2/17 SOCIAL MEDIA
3.7 725 AM 2/17 SOCIAL MEDIA
3.8 930 AM 2/17 SOCIAL MEDIA

...BURLINGTON COUNTY...

MCGUIRE AFB 6.5 730 AM 2/17 SOCIAL MEDIA FLORENCE 6.1 900 AM 2/17 TRAINED SPOTTER

Maher Terminals

Daily Terminal Gate Conditions

Date: Wednesday, February 18, 2015

Time: 1:00 p.m.

Main Terminal

Inbound:

Heavy

Outbound: Heavy

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Chassis Depot

For chassis availability please utilize the below contact information.

Reference the daily TRAC Intermodal chassis availability Metro NY/NJ email notification or contact TRAC Intermodal Customer Service at customerservice@tracintermodal.com Or (877) 987-2226 Option 2

- Status updates
- Add anyone to the daily blast

Columbia Empty Depot

Truck Queue: Normal

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Special Notes:

Maher Terminals Daily Terminal Gate Conditions

Date: Thursday, February 19, 2015

Time: 1:00 p.m.

Main Terminal

Inbound:

Heavy

Outbound: Heavy

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Chassis Depot

For chassis availability please utilize the below contact information.

Reference the daily TRAC Intermodal chassis availability Metro NY/NJ email notification or contact TRAC Intermodal Customer Service at customerservice@tracintermodal.com Or (877) 987-2226 Option 2

- Status updates
 - Add anyone to the daily blast

Columbia Empty Depot

Truck Queue: Normal

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Special Notes:

Maher Terminals

Daily Terminal Gate Conditions

Date: Friday, February 20, 2015

Time: 9:00 a.m.

Main Terminal

Inbound:

Heavy

Outbound:

Heavy and the state of the stat

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Chassis Depot

For chassis availability please utilize the below contact information.

Reference the daily TRAC Intermodal chassis availability Metro NY/NJ email notification or contact TRAC Intermodal Customer Service at customerservice@tracintermodal.com Or (877) 987-2226 Option 2

- Status updates
 Add anyone to the daily blast

Columbia Empty Depot

Truck Queue: Normal

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Special Notes:

Maher Terminals

Daily Terminal Gate Conditions

Date: Friday, February 20, 2015

Time: 1:00 p.m.

Main Terminal

Inbound:

Heavy

Outbound:

Heavy

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Chassis Depot

For chassis availability please utilize the below contact information.

Reference the daily TRAC Intermodal chassis availability Metro NY/NJ email notification or contact TRAC Intermodal Customer Service at customerservice@tracintermodal.com Or (877) 987-2226 Option 2

- Status updates
 Add anyone to the daily blast

Columbia Empty Depot

Truck Queue: Normal

*Light = A few trucks deep per lane; *Normal = Half of queue is full; *Heavy = Full queue

Special Notes:

Exhibit C of Exhibit C-14

Written disputes must be sent within 60 days of the first statement listing the transaction. The Year-End Summary does not extend an expired billing period. See your menthly statement, your Credit Card Agreement or the annual Your Billing Rights notice for details.

Preparing your taxes

Here is a list of all your transactions between January 1, 2015 and December 31, 2015. To find out more information about Itemized deductions such as travel expenses or medical and dental expenses, search "Topic 500" at www.irs.gov. To easily track deductions, just mark the "Deduct" column next to each charge. Please note: Here is a list of all your posted transactions.

Services 54,629.00	Services Date Description	Location	Amount	Deduct
	02/26/15 MAHER TERMINALS LLC 02/26/15 MAHER TERMINALS LLC	908-665-2100,NJ 908-665-2100,NJ	1,320.00 1,320.00	
The state of the s				
De wall		1	Фиросоло О	
<i>∆</i> 9	This credit card program is issued and the Bank of America logo are registered ©2016 Bank of America Corporation	administered by Bank of Ameri I trademarks of Bank of Americ	ca, N.A. Bank of America a Corporation.	and

Exhibit D of Exhibit C-14

Peggy Mecca

From:

Peggy Mecca <peggy.mecca@meccatrucking.com>

Sent:

Friday, February 20, 2015 11:30 AM

To:

'Joe McNelis'

Subject:

line

Joe

We have a lot of containers to get out of Maher this Today. All week it has been a disaster. We had drivers There until late at night and was hoping today would be Better. If I run into a problem with last free days, then Would you be able to help.

Peggy Mecca Mecca & Son Trucking Co., Inc. 580 Marin Bivd. Jersey City NJ 07310 Office: 201-792-5866 Ext. 104

Fax: 201-792-7090 www.meccatrucking.com

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Exhibit E of Exhibit C-14

TRAILER INTERCHANGE RECEIPT MAHER TERMINALS

DATE: 02/20/15

VISIT:2883970

SEQ: 2597140

DELIVER IMPORT EVERGREEN LINE

CONTAINER NO: EISU2208542 CHASSIS NO: METZ255138

SEAL \$1:

79817

LOCATION:

1

TRUCKING CO:

MECCA & SON TRU

DRIVER ID:

163588

VESSEL/VOYAGE:

ITAL MASSIMA/0873E

BOOKING NO:

PORT:

NEW YORK, N

WEIGHT:

47840

HAZARDOUS:

NO

 ω_J

INSPECTION:

RIGHT SIDE PANEL DENT - USABLE LEFT BOTTOM RAIL BENT - USABLE LEFT SIDE PANEL DENT - USABLE FRONT PANEL DENT - USABLE

ANY TIR INSPECTION DISCREPANCIES MUST BE REPORTED PRIOR TO EXIT. PROCEED TO "RED ZONE" AREA AND CALL (908) 527-8400 EXT. 4114 FOR ASSISTANCE

REMARKS:

TIR IN: 19:58 TIR OUT: 19:58

TIR: BEALE

OUT: NCORTES-

DRV: GAETJENS DARIUS

SEC: NAWAD

TIME IN:46:48 TIME OUT:20:18

NET_TIME:9 HRS 27 HINS

CKERICAL SVC TIME: O HRS O MINS

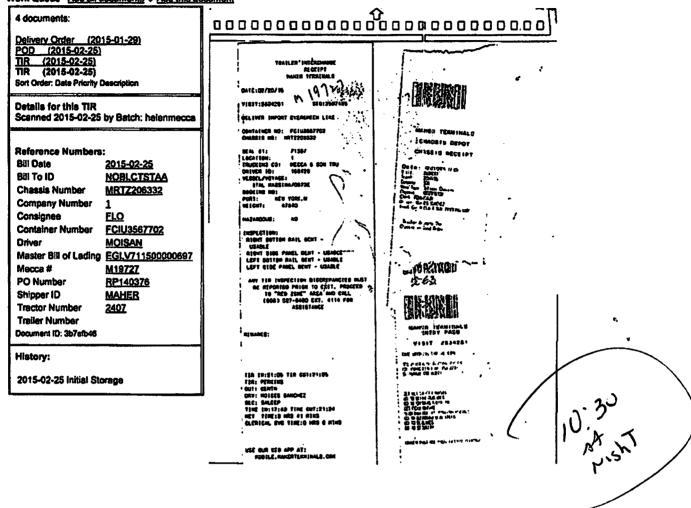
USE OUR WEB APP AT:
MOBILE.MAHERTERHINALS.COM

I hereby certify that on date stated. I carefully inspected the equipment described above and that this is a

Lett PM

TMWsImaging

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M19728

TRAILER INTERCHANGE RECEIPT MAHER TERMINALS

DATE: 02/20/15

VISIT:2834283

8EQ:2597441

DELIVER IMPORT EVERGREEN LINE

CONTAINER NO: MAGU2275151 CHASSIS NO: TRUCKER OWNED

SEAL \$1:

78808

LOCATION:

1

TRUCKING CO:

HECCA & SON TRU

DRIVER ID:

187554

VESSEL/VOYAGE:

ITAL HASSINA/0878E

BOOKING NO:

PORT:

NEW YORK, N

WEIGHT:

47399

HAZARDOUS:

NO

INSPECTION:

RIGHT BOTTOM RAIL BENT -

USABLE

RIGHT SIDE PANEL DENT - USABLE

LEFT BOTTOM RAIL BENT - USABLE

LEFT SIDE PANEL DENT - USABLE

ANY TIR INSPECTION DISCREPANCIES MUST BE REPORTED PRIOR TO EXITE PROCEED TO "RED ZONE" AREA AND DALL (808) 527-8400 EXT. 4114 FOR ASSISTANCE

TIR IN:20:20 TIR OUT:20:20

TIR: MANNUZZA

CKR: CALELLO

OUT: NCORTES

DRV: NILO REGARDIZ

SEC: SALEEP

TIME IN: 17:25 TIME OUT:20:25

NET TIME:3 HRS O MINS

CLERICAL SVC TIME:0 HRS 0 MINS

Exhibit F of Exhibit C-14

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Weight	Check By:	:													

Exhibit G of Exhibit C-14

From: Peggy Mecca [mailto:peggy.mecca@meccatrucking.com]

Sent: Tuesday, April 21, 2015 12:58 PM

To: 'Ivo Oliveira' < IOliveira@maherterminals.com>

Cc: michael.mecca@meccatrucking.com
Subject: RE: demurrage paid in February

Ivo.

As I recall,
Monday was a holiday.
Tuesday and Wednesday there were delays due
To snow storm.
Thursday and Friday the port authority police was
Diverting traffic away from Maher Terminal.
I have pictures of the lines.
Would you be willing to go the FMC mediation
program to take this further?

Peggy Mecca Mecca & Son Trucking Co., Inc. 580 Marin Blvd. Jersey City NJ 07310 Office: 201-792-5866 Ext. 104 Fax: 201-792-7090

www.meccatrucking.com

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From: Ivo Oliveira [mailto:IOliveira@maherterminals.com]

Sent: Monday, April 20, 2015 12:19 PM

To: Peggy Mecca

Cc: michael.mecca@meccatrucking.com
Subject: RE: demurrage paid in February

Hello Peggy. Was a pleasure meeting you, also. Pursuant to our conversation, I didn't infer that particular containers were "waived," rather I said that if there were extenuating circumstances on the days/containers in question, that we in all likelihood would have extended free time for issues that were outside of truckers control. I did in fact follow up on the dates that you outlined below and there were no issues during that time. In fact, during the shortened week (the Monday was a Holiday), we averaged approximately 5000 gate moves a day while delivering between 2500-3000 imports on each of those days. Truck line was rather fluid and daily bursts (twice a day) went

out that week indicating such. Again, was a pleasure meeting you and look forward to seeing you again. Ivo



Ivo Oliveira VP Industry Relations Maher Terminals LLC 1210 Corbin Street Elizabeth, NJ 07201

Tel: 908-527-8200 ext. 5136

Fax: 908-436-4812

Email: iyo@maherterminals.com

From: Peggy Mecca [mailto:peggy.mecca@meccatrucking.com]

Sent: Tuesday, April 14, 2015 1:05 PM

To: Ivo Oliveira

Cc: michael.mecca@meccatrucking.com Subject: demurrage paid in February

Dear Ivo.

It was nice to meet you this morning.

During the week of February 2/16 - 2/20, we were dealing with a 4 day week, snow and weather related conditions, heavy queue at Maher, and Port Authority diverting drivers.

It cost our company 2640.0 for 2 containers for EISU2015571 and MAGU2354055 on 2/24.

Anything you can do to help reimburse for this was demurrage which was caused by issues outside of our control is appreciated as you seem to think these may have been waived for us previously.

In addition, if there anyway for the terminal to advise a trucker or shipper as soon a container goes into demurrage – That would be a big proactive step for a terminal to do and appreciated by the trucking community.

Peggy Mecca

Mecca & Son Trucking Co., Inc.

580 Marin Blvd.

Jersey City NJ 07310

Office: 201-792-5866 Ext. 104

Fax: 201-792-7090

www.meccatrucking.com

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EXHIBIT C-15



To Whom It May Concern

May 6, 2016

Thunderbolt Global Logistics is an international freight forwarder/customs broker/NVOCC based in Baltimore, MD. We work with a large shipper who exports out of the Port of Oakland. We experienced the difficulty of shipping containers from Oakland during the first quarter of 2015.

Due to the congestion issues at the Port of Oakland our motor carriers had difficulty picking up empty containers and returning fully loaded containers back to the port. Sometimes our contracted truckers had to sleep overnight outside the terminal to be able to gate the container in the next day. The delays resulting from congestion getting into the terminal resulted in significant costs for our client.

We also had to pay per diem costs on several containers that were booked with Evergreen due to delays in being able to gate the containers back into the port due to vessel arrival delays which resulted in the containers not being able to be returned to the port so the trucker had to hold them in their yard. I've attached a copy of the invoice from Evergreen.

We had a similar instance in Seattle one time with \$350.00 in yard storage waiting to be able to gate the container back into the terminal.

Congestion has a ripple effect on both import and export shipments at any port in the United States. This was especially the case for us in Oakland. Anything that can be done to prevent this from happening will be good for everyone involved in the logistics process.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Sincerely

Director

Delivering Excellence Every Time



EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION

DALLAS OFFICE

TOLLWAY PLAZA I 16000 NORTH DALLAS PARKWAY SUITE 400, DALLAS, TX 75248

PER DIEM INVOICE

CLIENT NO. :USM003949

INVOICE NO. :PF 1502001928 001 INVOICE DATE:2015-02-20 :2015-03-22 DUE DATE

PAGE : 1/2

6905 SAN LEANDRO STREET

OAKLAND CA 94621

UNITED STATES

SCAC : MMPS M & M TRANSPORT

CONTACT: THIERRY FRANCK TURQUET

TEL : 1-972-2465531 : 1-972-2465504

E-MAIL: thierryturquet@evergreen-shipping.us

OFFICE : USDLS-LOG

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EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION

DALLAS OFFICE

TOLLWAY PLAZA I 16000 NORTH DALLAS PARKWAY SUITE 400, DALLAS, TX 75248

PER DIEM INVOICE

CLIENT NO. :USM003949

INVOICE NO. :PF 1502001928 001 INVOICE DATE:2015-02-20

DUE DATE :2015-03-22

PAGE : 2/2

CONTACT: THIERRY FRANCK TURQUET

TEL : 1-972-2465531 : 1-972-2465504

E-MAIL: thierryturquet@evergreen-shipping.us

OFFICE : USDLS-LOG

SCAC : MMPS M & M TRANSPORT

6905 SAN LEANDRO STREET

OAKLAND CA 94621 UNITED STATES

Remarks:

- 1. This invoice is due and payable when rendered.
- 2. Remittance is to be mailed to the address above.
- 3. Please show invoice number and client number on remittance.
- 4. The Motor Carrier/Customer shall respond in writing to Evergreen's invoices within 30 days of the invoice date, documenting with appropriate evidence its disagreement with any charges it believes to be incorrect. Otherwise, Evergreen deems all invoices to be billed accurately and the payment should be received by the due date.



FACT FINDING INVESTIGATION NO. 28 FINAL REPORT

CONDITIONS AND PRACTICES RELATING TO DETENTION,
DEMURRAGE, AND FREE TIME IN INTERNATIONAL
OCEANBORNE COMMERCE

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SUMMARY AND FINDINGS

Over the past nine months, Federal Maritime Commission (FMC) Commissioner Rebecca F. Dye, as the designated Fact Finding Officer for Fact Finding Investigation No. 28 (FF28), has collected and analyzed substantial amounts of information about the demurrage and detention practices of U.S. liner shipping companies, ports, and marine terminals serving U.S. trades. The Fact Finding Officer also personally interviewed large and small American importers and exporters, maritime attorneys, ocean transportation intermediaries, drayage trucking representatives, public port authorities, as well as executives from liner shipping companies and marine terminal executives.

As explained in the September 5, 2018, Interim Report,² the record developed from the Fact Finding's demand letters to carriers and marine terminal operators indicated that the concerns expressed in the original Coalition for Fair Port Practices³ petition and at subsequent public hearings that preceded the investigation⁴ go beyond a few severe episodes of inclement weather or labor-related port congestion problems. The record also shows that these concerns are relevant to more than just a small subset of major ports.

The Preliminary Observation of the Interim Report explained the challenges that existing demurrage and detention practices entail and focused on topics such as nonstandard terminology; trends and scope of demurrage and detention charges; tender of cargo and actual cargo availability; concerns about containers becoming unavailable; and impediments to container retrieval. The Interim Report also discussed specific issues related to billing practices, dispute

¹ The information and data were provided in response to FF28 information demand letters. See https://www.fmc.gov/fmc issues information demands in detention demurrage investigation/

² The Interim Report for FF28 was published on the Federal Maritime Commission's website and is available at https://www.fmc.gov/assets/1/Documents/FF28_int_rpt2.pdf. The investigation was conducted in two phases. The first phase analyzed information and data to develop the key topics to be addressed. The Interim Report covered Phase One activities and findings. The second phase involved field interviews at three locations across the country.

³ The Coalition for Fair Port Practices is a group of trade associations representing a broad array of importers, exporters, drayage providers, freight forwarders, Customs brokers and third-party logistics providers that petitioned the Commission to provide guidance on what constitutes "just and reasonable practices" with respect to demurrage, detention and per diem charges. See https://www.fmc.gov/assets/1/Documents/P4-16 Ptn_Lv_Supp.pdf.

⁴ On March 5, 2018, the Commission ordered a formal investigation into demurrage and detention practices in U.S. container shipping trades. See https://www.fmc.gov/formal investigation in detention demurrage case/.

resolution processes, demurrage charges related to government cargo inspections, and foreign demurrage and detention practices.

The information in the record developed in the first phase of Fact Finding 28 supported the view that significant benefits to the U.S. international ocean freight delivery system, and the American economy as a whole, would result from:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to cargo interests of container availability; and
- An FMC Shipper Advisory Board or Innovation Team.

The Interim Report explained that Phase Two of FF28 would solicit views from all interested parties on how to implement the above recommendations in ways that would improve the performance of the overall American freight delivery system.

In this regard, Phase Two of FF28, from early September through mid-November 2018, was devoted to conducting a series of field interviews with liner shipping companies, port officials, marine terminal operators, ocean transportation intermediaries, drayage truckers, and large and small American importers and exporters. Those field interviews were held at ports in Southern California, New York and New Jersey, and Florida. In addition, carrier executives, marine terminal operators, drayage trucking representatives, and American cargo interests offered comments and ideas directly to the Fact Finding Officer in response to her call for industry leaders to participate in the FF28 process.

Based on the relevant data and information developed in Phase One of FF28, interviews conducted, and comments received during Phase Two of FF28, the Fact Finding Officer finds that:

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⁵ This report refers to liner shipping companies as ocean common carriers or carriers, and it refers to shippers, importers, exporters, consignees, and any other beneficial cargo owners as "cargo interests."

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

In light of these findings, the Fact Finding Officer recommends that the Commission organize FMC Innovation Teams composed of industry leaders to meet on a limited, short-term basis to refine commercially viable demurrage and detention approaches in the following areas:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and
- Consistent notice to cargo interests of container availability.

BACKGROUND

A. Coalition Petition and Public Hearing

On December 7, 2016, the Coalition for Fair Port Practices petitioned the Commission to adopt an *interpretative rule*⁶ that would clarify what constitutes "just and reasonable rules and practices" with respect to the assessment of demurrage and detention charges.⁷

After reviewing the roughly 110 comments filed in response to the Coalition's petition, the Commission conducted two days of public hearings to take testimony from the petitioners and other parties that would be affected (including carriers, marine terminal operators, and drayage trucking companies) concerning the need for and likely consequences of the petition's proposal.

At these hearings, held on January 18 and 19, 2018, the Commission received testimony on the Coalition's petition.⁸ Testimony by Coalition witnesses generally agreed with the findings detailed in an April 2015 Commission report on demurrage and detention at selected U.S. ports and a May 2015 Commission report on the causes, consequences, and challenges of port congestion.⁹ One of the most important findings was that there is no clear or standard manner in which ocean carriers and marine terminal operators handle demurrage and detention issues, making it difficult for shippers to avoid charges.

Coalition witnesses presented testimony on an array of problems they experienced with current demurrage and detention practices, including the lack of shipper control over

⁶ An interpretive rule is an agency rule that clarifies or explains existing laws or regulations. An interpretive rule does not need to satisfy the requirements set out in the Administrative Procedure Act for notice to the public and opportunity for comment.

⁷ The petition, P4-16, and the public comments on its proposal are available on the Commission's website at https://www.fmc.gov/p4-16/

⁸ A summary of the hearing is available at https://www.fmc.gov/commission concludes hearing on petition p4-16/?F_All=y). Moreover, the hearings can be viewed on the FMC's YouTube channel: https://www.youtube.com/channel/UCwKTAlGGHIA0xcN3bDt_Uqg.

⁹ The Commission's April 2105 Demurrage and Detention report is available at https://www.fmc.gov/assets/1/Page/reportdemurrage.pdf. The May 2015 Commission port congestion report, which followed a serious of four port forums, is available online at https://www.fmc.gov/assets/1/Page/PortForumReport FINALwebAll.pdf.

circumstances in which charges are imposed, delays involved with U.S. government holds, the effect on demurrage and detention charges of ocean carrier big ships, the lack of sufficient marine terminal appointments for drayage truckers, the lack of notice of partially-closed terminals to truckers, the influence of periodic port congestion caused by weather complications, the unavailability of chassis at inland rail yards, certain labor issues, and unclear demurrage and detention billing and dispute resolution procedures.

The Commission also received testimony from ocean carrier and marine terminal witnesses. The topics they addressed included: the purpose of demurrage in moving cargo through the terminal and the need to maintain terminal velocity, the purpose of detention charges in facilitating equipment velocity for an efficient supply chain, the expense of non-residential waterfront property housing marine terminal facilities and the need to discourage use of that property as cargo storage, the need for carriers to maintain a balanced equipment flow and a fluid network, the role of market competition in addressing demurrage and detention problems, the approach among ocean carriers to extending free days during weather disruptions, the ocean carrier preference for quicker turnaround for equipment over collecting detention charges, and the marine terminal operator preference for moving cargo off terminal over collecting demurrage charges.

Following the hearing, the Commission deliberated on what additional action it should take, if any, to address the issues raised in the petition and hearing testimony. Ultimately, it decided that a non-adjudicatory fact finding investigation offered the most effective way to determine the nature and full extent of demurrage and detention issues and to find a way to mitigate any problems that were identified.

B. Order of Investigation

On March 5, 2018, the Commission initiated a non-adjudicatory fact finding investigation, Fact Finding Investigation No. 28, into the conditions and practices relating to detention, demurrage, and free time in U.S. international ocean commerce. The Order of

Investigation¹⁰ designated Commissioner Dye the Fact Finding Officer and directed her to develop a record on:

- (a) Whether and how the alignment of commercial, contractual, and cargo interests enhance or aggravate the ability of cargo to move efficiently through United States ports;
- (b) Whether and when a vessel-operating common carrier (VOCC) or marine terminal operator (MTO) has tendered cargo to the shipper and consignee;
- (c) Billing practices for invoicing demurrage or detention;
- (d) Practices with respect to delays caused by various outside or intervening events; and
- (e) Practices for resolution of demurrage and detention disputes between VOCCs or MTOs and shippers.

The Order also required the issuance of an Interim Report no later than September 2, 2018, and a Final Report no later than December 2, 2018.

¹⁰ See https://www.fmc.gov/assets/1/Documents/ff28 ord invst2.pdf.

INVESTIGATION PHASE ONE

Beginning in March 2018, Commissioner Dye developed a record on these subjects by serving orders comprising questions and document requests on 23 ocean carriers and 44 marine terminal operators and operating ports, and solicited evidence concerning demurrage and detention practices from cargo interests, drayage providers, and ocean transportation intermediaries. These efforts resulted in thousands of pages of answers and documents, which Commission staff reviewed and categorized, including hundreds of emails and other documents from cargo interests and truckers. The responses and other evidence are summarized in the Interim Report.

Although the investigation focused on the practices of VOCCs and MTOs, the Fact Finding Officer also pressed shippers, dray truck companies, and other affected parties to document specific allegations and to provide supporting materials of unreasonable port detention and demurrage practices. To facilitate their participation, the Commission created a dedicated email address, ff28@fmc.gov, to which correspondence and supporting documents could be sent. Hundreds of truckers, ocean transportation intermediaries, and cargo interests sent emails and supporting documents to this account. Issues ranged from container availability to Customs inspections to appointment availability to weather. The common theme was customer service and frustration with the amount of time and effort required to resolve problems with carriers and marine terminal operators. Those contacting the Fact Finding 28 through the dedicated email routinely expressed confusion over whom to contact and what documentation they needed to supply the marine terminal or carrier. They also described delayed responses that exacerbated problems and led to additional charges.

Phase One also included reviewing data compiled by the Commission's Office of Consumer Affairs and Dispute Resolution (CADRS). Between 2014 and 2018, CADRS handled hundreds of cases involving commercial cargo demurrage disputes. The most common demurrage problems during that period were congestion (driven by closed terminals, lack of available appointments, labor shortages, and backlogs); drayage issues (chassis shortages,

¹¹ FMC access to the FF28 email inbox was limited to the Fact Finding Officer and a few Commission staff.

changes in the drayage provider, and overweight trucks); demurrage incurred as the parties disputed other issues; paperwork problems (late paperwork, system errors, incorrect destinations, cargo title issues); and Customs holds.

Many of these same issues were also raised in individual discussions that the Fact Finding Officer conducted with cargo interests during Phase One. The investigation received significant cargo interest information at various conferences such as the NCBFAA Annual Conference (May 2, 2018), the Global Shippers Forum Annual Meeting (May 10, 2018), and the Agriculture Transportation Coalition (AgTC) 30th Annual Meeting (June 14, 2018).

For example, at the AgTC meeting, representatives from multiple exporters, importers and drayage providers met with the Commissioner to discuss issues such as burdensome, time-consuming, and non-transparent dispute resolution processes; multiple, delayed or unexpected bills; delayed or nonexistent refunds; charges accruing when a port was closed due to weather; and lack of communication from carriers and marine terminal operators regarding vessel arrival delays or schedule changes; and other access limitations such as gate times. One drayage provider pointed out that small customers who use freight forwarders are at times unaware of free time because they are not privy to the terms of the agreements between carriers and the ocean transportation intermediary. Another drayage provider pointed out that truckers are not part of the contracts that determine free time, and container free time and chassis days do not align.

Similarly, at the NCBFAA conference, multiple ocean transportation intermediaries contributed their views and experiences. They raised concerns about poor carrier customer service; carrier delays in correcting bills; lack of uniformity among dispute resolution procedures and free time policies; lack of advance notice or communication from marine terminal operators about closures and terminal ability to receive returned equipment; large demurrage and detention bills related to government cargo examinations; decreased free time; lack of ocean transportation intermediary involvement with shipper and ocean carrier arrangements; and congestion at rail yards in Dallas, Texas, and Memphis, Tennessee, due to drayage trucking and chassis unavailability.

Commissioner Dye continues to attend meetings and discussions of the FMC Memphis Supply Chain Innovation Team in Memphis, Tennessee, which was organized to respond to congestion in the rail yards caused by chassis unavailability on ocean carrier moves.

ISSUANCE OF INTERIM REPORT

In September 2018, the Fact Finding Officer released an Interim Report summarizing the Phase One process and reporting on the issues set forth in the Order of Investigation. The record developed during Phase One strongly suggested that concerns about demurrage and detention in U.S. trades are not limited primarily to weather-related or labor-related port congestion in 2014-2015, a small subset of large ports, or episodic events unrelated to potentially systemic issues. The record also supported consideration of the benefits to the U.S. international freight delivery system of:

- Transparent, standardized language for demurrage, detention, and free time practices;
- Clarity, simplification, and accessibility regarding demurrage and detention billing practices, and dispute resolution processes;
- Explicit guidance regarding types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to shippers of container availability;
- An optional billing model wherein marine terminal operators bill shippers directly for demurrage, and carriers bill shippers for detention; and
- An FMC Shipper Advisory Board.

INVESTIGATION PHASE TWO

Following the issuance of the Interim Report, the Fact Finding Officer met in-person and telephonically with representatives from over twenty-five ports and marine terminal operators, as well as numerous representatives of the shipper, carrier, marine terminal operator, ocean transportation intermediary, and drayage trucking segments of the ocean transportation supply chain. The first set of meetings were held at Port Everglades and the Port of Miami from October 31, 2018, to November 2, 2018. The following week, the Fact Finding Officer met with stakeholders over a three day period at the Port of New York and New Jersey. From November 14-16, 2018, the Fact Finding Officer held stakeholder meetings at the Port of Long Beach and Port of Los Angeles.¹²

The meetings and comments focused on the six areas outlined in the Interim Report, how stakeholders would implement those ideas, and what effect doing so likely would have on operations. The Phase Two record that resulted made clear that, at an operational level, there is a great deal of variety among and within ports and terminals and a diversity of views of how best to address 'demurrage' and 'detention' concerns. The record reinforced the importance of the following distillation of the areas from the Interim Report: (1) standardized and clarified language; (2) transparent and accessible demurrage and detention billing and dispute resolution practices; (3) evidentiary guidelines or corroboration of demurrage problems; and (4) actual container availability and reasonable notice thereof.¹³

A. Standardization and Clarification of Language

The record at the end of Phase One demonstrated the "need for unambiguous, standard terminology, especially of the terms demurrage and detention, that accurately reflects the nature

¹² The interview schedule was published online in advance, and interested parties were encouraged to request meetings, as time permitted.

¹³ Although it was not discussed during the field interviews, there was also strong cargo interest and ocean transportation intermediary support for a shipper advisory board or some other mechanism for the Commission to receive regular input from U.S. cargo interests. The marine terminal operators did not object to this notion, so long as the resulting board or teams represented a cross-section of the industry and they did not address individual disputes between supply chain actors.

and source of the charges at issue." ¹⁴ The information obtained in Phase Two bolstered the conclusion that standardized, transparent language is desirable. With few exceptions, ¹⁵ the Phase Two respondents acknowledged that the language used in the industry could be clarified or standardized and that doing so is "good common sense" and could enhance competition.

One marine terminal operator noted that miscommunications can arise when new people enter the industry and are not aware of the meanings terms have acquired over time. Another terminal operator conceded that terminology can be confusing even to those in the industry. Cargo interests asserted that, in some cases, carriers charge both demurrage and detention separately; in some cases, the rental fee for the equipment is included in demurrage; and in other cases, carriers charge demurrage fees that include equipment and then assess other equipment charges.

There was less consensus on how the relevant terms should be defined. Some Phase Two respondents agreed that, as described in the Interim Report, 16 demurrage should mean a charge for the use of terminal space, whereas detention should mean a charge for the use of a container. Ocean transportation intermediary representatives, for instance, advocated for those definitions. Others preferred the traditional approach where demurrage is anything charged inside the terminal, and detention is anything outside the terminal. Cargo interests suggested definitions for demurrage and detention that reflected this on-terminal/off-terminal approach.

Regardless of the definitions adopted, most Phase Two respondents indicated that clarifying and standardizing language would not be particularly difficult. A few cautioned, however, that systemwide changes could interfere with operating systems or existing service contract terms. One marine terminal operator advised that any Commission-sanctioned terminology should not conflict with or cause confusion with how similar terms are used by other government agencies or other industries, such as rail.

Importantly, almost every Phase Two respondent characterized demurrage as an incentive, to get containers out of the terminal. As one port official put it: "demurrage exists to

¹⁴ Interim Report at 17.

¹⁵ One of the carriers argued against standardization because the whole world uses regional definitions, and terms can vary by service contract.

¹⁶ Interim Report at 6-7.

facilitate expedited processing of equipment and cargo." It is not intended, the marine terminal operators stated, to be a revenue stream. One marine terminal operator emphasized that demurrage is not related to the term, or concept, of storage, which should not be injected into the demurrage and detention lexicon. Carriers, too, pointed out that they do not want to charge demurrage or detention; they want their equipment back so that they can make more turns and more revenue.

B. Transparent and Accessible Demurrage and Detention Billing and Dispute Resolution Practices

The Phase Two meetings also reinforced the value of making demurrage and detention billing and dispute resolution policies and practices more transparent and accessible to cargo interests and truckers. The Phase One record demonstrated the utility of: (1) having all of a carrier's or marine terminal operator's demurrage and detention policies at one, easily accessible website; and (2) more accessible, user-friendly information about how demurrage and detention disputes are resolved, whom one should contact about demurrage or detention problems, and how long the dispute resolution process should take.

Cargo interests supported these ideas, as one of the biggest issues they deal with is the propensity of carrier and marine terminal operators to pass the buck back and forth, leaving the cargo interests uncertain about who to contact or how precisely to dispute a charge. Few carriers or marine terminal operators disagreed with the Interim Report's suggestions, as the industry was, some conceded, "past due" for some standardization and transparency.

1. Demurrage and Detention Billing Procedures

Regarding increased transparency of demurrage and detention billing procedures, the Phase Two participants were generally not opposed to the idea, though some questioned its necessity. The chief comment of marine terminal operators was that they do not issue bills for demurrage or detention. While they may collect demurrage on behalf of carriers, they noted, cargo interests usually pay demurrage via online portals; they do not typically receive bills. According to some marine terminal operators, those portals show exactly what is being collected, with respect to the carrier's tariff or service contract.

In contrast, cargo interests advocated for standardized billing practices by region. They claimed that they or their truckers often have to spend too much time and resources dealing with disparate billing arrangements. That said, cargo interests preferred one bill (or billing system) over receiving multiple bills from multiple sources, despite any lack of transparency associated with the former.

Truckers who participated in Phase Two advocated for more transparency and for a formal dispute resolution process. Ocean transportation intermediaries asserted that reasonable billing practices would include strictly defined time frames for invoice issuance and respect for the terms of the Uniform Intermodal Interchange and Facilities Access Agreement.

Finally, there were no particular objections by carriers or marine terminal operators to making more demurrage and detention information available on their websites. Some noted that they already provide this information. One marine terminal operator pointed out that the industry is already required to file tariffs and that cargo interests know the tariff rules for demurrage. But this terminal operator was not opposed to increased clarity and accessibility, and he did not challenge the idea that demurrage and detention tariffs and schedules can be difficult to navigate for the uninitiated.

2. Dispute Resolution Practices and Procedures

The existence, clarity, and accessibility of dispute resolution practices, procedures, and processes was a major topic of inquiry during Phase Two. Cargo interests stated that when dealing with demurrage, there was often no clear dispute resolution contact person, procedure, or escalation point. One representative stated that they typically just pay whatever demurrage is charged at the gate and dispute it later. Some cargo interests asserted that carriers should post their dispute settlement process, including step-by-step instructions, contact information, and the evidence required to dispute a charge. They focused on carriers' dispute resolution practices because, they asserted, cargo interests should deal exclusively with carriers when it comes to demurrage disputes, as opposed to the marine terminal operators who collect demurrage. These cargo interests reasoned that dealing with marine terminal operators, with whom cargo interests lack direct contractual relationships, robs cargo interests of the bargaining power they would have vis-à-vis carriers.

The ocean transportation intermediaries who provided information to FF28 in Phase Two also advocated for clear lines of authority and accessible dispute resolution policies. Like cargo interests, they stated that when demurrage or detention issues arise, carriers and marine terminal operators have a tendency to shift responsibility to each other. They also recommended that carriers and marine terminal operators maintain formal, publicly accessible dispute resolution processes, which ideally would include specially trained individuals, rather than general account managers.

Marine terminal operators and carriers generally acknowledged that developing demurrage and detention dispute resolution practices was something they could do and that such transparency was valuable, especially regarding whom a cargo interest should contact in the event of a problematic demurrage charge (or need for additional free time) and what a marine terminal operator's rules and regulations are. But they also stated that cargo interests and truckers "know whom to call" when there is a problem with demurrage at their respective terminals.

Most of the marine terminal operators stated that they handled most demurrage disputes, even when the carrier's demurrage or free time was at issue. For instance, most of the Southern California marine terminal operators said that they had the authority to waive the carrier's demurrage (or extend the associated free time) without necessarily needing approval from the carrier. They were quick to point out, however, that such practices varied by carrier, and that it might be different in other ports.

While agreeing that having demurrage and detention dispute resolution policies is important, several marine terminal operators asserted that they already have adequate processes, or standard operating procedures, or consumer service departments. But the detail and accessibility of these processes vary. Some MTO procedures are quite detailed and explain what can be waived (carrier or terminal demurrage) or extended (free time or last free day), by whom, under what circumstances, and when carriers need to be consulted. Others post contact information on their websites. A few terminal operators noted that they had changed or established dispute resolution practices since the Fact Finding 28 investigation started. ¹⁷ In one

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¹⁷ Moreover, the Fact Finding spurred the International Federation of Freight Forwarders Associations (FIATA) to develop demurrage and detention best practices in September 2018.

case the terminal operator stated that it notified stakeholders of the proof required to substantiate demurrage and waivers or free time extensions. Another terminal operator stated that the Fact Finding 28 contributed to his starting to keep track of disputes at his terminal.

Although the stakeholders agreed in principle that carriers and marine terminal operators should have dispute resolution policies and practices and known points of contact, there was less agreement on the substance of those policies. Cargo interests asserted that carriers and marine terminal operators should be required to stop the free time or demurrage clocks if a container-not-available ticket is issued to a trucker, ¹⁸ when a marine terminal operator and carrier provide notification of a yard or terminal closure, and when a trucker cannot obtain an appointment within 48 hours of container availability. According to these cargo interests, stopping the clock in such situations was appropriate because the container could not be moved due to factors outside the cargo interest's control, and that such a process would induce marine terminal operators to ensure that appointment systems and yard operations are adequate for the volume of trade.

Marine terminal operators and carriers asserted in their Phase One responses that they do waive demurrage or extend free time in many of the situations the cargo interests raised. They reiterated this in Phase Two. The marine terminal emphasized that if a container is not available due to a verified issue within their control, such as when a container cannot be located, a terminal is closed, or a container is in a closed area, ¹⁹ they waive demurrage or extend free time. More than one terminal operator stated that they simply wanted to be fair.

Further, while there was no objection with providing cargo interests and truckers with appropriate contact information, marine terminal operators were opposed to making their internal processes public. One of the carriers pointed out that when disputes are not resolved at the local level, they must be referred up the management chain of command.

¹⁸ See infra Part 3.

¹⁹ A container is in an open area when it is in an area from which it can be retrieved. In contrast, a closed area is a section of a container yard in which a ship is being worked. When a container is in a closed area, it cannot be retrieved for safety and labor reasons. Not all terminals have open and closed areas.

C. Evidentiary Guidelines or Corroboration

A related issue was what sort of evidence, or corroborating documentation, should cargo interests submit to support their claims for demurrage or detention waivers or free time extension. The Phase One record suggested that all stakeholders could benefit from "external guidelines regarding the type of evidence relevant to resolving demurrage and detention disputes."²⁰

The Phase Two respondents generally agreed that cargo interests seeking a demurrage waiver or free time extension should substantiate their arguments with corroborating documentation and that having guidelines could resolve disputes more efficiently. The marine terminal operators identified a number of recurring issues that result in disputed demurrage charges, including:

- Trucker or shipper unable to get an appointment within free time;
- Trucker unable to get in the terminal due to closure;
- Trucker delayed due to congestion outside terminal gates;
- Insufficient equipment available;
- Buried containers; and
- Containers in closed terminal areas.

The marine terminal operators stated that the type of problem determined what sort of evidence would be helpful, and that much of it was in the possession of the marine terminal operators themselves, at least at technologically advanced terminals. Some marine terminals have systems that can verify terminal closures. Some have real-time location systems or automatic locating systems that can track containers and vehicles. Many marine terminals with appointment systems can determine how many appointments were available on a given day, whether and when a trucker attempted to make an appointment or cancelled an appointment, and whether a trucker arrived outside an appointment window.

According to marine terminal operators, this sort of information often would demonstrate that while an appointment on the last free day might not have been available, there were plenty

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²⁰ Interim Report at 18.

of appointments at other times during free time. The marine terminal operators asserted that the last free day problems resulted from shippers using terminals as storage, truckers overcommitting, and poor communication between shippers and consignees and shippers and truckers. They nevertheless acknowledged that it would be helpful if truckers took pictures to verify situations such as lines of trucks outside a gate. Also, if cargo interests simply place a phone call if they are aware of issues with a container, these phone calls could be considered as evidence.

Cargo interests and ocean transportation intermediaries did not dispute the need to corroborate requests for waivers or extensions but believed that marine terminals or carriers should provide the evidence to them. Some cargo interests asserted that if a trucker arrives at a terminal to retrieve a container that a carrier has indicated is available, and the container is not available, the terminal operator should provide the trucker with a special trouble ticket that provides the container number, the time and date, the location within the terminal, and a description of the reason the container is not available. They reasoned that this ticket would serve as evidence to efficiently resolve disputes.

Cargo interests also urged that marine terminals provide cargo interests and truckers with appointment log records that could show a trucker's attempts to make appointments for specific containers. Similarly, ocean transportation intermediaries noted that there should be a way for a trucker to notify a terminal electronically that he attempted to make an appointment, but none was available. Both cargo interests and ocean transportation intermediaries stated that the only way a trucker could corroborate a lack of available appointments was to take a screenshot with a mobile phone.

D. Notice of Actual Container Availability

The issue most frequently discussed during Phase Two was notice of container availability and the relationship between container availability and demurrage free time. Most Phase Two participants acknowledged that notice of container availability was important. The sticking point was what "availability" means.

1. Appropriate Notice to Cargo Interests

As noted in the Interim Report, most carriers provide cargo interests with notice of vessel arrival but not notice of container availability. In Phase Two, carriers explained that they also send cargo interests numerous other notices that allow cargo interests to plan for container retrieval, such as notices regarding Customs holds, Customs releases, and carrier releases.

When asked about arrival notices, some marine terminal operators believed that notice of vessel arrival is sufficient, whereas other terminal operators, as well as cargo interests, believed that vessel arrival is a poor proxy for notice that a container is available. As one marine terminal operator noted, as vessels grow larger, a container might not be discharged (and reach a point of rest) until days after vessel arrival, depending on where the container is stowed and when the vessel arrives, due to factors such as labor shifts, weekends, and holidays.

Most marine terminal operators fill this gap between vessel arrival and container availability by making container information available on terminal websites. Usually, these terminal information systems are passive, requiring cargo interests and truckers to check on a container's availability. Cargo interests stated that they, and their truckers, spend a great deal of time scouring carrier and marine terminal webpages for basic container information.

Some marine terminal operators were amenable to the idea of "push notifications" that affirmatively notify a cargo interest or trucker that a container is available. But others stated that there was nothing unreasonable about relying on cargo interests to track their own cargo. One marine terminal operator suggested that it could be useful if a system could automatically generate a notification when the availability clock started, similar to how airline passengers receive an email notifying them that they can check in for a flight. Another terminal operator pointed out that it provides advanced availability functionality that allows cargo interests to determine the future availability of a container, and make an appointment, five days prior to the arrival of a vessel.

The problem, according to some marine terminal operators, was that cargo interests and truckers do not use available information to their advantage and often wait until the last free day to attempt to retrieve containers. In other words, the terminal operators stated, they are being asked to create tools that are not effective for the market.

Cargo interests stated that the Commission should require carrier websites to uniformly provide information about container availability, free time, and holds. They also believed that marine terminal operators should notify carriers about, and post on their webpages, any yard closures. Cargo interests also advocated a push notification system wherein carriers would send notification of container availability to cargo interests via email or other electronic means.

Ocean transportation intermediaries asserted that vessel arrival notices should be updated after vessel arrival to provide information about the last free day and the free time window for container return.

2. Definition of Availability

During FF28 interviews, it became apparent that stakeholders have very different ideas concerning what it means for a container to be "available." Some cargo interests would define availability in terms of accessibility of a container for pickup and would not consider a container available if access to it is inhibited by congestion; port, terminal, or yard closures; lack of appointments; or similar circumstances. They would further require that once a government hold is released, any remaining free time period be suspended until the container becomes available, or if the container is in demurrage, the demurrage would cease until the container becomes available.

Among marine terminal operators, there was a diversity of approaches to container availability. Some marine terminal operators were of the opinion that a container is available the moment it arrives at its first place of rest, subject to some contingencies, such as holds. Others described a number of elements that factor into whether a container is available for retrieval. To be available, they indicated, at a minimum a container: (1) must be discharged from a vessel, (2) assigned a location, (3) in an open area, (4) released from Customs and other government holds, and (5) have relevant freight and fees paid. In addition to this "core" availability, a trucker must have access to the marine terminal and a chassis (to the extent truckers do not provide their own). Other marine terminals described availability similarly as when a container is off the vessel, has no holds, and has a yard spot (i.e., the marine terminal operator knows the location of the container). A major ocean carrier indicated that cargo is not available if under hold by a regulatory authority, if not in a clearly accessible location, or if an appointment is made and a trucker arrives but cannot retrieve the cargo due to a terminal issue.

Based on the information obtained in Phase Two, it appears that stakeholders' definition of availability often depends on the concept of control. Cargo interests, for instance, proposed building into their definition of container availability the notion that access to a container is not inhibited by congestion, terminal closures, or lack of appointments, i.e., circumstances purportedly outside a shipper's or trucker's control. Several marine terminal operators also imported notions of control into their definitions of availability. According to these marine terminal operators, requirements such as payment of freight, Customs clearance,²¹ and making appointments do not render a container unavailable because those requirements are within the control of the cargo interest or trucker. From the view of many marine terminal operators, when their job was done – a container was off a vessel and in an open area -- it was available.

3. Availability and Demurrage Free Time

Phase Two of the Fact Finding also focused on the relationship between container availability and demurrage free time. As part of field interviews, the Fact Finding Officer asked the Phase Two respondents what would happen if free time did not start until a container was available. Cargo interests strongly supported this notion, asserting that having the free time clock start when a container actually becomes available would reduce congestion because truckers would not be dispatched until they can actually retrieve the container.

Marine terminal operator responses to this question depended in part on a terminal operator's definition of availability. For those who said that a container was "available" once it had a yard location, and a yard location was known shortly after discharge (due to real time location technology), starting free time upon availability as opposed to a predetermined time after discharge would not make a large amount of difference. For example, one marine terminal operator stated that because it does not take more than eight hours to get a container from the discharge area to the pickup area, starting free time upon availability would extend free time by eight hours. Others stated that most holds on containers are cleared by the time a vessel arrives, and they suggested that, to the extent availability depended clearing these holds, free time might

²¹ This was true even for "random" Customs inspections because, according to terminal operators, such inspections are not truly random. Some terminals, however, do not charge demurrage if a container is removed from the terminal for a government inspection. When asked about situations where a marine terminal operator delayed transporting a container to Customs, one marine terminal: (a) questioned how often that occurred, given a terminal operator's business incentive to move containers off the terminal; and (b) agreed that there should be some mechanism whereby a marine terminal operator has to get a container to Customs in reasonable amount of time.

not be affected in the majority of cases. In contrast, some marine terminal operators were concerned that starting demurrage free time once a container was available might interfere with the deterrent effect of demurrage, especially if a container was not available until an appointment was made.

Still other marine terminal operators acknowledged that free time should not start before a cargo interest can get its container. Moreover, the respondents made clear that port practices, conditions, and technology may affect how long after discharge a container can be made available. One marine terminal, for instance, pointed out that because it does not stack containers, a container is available as soon as it is off the vessel. Another idea involved the difference between days and labor shifts: a day at a terminal that operates night gates differs substantially from a day at a terminal that does not. According to one marine terminal operator, citing rail free time as an example, if demurrage free time started on availability, lasted for two shifts, and demurrage was high, there would be no problem with cargo interests timely retrieving their cargo.

Several marine terminal operators questioned whether free time still makes sense. They asserted that shippers once needed free time to get Customs approval and funding to release containers. Now, over ninety percent of containers are cleared prior to arrival, undermining this rationale for free time. In sharp contrast, cargo interests argued that they need more free time because vessels are larger, and containers are not always actually available when terminals say they are.

4. Appointment Systems

The ubiquity of appointment systems made them a major topic of discussion in Phase Two by cargo interests, truckers, and marine terminal operators. At terminals with appointment systems, a trucker must make an appointment in order to retrieve a container. Of particular concern was how these systems affect container availability.

One appointment issue was the availability of appointments. Many marine terminal operators stated that there were usually adequate appointments available; the problem was that too many cargo interests and their truckers waited until the last free day. One terminal operator suggested that instead of the current pull system, wherein marine terminal operators wait on

cargo interests to retrieve cargo at their convenience, it would be preferable to have a push system, wherein the terminal tells the cargo interests when to retrieve a container. Another pointed out that the number of appointments were limited by equipment speed and available labor. Conversely, cargo interests asserted that if a terminal can only handle a certain number of containers in a day, it should adjust the appointments or free days accordingly.

Another issue was whether cargo interests and truckers should be eligible to make appointments before a container is available. The responses were mixed. Some marine terminal operators preferred that no appointments be available until a container was available – this would, they asserted, solve a number of problems and prevent a trucker from making a dry run. As noted by one of the ocean carriers, currently cargo interests make appointments hoping their containers will be available, which takes appointments from others whose containers might already be available. Others agreed with the idea that one should not be able to make an appointment if a container is not deliverable but felt that this is a rare occurrence. Some marine terminal operators disagreed with the concept. Under their view, limiting appointments until after all the availability boxes are checked reduces flexibility, and cargo interests are more motivated to clear Customs and freight holds once an appointment is booked.

Cargo interests recommended several procedures for appointment systems, asserting that terminal appointment systems should: (1) guarantee the availability of an appointment within 48 hours of notice of container availability; (2) provide cargo interests and truckers with access to log records that track attempts to make appointments; and (3) give priority appointments to containers that were previously issued a container-not-available trouble ticket. As justification, cargo interests maintained that it is difficult to obtain appointments, and even more so after a failed pickup attempt.

E. Other Phase Two Topics

During the course of Phase Two of the investigation, the respondents raised a number of other issues. One was free flow.²² Many marine terminal operators wanted to promote free flow but suggested that it was difficult to implement because, while helpful for large shippers, it was

²² Free flow or peel off refers to a system where a trucker retrieves the first available container from a terminal (or pile of containers within a terminal) rather than retrieving a particular container.

less helpful to smaller shippers or those who use ocean transportation intermediaries. Moreover, they suggested that free flow must be done systemwide rather than on a shipper-by-shipper basis to be successful.

Another frequently discussed topic was the benefits and problems with technology. Some cargo interests and ports were strong advocates of the benefits of technology, such as the upgraded dashboard at the Port of New York and New Jersey, known as TIPS. Ideally, according to many truckers, there would be one reservation system for all stakeholders so that everyone is using the same system. But another port official pointed out that to be truly effective, technology has to be adopted systemwide. If different entities have different operating systems, different portals, etc., it will actually reinforce silos among marine terminal operators and between them and their customers.

OBSERVATIONS AND ANALYSIS

A. Scope and Complexity of Demurrage and Detention Concerns

As pointed out in the Interim Report, the information obtained in Phase One of Fact Finding 28 indicated that cargo interest and trucker concerns about demurrage and detention cannot be explained solely by unique events in 2014-2015. The information obtained also indicated that these concerns are not limited to larger ports such as those in Southern California or New York/New Jersey.²³ In fact, information obtained during Phase One suggested that numerous non-U.S. ports also wrestle with demurrage and detention concerns, despite foreign operating environments and differing procedures.

The Phase Two respondents reported an ongoing surge in cargo in the post-holiday shipping season in 2018, with as many as 150,000 additional containers expected in Southern California ports alone, as cargo interests seek to avoid impending tariffs. In light of these figures, carriers warned that the Commission may be hearing about port congestion as a result. Moreover, increasing diversity of business models in the terminal industry may disrupt previous relationships, business methods, and incentives.

The prevalence of demurrage and detention problems, and the difficulty in resolving them, is not surprising. The U.S. international ocean supply chain is a complex system of cargo delivery. As noted in the Order of Investigation, ²⁴ contractual and operational relationships are not always aligned. Cargo interests usually have contractual relationships with carriers and truckers, but not with marine terminal operators. Marine terminal operators have contractual relationships with carriers but typically not cargo interests or truckers. But terminals, cargo interests, and truckers interact with each other on a daily basis, and in many cases, terminals collect demurrage (i.e. line or carrier demurrage) from cargo interests or truckers on carriers' behalf.

²³ Interim Report at 7-8.

²⁴ Order of Investigation at 2.

The nature of these relationships has a number of consequences. Marine terminal operators, for instance, are concerned that shippers and carriers negotiate extensive free time, which turns their terminals into *de facto* warehouses.²⁵ Truckers have also pointed out that they lack any leverage with carriers or the marine terminal operators with whom they interact on an everyday basis. Similarly, a lack of communication among truckers, carriers and marine terminal operators can result in problems. One such problem involves a trucker arriving at a terminal with his own chassis, only to find that his container has already been placed upon a chassis, resulting in a flip fee.

These arrangements are unlikely to change. Cargo interests, ocean transportation intermediaries, and marine terminal operators generally expressed a preference for dealing with carriers when possible. ²⁶ Alliances among carriers may contribute to complexity rather than reduce it. For instance, in Southern California, both truckers and marine terminal operators pointed out that because alliance carriers call at multiple terminals, empty container return locations sometimes change without adequate notice to truckers.

Moreover, while truckers are encouraged to perform dual transactions (returning an empty container and picking up a loaded container on the same trip to a terminal), carrier alliance operations can result in triangle moves, wherein a trucker is asked to return a container to a different terminal than that from which it was picked up, and then must go to another terminal to get an import container. The need for empty containers at a particular terminal can result in chassis misalignment, as every empty container comes with a chassis.

B. Notice of Cargo Availability

The full investigatory record also demonstrated that while free time is derived from a carrier's obligation to tender cargo for delivery, carriers and marine terminals focus less on tender and more on operational concepts such as vessel arrival, container discharge, first point of

²⁵ Although ports and terminals do not control the contractual relationships between cargo interests and shippers, and thus the free time a carrier offers its customers, they can negotiate with carriers about the demurrage and free time policies of the ports and terminals vis-à-vis carriers. One port, for instance, created an ancillary fee approach where miscellaneous charges, including demurrage for the first 30 days on dry containers, were rolled into one ancillary fee per container. The port would then adjust the ancillary fee as needed based on the carriers actual utilization of the port.

²⁶ The Phase Two respondents exhibited little appetite for the optional billing model described in the Interim Report.

rest, yard location, and open and closed areas. Similarly, for the purposes of day-to-day operations, cargo interests and truckers are primarily interested in cargo availability.

For background, a carrier is obligated, as part of its contract of carriage, to tender for delivery²⁷ cargo to a consignee.²⁸ Tender requires more than depositing cargo on a "reasonable pier."²⁹ To tender for delivery, unless the Customs or regulations of the port require otherwise, a carrier must: (1) unload cargo onto a dock or pier, (2) place it at a location where it is accessible to the consignee, (3) segregate it by bill of lading and count, (4) give the notice to the consignee, and (5) afford the consignee a reasonable opportunity to come and get it.³⁰ In discharging this duty, the carrier is also required to provide, directly or through an agent, adequate terminal facilities.³¹

This reasonable opportunity to pick up cargo is what the industry refers to as free time for demurrage.³² Because it is part of a carrier's transportation obligation, free time is not a gratuity; the carrier or its agents or contractors (e.g. terminals) must provide it.³³ Thus tender and demurrage are related: a carrier cannot charge demurrage unless it has tendered cargo for delivery.³⁴

²⁷ The "tender" cases tend to involve port-to-port moves (i.e., merchant haulage) rather than door-to-door moves (carrier haulage), where actual delivery is more likely to occur.

²⁸ See, e.g., Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n, 10 F.M.C. 409, 415 (FMC 1967).

²⁹ Boston Shipping Ass'n, 10 F.M.C. at 415.

³⁰ Am. President Lines, Ltd. v. Fed. Mar. Bd., 317 F.2d 887, 887, 888 (D.C. Cir. 1962); Boston Shipping Ass'n, 10 F.M.C. at 415. The COGSA and Harter Act cases cited by the Phase One respondents in their written responses use the terms "actual delivery" and "constructive delivery" rather than "tender for delivery." But "constructive delivery" and "tender for delivery" appear to be similar, as both are defined in terms of cargo discharged from a vessel, made accessible to a consignee for a reasonable time, with notice to the consignee. Compare B Elliott (Canada), Ltd. v. John T. Clark & Sons, Inc., 704 F.2d 1305, 1308 (4th Cir. 1983), with Am. President Lines, 317 F.2d at 887-88.

³¹ Boston Shipping Ass'n, 10 F.M.C. at 415; Investigation of Free Time Practices – Port of San Diego, 9 F.M.C. 524, 539 (FMC 1966).

³² Port of San Diego, 9 F.M.C. at 539 ("This allowance by the carrier to the consignee of 'a reasonable opportunity to come and get' his cargo is what is known in the industry as free time.").

³³ Port of San Diego, 9 F.M.C. at 539; *id.* at 540 ("Free time is not a gratuity, but it is required as a necessary part of the carrier's transportation obligation which includes a duty on the carrier to 'tender for delivery' all cargo carried by it absent a special contract to the contrary."); *id.* at 540 (noting that the port, as agent of the carrier, was required to provide reasonable free time).

³⁴ In re Free Time and Demurrage Practices on Inbound Cargo at New York Harbor, 9 S.R.R. 860, 874 (FMC 1967) (noting that the carrier has an obligation to tender for delivery "free of assessments of any demurrage"); Free Time and Demurrage Charges at New York, 3 U.S.M.C. 89, 101 (U.S.M.C. 1948) ("[C]onsignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties.").

Although much of the caselaw pre-dates, or does not address, containerization, and arose in a different regulatory environment, it nonetheless highlights points of significance to the Fact Finding. First, the duties owed cargo interests are owed by the *carrier*. Carriers are responsible for tendering cargo for delivery, and thus carriers are responsible for giving the requisite notice regarding cargo, making terminal facilities available, ensuring that cargo is accessible for retrieval, and giving cargo interests adequate time for retrieval. They may rely on marine terminal operators and others to meet these obligations on their behalf, but carriers cannot disclaim responsibility until delivery is tendered. Second, while there may be good reason to reconsider some of the older "tender" caselaw in light of the current shipping operations, the cases demonstrate that free time turns on *notice* to cargo interests, *accessibility* of cargo to consignees, and *reasonable opportunity* to pick cargo up.³⁵

Viewing the record with these general principles in mind, it is evident that some of the demurrage problems complained of may benefit from a focus on container availability. Presently, although demurrage and detention practices differ among ports and even among terminals at the same port, in general it appears that the start of allotted free time typically begins either when cargo is off-loaded from a vessel or when the container is moved to the terminal yard. In some cases, free time reportedly begins with vessel arrival.

The respondents in both phases of the investigation generally indicated that the primary purpose of demurrage and detention is to establish a financial incentive to encourage the productive use of assets (containers and terminal space) and promote optimal velocity of cargo flow across the terminal and out of the port. ³⁶ For demurrage and detention to be effective, and for demurrage and detention practices to be reasonable, they must be tailored (and limited) to those situations in which the container is actually available. ³⁷

. .

³⁵ Notice, at least for the purposes of delivery in the Harter Act context, typically refers to "notice that goods have been discharged" from a vessel. *See*, *e.g.*, *B. Elliott*, 704 F.2d at 1308 (quoting *Orient Overseas Line*, *Inc.* v. *Globemaster Baltimore*, *Inc.*, 365 A.2d 325, 335-36 (Md. App. 1976)).

³⁶ Some cases refer to demurrage also serving a compensatory purpose. *New York Harbor*, 9 S.R.R. at 864 (FMC 1967) (noting that demurrage has both a penal purpose and "is the charge assessed for the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time."); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. at 107.

³⁷ See, e.g. Free Time and Demurrage Charges at New York, 3 U.S.M.C. at 107 ("When property lies at rest on a pier after free time has expired and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier."). Moreover, it is well-established that just and reasonable practices under 46 U.S.C. § 41102(c) must be

In considering whether a carrier's or marine terminal operator's demurrage practices adequately address container availability, accessibility, and notice thereof, a number of considerations should be taken into account, given the principle that demurrage and detention are, in the first instance, incentive-creating charges:

- Where appointment systems are used, whether carrier and marine terminal operator demurrage practices take into consideration a cargo interest or trucker's reasonable opportunity to make an appointment following notice that cargo was available:
- Whether carrier and marine terminal operator demurrage practices extend free time to mitigate for any delay in moving a container to an examination facility for government inspections or holds; and
- Whether carrier and marine terminal operator demurrage practices take into account terminal closures that occur after notice of availability is given, and provide for notice of terminal closures or revised notice of container availability.³⁸

C. Demurrage and Detention Billing Practices

As mentioned in the investigation's Interim Report, the lack of uniformity of billing practices, timeframes, and transparency can cause confusion about the demurrage and detention charges that are imposed. For that reason, ocean carriers and marine terminals should have clear billing processes and procedures, and clear avenues for shippers to pursue billing questions or disputes with officials empowered to resolve them.

Based on discussions with carriers, cargo interests and marine terminal operators, it appears that public webpages which explain demurrage and detention billing practices are the most effective way to meet this need.

[&]quot;otherwise lawful but not excessive and which is fit and appropriate to the end in view." *Distribution Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan & Its Member Lines*, 24 S.R.R. 714, 721 (FMC 1988) (quoting *Port of San Diego*, 9 F.M.C. 525 (FMC 1966)).

³⁸ In cases where the shipper has not exceeded the allotted free time, typically free time is suspended when terminal facilities are closed. But it is unclear why, if a shipper is outside free time, demurrage would continue to run where terminal facilities are closed, since an incentive cannot be effective if the shipper cannot access its cargo.

D. Dispute Resolution Processes and Procedures

As with billing practices, it is important to the smooth operation of the cargo delivery system that shippers and their drayage providers understand and have easy access to information concerning a marine terminal's or carrier's dispute resolution process and procedures.

Consequently, the Fact Finding Officer believes that, as with billing practices, it is important that dispute resolution process and procedures be: (a) clearly established; (b) made available on public webpages; and (c) include information about who – which person or organizational unit – should be contacted to discuss and resolve any demurrage and detention disputes that arise.

E. Standard Terminology

As the Interim Report explained in some detail, industry terminology is not used consistently by carriers and marine terminal operators, which may cause confusion. There was a general consensus that standardization and clarification of language would be useful. The only question going forward is how to define the terms at issue and how to implement standardization.

Some respondents in both phases of FF28 preferred the traditional definitions of demurrage and detention, where demurrage refers to any charge for use of terminal space or a carrier's container within the terminal, and detention refers to the carrier's charge for use of a container outside the terminal. In some instances, this may lead to two types of demurrage: the demurrage imposed on cargo interests by carriers via tariffs and service contracts, and the demurrage imposed on carriers by marine terminal operators, as set forth in terminal services agreements.

Several respondents favored the approach described in the Interim Report, which defined demurrage and detention in terms of the source of the charge. Under that approach, demurrage is a charge for the use of terminal land or space, and detention is a charge for the use of a container. This would result in one kind of demurrage, charged by the marine terminal operators or ports that control terminal land. As for detention, carriers could still distinguish between on-terminal and off-terminal use of a container, which could be reflected in the type of detention: on-terminal or off-terminal.

F. FMC Shipper Advisory Board

During the course of the investigation, it was found that the complexity of port operations and the wide variation in port procedures and practices supported the conclusion that the Commission could benefit from the establishment of a Shipper Advisory Board for the Federal Maritime Commission. The Fact Finding Officer also supports advisory boards for other Commission stakeholders and those involved in the U.S. international freight delivery system.

CONCLUSIONS AND RECOMMENDATIONS

Having developed a record on the issues identified in the Order of Investigation and reporting on them in the Interim Report, and having explored these and related issues and potential solutions in the second phase of the investigation, the Fact Finding Officer finds that:

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

The Fact Finding Officer further finds, based on the FF28 record, that significant benefits to the U.S. international ocean freight delivery system, and the American economy as a whole, would result from:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to cargo interests of container availability; and
- An FMC Shipper Advisory Board.

In light of these Findings, the Fact Finding Officer recommends that the Commission organize FMC Innovation Teams composed of industry leaders who will meet on a limited,

short-term basis to refine commercially viable demurrage and detention approaches in the above areas.

Finally, Commissioner Dye also recommends the establishment of a Shipper Advisory Board to offer information and insights to the Commission on emerging maritime issues. Commissioner Dye also supports advisory boards for other stakeholders and those involved in the U.S. international freight delivery system.

On December 7, 2019, the Federal Maritime Commission voted to accept this report and to approve the recommendations contained herein.



Nederal Maritime Commission Washington, P.C. 20573

August 27, 2019

Chairman Michael A. Khouri Commissioner Daniel B. Maffei Commissioner Louis E. Sola U.S. Federal Maritime Commission 800 North Capitol Street, N.W. Washington, D.C. 20573

Dear Colleagues:

It is my privilege to report on the last phase of Fact Finding Investigation No. 28 and to present my final recommendations as Fact Finding Officer. I recommend that the Commission issue an interpretive rule to implement the general guidance contained in my Final Report on the application of demurrage and detention charges. I also recommend that the Commission establish a Shipper Advisory Board and continue to support the work of the Supply Chain Innovation Team in Memphis.

Since January, we have worked with industry stakeholders to refine the findings and recommendations contained in the Final Report. Working with industry leaders representing major international ocean supply chain businesses has been a pleasure. Several of the most knowledgeable ocean carrier, seaport, and marine terminal officials have been especially helpful to me as we developed approaches to addressing demurrage and detention concerns, and I appreciate their cooperation and advice.

We also hosted two groups in Washington, D.C., representing ocean carriers, marine terminals, ocean transportation intermediaries, truckers, U.S. importers, and U.S. exporters to discuss the feasibility of implementing the recommendations in the Final Report. The valuable discussions with stakeholders during this phase of the investigation gave me confidence that Commission guidance, consistent with the Final Report's findings, is advantageous and workable.

I recommend that the Commission issue the attached Notice of Proposed Rulemaking, which proposes an *interpretive* rule that clarifies how the Commission will assess the reasonableness of demurrage and detention practices. The rule flows from the longstanding principle that practices imposed by tariffs, which are implied contracts by law, must be tailored to meet their intended purpose. In the case of demurrage and detention charges, the purpose is to act as financial incentives to cargo interests to retrieve cargo and return equipment.

These financial incentives operate to ensure that cargo interests do everything customarily required to be positioned to retrieve cargo and return equipment within the time allotted. Absent extenuating circumstances, however, when incentives no longer function because shippers are prevented from picking up cargo or returning containers within time allotted, charges should be suspended.

Focusing on this incentive principle and cargo availability, and supporting innovations such as a "push notice" of container availability, will improve port performance and overall freight delivery system effectiveness.

The interpretive rule also includes other factors that the Commission may consider as contributing to the reasonableness inquiry. These considerations include the existence, accessibility, and transparency of demurrage and detention policies, including dispute resolution policies (and related concepts such as clear bills and evidence guidelines), and clarified language.

Also, consistent with my Final Report, I recommend that the Commission establish a Shipper Advisory Board to allow us to evaluate the implementation of the Fact Finding No. 28 recommendations and to obtain the advice of American importers and exporters concerning other Commission matters.

I further recommend that the Commission continue to support the Memphis Supply Chain Innovation Team in its efforts to improve the performance of the international ocean container freight delivery system.

As I said at the beginning of the Commission's investigation, my interest in demurrage and detention practices is to ensure that the charges are applied in a way that improves the fluidity and overall performance of the American freight delivery system. The proposed interpretive rule accomplishes this without inhibiting the industry's ability to craft flexible commercial solutions to commercial problems.

In closing, I would like to thank the Commission staff members whose participation was essential to this project. Finally, thanks to you, my colleagues, for your support during this effort.

Sincerely,

Rebecca F. Dye Commissioner

BEFORE THE FEDERAL MARITIME COMMISSION

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC.

Complainant,

V.

OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION, INC.; CONSOLIDATED CHASSIS MANAGEMENT, LLC; CMA CGM S.A.; COSCO SHIPPING LINES CO. LTD.; EVERGREEN LINE JOINT SERVICE AGREEMENT, FMC NO. 011982; HAPAG-LLOYD AG; HMM CO. LTD.; MAERSK A/S; MSC MEDITERRANEAN SHIPPING COMPANY S.A.; OCEAN NETWORK EXPRESS PTE. LTD.; WAN HAI LINES LTD.; YANG MING MARINE TRANSPORT CORP.; AND ZIM INTEGRATED SHIPPING SERVICES,

Respondents.



Docket No. 20-14

COMPLAINT FOR VIOLATION OF THE SHIPPING ACT OF 1984, 46 U.S.C. § 41102(C)

INTRODUCTION

1. Complainant Intermodal Motor Carriers Conference of the American Trucking Associations ("IMCC") brings this Complaint on behalf of its intermodal motor carrier members, seeking declaratory relief and an order to cease and desist from violations of the Shipping Act of 1984 directed to Respondents Ocean Carrier Equipment Management Association Inc. ("OCEMA"), Consolidated Chassis Management, LLC ("CCM"), CMA CGM S.A. ("CMA"), COSCO SHIPPING Lines Co. Ltd. ("COSCO"), Evergreen Line Joint Service Agreement, FMC No. 011982 ("Evergreen"), Hapag-Lloyd AG ("Hapag-Lloyd"), HMM Co. Ltd. ("HMM"), Maersk A/S ("Maersk"), MSC Mediterranean Shipping Company S.A.

("MSC"), Ocean Network Express Pte. Ltd. ("ONE"), Wan Hai Lines Ltd ("Wan Hai"), Yang Ming Marine Transport Corp. ("Yang Ming"), and Zim Integrated Shipping Services ("Zim"). As IMCC alleges below—based upon first-hand industry knowledge and expertise and upon information and belief as to all other matters—OCEMA, its members, and participating nonmembers have adopted and imposed unjust and unreasonable regulations and engaged in unjust and unreasonable practices by requiring the use of OCEMA member default chassis providers, and denying motor carriers their right to select the chassis provider for merchant haulage movements, all in violation of 46 U.S.C. § 41102(c).

- 2. In 2006, OCEMA members and others filed the Consolidated Chassis

 Management Pool Agreement ("CCMP Agreement") "to provide for the formation of local,
 metropolitan, and/or regional Chassis Pools," at marine and inland intermodal terminals
 throughout the United States. FMC Agreement No. 011962, at 2, effective June 30, 2006.

 These pools were to operate through OCEMA affiliates, with rules adopted by management
 boards of those affiliates composed of OCEMA members. As OCEMA members subsequently
 sold their chassis to third-party providers, OCEMA adopted pool policies ostensibly designed to
 permit motor carriers the *freedom of chassis choice* i.e., the right of a motor carrier to choose a
 chassis from a "gray pool" owned by an independent Intermodal Equipment Provider ("IEP")
 and to be billed by that IEP.
- 3. In reality, and notwithstanding that OCEMA members do not themselves own chassis, OCEMA members control the operation of chassis pools at ports and intermodal terminals nationwide through the rules and practices they adopt for pool operation, their contracts with equipment providers, and their own rules and practices governing how the cargo containers that they own may be interchanged. OCEMA, its affiliates, and its members and

signatories to the CCMP Agreement, have exercised this unlawful control in violation of their Shipping Act obligations by:

- a. Adopting and enforcing CCM Pool Rule 5.7, giving ocean carriers ultimate control by mandating their power of "consent" over chassis choice;
- Systematically denying consent to motor carriers' chassis choice, including through posted carrier policies that expressly disallow choice when a motor carrier is billed for chassis usage;
- c. Adopting and enforcing ocean carrier "box rules" affecting containers in ports that have non-CCMP Agreement pools, such as in Los Angeles/Long Beach, that prevent chassis choice—even when IEP rules would permit motor carriers the freedom of chassis choice;
- d. Withdrawing from CCMP Agreement pools and designating single-provider chassis pools as the default provider for all container movements;
- e. Soliciting proposals for and entering into IEP contracts in which the ocean carrier designates an IEP as its default provider for haulage of containers when a motor carrier is billed for usage, while awarding the contract based on the price of haulage when the ocean carrier is billed for chassis usage; and,
- f. Exploiting these regulations and practices so as to compel IEPs to *under*charge the ocean carrier for carrier haulage ("CH") movements while *over*charging for chassis usage for merchant haulage ("MH")—without fear that the overcharge will cause the motor carrier to use the services of another IEP -- thus denying the benefits of chassis choice and price competition to motor carriers, to the benefit of the ocean carrier respondents.

- 4. As a consequence of these unlawful practices, ocean carrier respondents have caused motor carriers, their shipping and receiving customers, and ultimately the consuming public, to be overcharged in an amount that IMCC estimates to be as much as \$1.8 billion during the three years prior to the filing of this Complaint.
- 5. This misconduct by OCEMA, its affiliates, its ocean carrier members, and signatories to the CCMP Agreement constitutes precisely the type of unlawful conduct that the Commission has held should be the focus of enforcement efforts under 46 U.S.C. § 41102(c): conduct by "regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States." 83 Fed. Reg. 45367, 45372 (Sept. 7, 2018). The IMCC therefore seeks a declaratory judgment, a cease and desist order, reasonable attorneys' fees, and such other relief as the Commission determines to be proper against the Respondents to end these ongoing violations of the Shipping Act.

THE COMPLAINANT

6. Complainant IMCC is a conference of the American Trucking Associations, Inc. ("ATA"), a District of Columbia corporation. Its business address is 950 North Glebe Road, Suite 210, Arlington, VA 22203. The IMCC mission statement directs the conference to provide a stronger, more unifying and effective policy voice for the large and growing intermodal motor carrier sector before both government and private entities on key issues including roadability, economic and operational fairness and infrastructure efficiencies. The IMCC's membership includes ATA member companies engaged in the intermodal transportation of property, including the interchange of chassis with respect to receipt and return of the

containers of respondent ocean carriers. The filing of this Complaint was authorized by the IMCC's Board of Directors and its Executive Committee as fulfilling its mission to protect the economic, operational, and efficiency interests of its members. IMCC has associational standing to bring this Complaint on behalf of IMCC members because its members would otherwise have standing to sue these Respondents in their own right; IMCC seeks by this Complaint to protect interests germane to its organizational purpose; and, individual IMCC members do not need to participate in this action for the Commission to issue orders to Respondents to cease and desist from violating the Shipping Act.

THE RESPONDENTS

7. Respondent OCEMA is a District of Columbia non-profit corporation established pursuant to FMC Agreement No. 011284, effective July 6, 1990, and the latest version of which is No. 011284-81, effective July 6, 2020. OCEMA's business address is 1200 19th Street, N.W., 3rd Floor, Washington, D.C. 20036. According to its website:

OCEMA is an association of major U.S. and foreign flag international ocean common carriers. OCEMA provides a forum for its members to discuss, evaluate and reach agreement with respect to matters pertaining to the interchange, transportation, use and operation of carrier equipment in the U.S. Included in its scope are equipment-related operational, safety, and regulatory activities such as participation in industry forums, educational sessions, regulatory proceedings and legislative matters. OCEMA members operate worldwide and serve all major U.S. ports and inland locations, moving cargoes primarily in containers. As a regular part of intermodal transportation services provided to U.S. manufacturers, importers, retailers and others, OCEMA members interchange cargo to be carried to and from U.S. inland locations via motor carriers and railroads. An essential element of these inland operations involves the movement of containers on intermodal chassis and rail cars.

OCEMA, http://www.ocema.org/about.html.

OCEMA's "Senior Steering Committee is comprised of Senior representatives from each OCEMA member line and is the primary forum for high level policy discussions"; OCEMA's

Executive Committee serves as its board of directors. OCEMA reaches agreements on policies relating to the operation of Chassis Pools, and communicates these operating instructions to any entity formed to own or operate a Chassis Pool. OCEMA's website reports that its members are responsible for 80 percent of global container traffic. Respondent's email address is jlawrence@cozen.com.

- 8. Respondent CCM is a limited liability company under the laws of Delaware. CCM's headquarters is located at 500 International Drive, Suite 130, Budd Lake, NJ 07828. CCM and its affiliated pools operate pursuant to the CCMP Agreement, FMC Agreement No. 011962, the latest version of which is FMC Agreement No. 011962-016, effective July 28, 2020. According to CCM's website, "CCM's mission is to operate the most efficient and effective chassis provision model for all stakeholders. It will achieve this by following a 'fully interoperable gray pool' operating philosophy...." CCM, https://www.ccmpool.com/About/Our-Mission.aspx. Under Article 6.1 of the CCMP Agreement, selection of the management boards of CCM and affiliate regional pools is vested in Consolidated Chassis Enterprises, LLC. ("CCE"), a Delaware limited liability company that is CCM's parent. The governing boards of CCM and its affiliates are selected by CCE, and may only include OCEMA Members that are Contributors and Users. Associate Members and Non-Regulated Entities do not have the right to participate in the selection of the Governing Board. Under Article 6.1 of the CCMP Agreement, CCE and its affiliates receive and implement OCEMA instructions regarding the operation of their chassis pools. Respondent's email address is mwilson@ccmpool.com.
- 9. Respondent CMA, conducting business in the United States through CMA CGM (America) LLC, is a French global ocean carrier company founded in 1978 and located at 4, Quai D'Arenc, P.O. Box 2409, 13215 Marseilles Cedex 02, France. CMA, by itself and through

its common carrier subsidiaries and affiliated companies, provides container transportation to over 420 ports in 150 countries. CMA CGM (America) LLC's U.S. office is located at 5701 Lake Wright Drive, Norfolk, VA 23502. In the United States, CMA serves multiple ports and/or intermodal terminals including New York, Baltimore, Charleston, Savannah, Jacksonville, New Orleans, Houston, Chicago, Los Angeles, and Oakland. CMA is a member of OCEMA and the CCMP Agreement. Respondent's email address is usa.thaas@usa.cma-cgm.com.

- 10. Respondent COSCO, conducting business in the United States through COSCO Shipping (North America) Inc., is a Chinese global ocean carrier company founded in 1964 and located at No. 378 Dong Da Ming Road, Shanghai, 200080, People's Republic of China. COSCO is a subsidiary of COSCO Shipping Corporation Limited, a company established after the 2016 merger of COSCO and China Shipping. COSCO's U.S. office is located at 100 Lighting Way, Secaucus, NJ 07094. COSCO, by itself and through its common carrier subsidiaries and affiliated companies, offers container transportation in 356 ports in 105 countries. In the United States, COSCO serves multiple ports and/or intermodal terminals including New York, Norfolk, Savannah, Charleston, Miami, Chicago, Los Angeles, and Long Beach. COSCO is a member of OCEMA and the CCMP Agreement. Respondent's email address is jhoughta@cosco-usa.com.
- 11. Respondent Evergreen is a joint service agreement between Evergreen Marine Corp. (Taiwan) Ltd., Italia Marittima S.P.A., Evergreen Marine (Singapore) Pte Ltd, Evergreen Marine (UK) Ltd., and Evergreen Marine (Hong Kong) Ltd., FMC Agreement No. 011982 and located at No. 163, Sec. 1, Hsin-Nan Road, Luchu Hsian, Taoyuan Hsien, 338, Taiwan. Evergreen conducts business in the United States through Evergreen Shipping Agency (America) Corporation, located at One Evertrust Plaza, Jersey City, NJ 07302. Evergreen, by itself and

through its common carrier subsidiaries and affiliated companies, provides container transportation at 240 ports globally in 80 countries. In the United States, Evergreen serves multiple ports and/or intermodal terminals including New York, Norfolk, Savannah, Charleston, Tacoma, Oakland, and Los Angeles. Evergreen is a member of OCEMA and the CCMP Agreement. Respondent's email address is TomWang@evergreen-shipping.us.

- 12. Respondent Hapag-Lloyd, conducting business in the United States through Hapag-Lloyd (America) LLC, is a German global container carrier company founded in 1970 and located at Ballindamm 25, 20095 Hamburg, Germany. Hapag-Lloyd (America) LLC's U.S. address is 399 Hoes Lane, Piscataway, NJ 08854. Hapag-Lloyd, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation on major trade routes in 129 countries and provides connections between more than 600 ports. In the United States, Hapag-Lloyd serves multiple ports and/or intermodal terminals including Norfolk, Charleston, Savannah, Port Everglades, Houston, Chicago, Los Angeles, and Long Beach. Hapag-Lloyd is a member of OCEMA and the CCMP Agreement. Respondent's email address is thomas.barattini@hlag.com.
- 13. Respondent HMM is a South Korean global ocean carrier company founded in 1976 and located at 194 Yulgok-ro, Jogno-gu, Seoul, Korea. HMM's global reach includes four international headquarters, 27 subsidiaries, 76 branches, five overseas offices, and 10 liaison offices. HMM conducts business in the United States through Hyundai America Shipping Agency Inc., located at 7701 Las Colinas Ridge, Suite 400, Irving, TX 75063. HMM, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation to multiple U.S. ports and/or intermodal terminals including New York, Norfolk, Savannah, Jacksonville, El Paso, Chicago, Oakland, Long Beach, and Los Angeles. HMM is a

member of OCEMA and the CCMP Agreement. Respondent's email address is hikid@hmma.com.

- 14. Respondent Maersk, conducting business in the United States through Maersk Inc., is a Danish global ocean carrier company founded in 1904 and located at 50, Esplanaden, DK-1098 Copenhagen, Denmark. Maersk Inc.'s U.S. office is located at 9300 Arrowpoint Boulevard, Charlotte, NC 28273. Maersk, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation and is the world's largest container and supply vessel operator. In the United States, Maersk serves multiple ports and/or intermodal terminals including New York, Baltimore, Charleston, Jacksonville, Miami, Houston, New Orleans, Chicago, and Los Angeles. Maersk is a member of OCEMA and the CCMP Agreement. Respondent's email address is tom.weisberg@maersk.com.
- 15. Respondent MSC, conducting business in the United States through Mediterranean Shipping Company (USA) Inc., is a global container shipping company founded in 1970 and headquartered at S.A. Chemin Rieu 12-14, 1208 Geneva, Switzerland.

 Mediterranean Shipping Company (USA) Inc.'s U.S. office is located at 420 5th Avenue, 8th Floor, New York, NY 10018. MSC, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation in over 300 ports globally. In the United States, MSC serves multiple ports and/or intermodal terminals including New York, Norfolk, Charleston, Savannah, New Orleans, Houston, Chicago, Oakland, and Los Angeles. MSC is a member of OCEMA and the CCMP Agreement. Respondent's email address is robert.milazzo@msc.com.
- 16. Respondent ONE, conducting business in the United States through Ocean Network Express (North America) Inc., is a global ocean carrier company founded in 2017, with

global headquarters located at 7 Straights View, #16-01 Marina One East Tower, Singapore 018936. Ocean Network Express (North America) Inc.'s U.S. address is 8730 Stony Point Parkway, Suite 150, Richmond, VA 23235. ONE, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation to a network that encompasses a fleet of 250 vessels operating in over 100 countries. In the United States, ONE serves multiple ports and/or intermodal terminals including New York, Norfolk, Savannah, Houston, Chicago, and Los Angeles. ONE is jointly owned by the Japanese shipping companies Nippon Yusen Kaisha, Mitsui O.S.K. Lines Ltd., and Kawasaki Kisen Kaisha Ltd. (K Line) through Ocean Network Express Holdings Ltd, Japan. ONE is a member of OCEMA and the CCMP Agreement. Respondent's email address is dave.daly@one-line.com.

- 17. Respondent Wan Hai, conducting business in the United States through Wan Hai Lines (USA) Ltd., is a Taiwanese global ocean carrier company founded in 1965 and located at 10th Floor, No. 136, Sung Chiang Road, Taipei 10417, Taiwan. Wan Hai's U.S. address is 301 E. Ocean Boulevard, #1650, Long Beach, CA 90802. Wan Hai, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation, operating roughly 20 routes in 43 major international ports. In the United States, Wan Hai serves multiple ports including Seattle, Long Beach, and Los Angeles. Wan Hai is a member of OCEMA. Respondent's email address is tim_murphy@wanhai.com.
- 18. Respondent Yang Ming is a Taiwanese global ocean carrier company founded in 1972 and located at 271 Ming De 1st Road, Cidu District, Keelung 20646, Taiwan, Republic of China. Yang Ming, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation in Asia, Europe, America, and Australia. Yang Ming conducts business in the United States through Yang Ming (America) Corporation, whose

office is located at One Newark Center, 1085 Raymond Boulevard, 9th Floor, Newark, NJ 07202. In the United States, Yang Ming serves multiple ports and/or intermodal terminals including New York, Norfolk, Charleston, Houston, Chicago, Wilmington, Long Beach, and Los Angeles. Yang Ming is a member of the CCMP Agreement. Respondent's email address is austinchen@us.yamgming.com.

Integrated Shipping Services Company, Inc., is an Israeli global ocean carrier company founded in 1945, and located at 9 Andrei Sakharov St., "Matam"- Scientific Industries Center, P.O.B.
1723, Haifa 31016, Israel. Zim American Integrated Shipping Services Company, Inc.'s U.S. address is 5801 Lake Wright Drive, Norfolk, VA 23502. Zim, by itself and through its common carrier subsidiaries and affiliated companies, provides container transportation to over 100 countries and networks in major strategic ports worldwide. In the United States, Zim serves multiple ports and/or intermodal terminals including New York, Norfolk, Savannah, Miami, New Orleans, Houston, Chicago, Seattle, Oakland, and Los Angeles. Zim is a member of OCEMA and the CCMP Agreement. Respondent's email address is messing.dennis@us.zim.com.

JURISDICTION AND LEGAL AUTHORITY

20. The Commission has jurisdiction over this Complaint pursuant to 46 U.S.C. § 41301 because it alleges violations of the Shipping Act of 1984, 46 U.S.C. § 41102(c), by ocean common carriers and their agents engaged in international maritime commerce of the United States at ports and inland intermodal terminals where they engage in the interchange of cargo containers and container chassis moving in such commerce. Section 41102(c) provides:

(c) Practices in Handling Property.—

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

21. The Commission has personal jurisdiction over the ocean carrier respondents because they have engaged and continue to engage in such international maritime commerce of the United States, and because they have submitted to the jurisdiction of the Commission by filing agreements with the Commission as required by 46 U.S.C. §§ 40301(a), 40302. Article 5.8 of the Ocean Carrier Equipment Management Association, FMC Agreement No. 011284, expressly acknowledges that its agreements on issues specified in that section are "Subject to the Shipping Act of 1984, as amended." The Commission has jurisdiction over OCEMA as an entity created pursuant to FMC Agreement No. 011284 and as an agent for its ocean carrier members. The Commission has jurisdiction over Consolidated Chassis Management, LLC and its affiliates as entities created pursuant to the CCMP Agreement, FMC Agreement No. 011962, and as agents for the members of OCEMA who control their governance pursuant to the provisions of that agreement.

FACTUAL ALLEGATIONS

A. Chassis and the Development of the Business Models Used to Provide Them

22. A chassis used by motor carriers to move containers "is a frame with a suspension and axle system, wheels and tires, brakes, a lighting and electrical system, a coupling for towing behind a truck tractor, and twistlocks that provide the securement points to the corner castings on a container. Newly constructed and remanufactured chassis often have high-tech components such as asset tracking, or GPS, weight sensors and automatic tire inflation systems." Intermodal Association of North America ("IANA"), *Intermodal Factbook*, at 14 (2018), IANA,

https://www.intermodal.org/sites/default/files/documents/2018-08/IntermodalFactbook.pdf.

Chassis used to move international containers are generally sized to accommodate the 20, 40, or 45-foot container lengths standardized by the International Standards Organization. *Id.*

- 23. Motor carriers usually bring a chassis onto a port dock where a container is loaded onto the chassis. This is referred to as a "landed" operation, since the containers are stored stacked without chassis. In contrast, at inland intermodal terminals, the railroad or ramp operator loads a container onto a chassis prior to the motor carrier's arrival, which is referred to as a "wheeled" operation. Motor carriers then move the container and the chassis on which the container sits to a customer location, where it generally remains until the motor carrier picks up the container and chassis for its return to the port or terminal. Once the container is off-loaded from the chassis, the chassis is returned to the appropriate drop-off location, which may be on or off port, unless the chassis is used to pick up another container. Depending on circumstances, the roundtrip may take 10 or more days. For MH movements, the motor carrier is generally charged a daily usage fee from the time of pick-up to drop-off. In some instances, the motor carrier may be allowed a certain number of free days, in which case the subsequent charges may be denominated "per diem" charges.
- 24. There are currently in the United States between 400,000 and 500,000 chassis used in the haulage of international containers.
- 25. There are multiple business models by which chassis may be provided for daily use for the interchange of containers. In other countries, including Canada and Mexico, motor carriers own or lease chassis, facilitating efficient pick-up and drop off of containers using the same chassis. *Id.* at 15. In the United States, historically ocean carriers owned or directly leased chassis. Motor carriers had to pick up and return both a chassis and container from an ocean

carrier. *Id.* This led to inefficiencies, particularly if some carriers had shortages while others had chassis to spare. In those cases, a motor carrier could pick up and drop off the chassis and container from one ocean carrier, but be unable to pick up and drop off the container from another.

26. According to IANA,

In the 1990s, steamship lines began entering into alliances whereby partner ocean carriers would cooperate on trade routes by sharing services and space, pooling available container slots on their vessels. In order to optimize the allocation of their chassis and minimize terminal capacity issues, steamship lines began to share chassis assets through regional cooperatives, or co-ops, and the alliance co-op chassis pool supply model. In this model, the member contributor companies that own the equipment make joint decisions regarding the pool. ... In the U.S. the group Consolidated Chassis Management, or CCM, is a subsidiary of the Ocean Carrier Equipment Management Association, or OCEMA. CCM independently operates regional pools around the country on behalf steamship line OCEMA members that contribute chassis.

- *Id.* As discussed *infra*, this governance structure has remained notwithstanding OCEMA members' exit from the business of owning chassis.
- 27. A third U.S. model for daily use of chassis is based on pools organized by chassis leasing companies. According to IANA:

In some regions, third-party chassis leasing companies have developed chassis pools independent of steamship lines and motor carriers. In this neutral chassis pool or "gray pool" supply model, the chassis leasing company owns the equipment and operates the pool by providing responsibility for the equipment, maintenance and repair, insurance, and repositioning of assets based off the chassis' supply and demand. In this model, motor carriers, steamship lines and other customers use a chassis by "renting" the equipment at a daily rate. This allows users to operate individual or multiple chassis without the need to maintain and administer the daily operations of the fleet. Examples of "gray pools" include the Pool of Pools in Los Angeles/Long Beach....

Id. at 16. As alleged *infra*, the respondent ocean carriers have adopted and enforced regulations and procedures that prevent motor carriers from exercising the ability to choose chassis from participant pools.

- 28. "In the US, starting in 2009, ocean carriers began withdrawing from the chassis business. Most transferred their equipment to a few major intermodal equipment providers (IEPs) that now own, maintain and provide chassis...." Statement of Commissioner Rebecca Dye before the *Surface Transportation Board Oversight Hearing on Demurrage and Accessorial Charges* (May 22, 2019) ("Dye Statement"), https://www.fmc.gov/statement-of-dye-stb-demurrage. According to a March 5, 2014 presentation by CCM on behalf of OCEMA, entitled *Operational and Commercial Changes in the Chassis World*, CCM, https://www.ccmpool.com/UploadedDocuments/Chassis%20Provision%20Outreach%20Presentation%20Feb%202014%20 (2).pdf ("March 5, 2014 Presentation"), in 2009, the ocean carriers owned 51 percent of chassis. By 2013, that percentage had been reduced to 17 percent, with leasing companies owning the remainder. *Id.* Slide 9. Today, none of the respondent ocean carriers owns chassis in the United States.
- 29. At present, three major IEPs lease chassis to ocean carriers and motor carriers: TRAC Intermodal, Direct ChassisLink Inc. ("DCLI"), and Flexi-Van, as well as several smaller providers.
- 30. Some motor carriers own their own chassis. Several IMCC members participate in the North American Chassis Pool Cooperative.
- 31. Under all of the chassis business models described above, financial responsibility for the payment of daily chassis charges can be divided into two models.
 - Under CH, the ocean carrier tariff or contract includes the transport of a container to or from a shipper's or receiver's point of delivery, and the ocean carrier is thus responsible for payment of chassis charges.

Under MH, the motor carrier (or, in limited instances, the shipper/receiver) bears
financial responsibility for daily container and chassis fees. *See, e.g.*, March 5, 2014
Presentation at Slide 12. Under MH, the motor carrier pays the ocean carrier or IEP and then bills its customer, the shipper or receiver, for the chassis usage.

B. The OCEMA and CCMP Agreements

- 32. The initial version of the OCEMA agreement was filed with the Commission as the Equipment Interchange Discussion Agreement. FMC Agreement No. 011284, effective July 6, 1990. Consistent with the development of ocean carrier chassis cooperatives, as described in paragraph 26, the scope of the Discussion Agreement was expanded, effective May 20, 1999, so that, "Subject to any restrictions in the Shipping Act of 1984, as amended, the parties [ocean carriers] may also discuss, negotiate, and agree upon joint contracts, joint purchase and joint lease of inland transport services, inland depot services, pools, equipment, terminals, and other facilities." Article 5.8, FMC Agreement No. 011284-33. Effective April 18, 2000, the Discussion Agreement was renamed the Ocean Carrier Equipment Management Association. FMC Agreement No. 011284-35.
- 33. In 2005, the OCEMA Agreement's scope was expanded to its current role of establishing and overseeing the operation of the chassis pools now managed by CCM. FMC Agreement No. 011284-58, effective October 5, 2005, further permitted OCEMA discussions and agreements in Article 5.8 to include the establishment of pools, as well their use; and to add new Article 5.13 that provides, *inter alia*, "The parties may also form, own, and operate corporations, limited liability companies, holding companies, and other entities, formed either for profit or not for profit, to establish, own, and/or operate equipment pools or pool-owning companies."

- 34. In 2006, the CCMP Agreement, FMC Agreement No. 011962, effective June 30, 2006, was filed to carry out the provisions of the revised OCEMA Agreement. Its stated purpose was "to provide for the formation of local, metropolitan, and/or regional Chassis Pools" at marine and intermodal terminals throughout the United States. Parties to the Agreement include OCEMA and its members, as well as CCM and its affiliates. Under Article 6.1 of the Agreement, "Operating rules for each Chassis Pool and the rates, charges, terms and conditions under which Chassis are contributed to a Chassis Pool and/or are utilized by Users will be established by for the Chassis Pool by a board of directors, board of managers, or other governing body (the 'Governing Board') of the Affiliate owning the Chassis Pool."
- 35. Under that original CCMP Agreement, selection of the management boards of CCM and affiliate regional pools was vested in CCM. Further, "Associate Members shall not have the right to participate in the selection of the Governing Board. Without limitation, OCEMA may discuss and agree on policies and other matters relating to the operation of Chassis Pools and may communicate same to CCM, an Affiliate, or other Entity formed to own or operate the Chassis Pool."
- 36. FMC Agreement No. 011962-007, effective December 29, 2011, reorganized CCM by adding a holding company, CCM Holdings, LLC, and a Pool subsidiary, CCM Pool, LLC. It also added a limitation to Article 6.1 regarding governing board membership: "Only OCEMA Members that are Contributors and Users shall be eligible to serve on the Governing Board." CCM Holdings, LLC was renamed to the current Consolidated Chassis Enterprises, LLC ("CCE") by FMC Agreement No. 011962-010, effective January 29, 2014. The current authority of OCEMA and its members to instruct the various CCM affiliate governing boards reads: "Without limitation, OCEMA may discuss and agree on policies or other matters relating

to the establishment or operation of Chassis Pools and may communicate same to CCE, an Affiliate, or other Entity formed to own or operate the Chassis Pool." CCMP Agreement Article 6.1

- 37. According to OCEMA's website, the CCM pools have over 110,000 chassis under management.¹ The South Atlantic Chassis Pool ("SACP") operates under its own agreement, FMC Agreement No. 011980. Article 6.1 of the SACP Agreement mirrors the same article of the Consolidated Chassis Pool Agreement, and authorizes OCEMA and its members to instruct any entity "formed to own or operate the Chassis Pool as to policies and other matters relating to the establishment or operation of" the pool.
- 38. The standard form Master Chassis Contribution Agreement, Section 11.9, under which IEP's contribute chassis to a CCM-managed pool, provides:

This Agreement establishes a contract between the parties and shall not be construed to create a partnership or joint venture between the parties hereto. Contributor shall not have any ownership rights or interest in the assets of the Chassis Pool or (CCM POOL NAME) other than chassis it contributes. (CCM POOL NAME) shall not be deemed to have any ownership or leasehold interest in Contributor's Chassis in the Chassis Pool.

CCM, Master Chassis Contribution Agreement, https://www.ccmpool.com/Uploaded Documents/Sample%20contribution%20agreement%20for%20Ocean%20Carriers%20and%20L easing%20Companies%20(B).pdf.

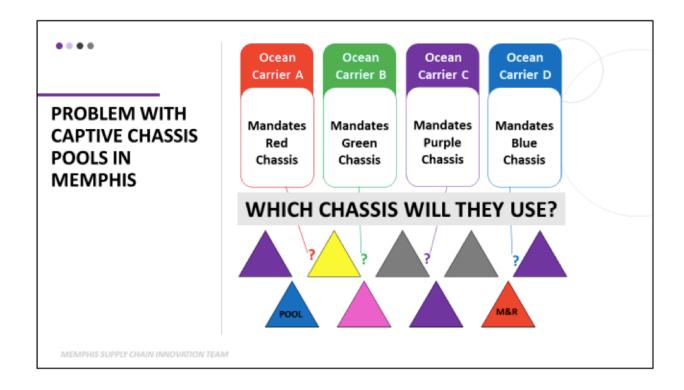
18

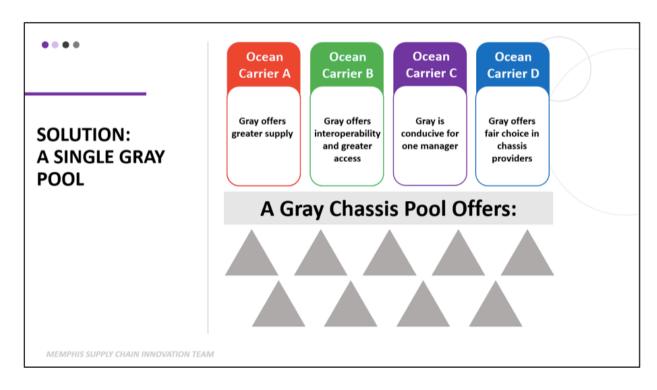
¹ The OCEMA website lists the 6 pool LLCs (of which two are being dissolved) that are subsidiaries of CCM LLC, and the port and inland terminal metropolitan areas that they serve. These CCM LLC Subsidiaries include: Chicago & Ohio Valley Consolidated Chassis Pool LLC; Denver Consolidated Chassis Pool LLC; Gulf Consolidated Chassis Pool LLC (closing August 19, 2020); Mid-South Consolidated Chassis Pool LLC (closing August 19, 2020); Mid-West Consolidated Chassis Pool LLC; and South Atlantic Chassis Pool LLC. OCEMA, http://www.ocema.org/ccm.html.

C. The Benefits of "Gray" Pools Over Single-Provider Pools

39. Both the Commission and OCEMA/CCM have recognized the benefits of chassis pools that are interoperable (from the standpoint of usage with the containers of multiple ocean carriers) and that are managed by a neutral party with no interest in favoring particular ocean carriers or IEPs, e.g., with respect to the use of a particular chassis by a motor carrier. The 2019 report of the Memphis Supply Chain Innovation Team, convened as part of Commission Fact Finding No. 28, articulated the benefits of such a "gray" pool in contrast with single-provider "captive" chassis pools dedicated to serving the containers of one or a few ocean carriers when used for pick-ups and returns to a terminal:

The Memphis Supply Chain Innovation team believes the answer to reducing gridlock and improving supply chain velocity in the Mid-South is a single gray chassis pool in Memphis offering greater supply, quality, fair access, and accountability. A gray pool allows interoperability of all chassis, which is the exchange of any color chassis for usage.





FMC, White Paper Submitted by The Memphis Supply Chain Innovation Team, A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity Team assembled as part of FMC Fact Finding Detention and Demurrage Investigation 28, at 4, https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf.

40. As noted by the Commission's Fact Finding Officer, Commissioner Rebecca Dye:

In our inland rail locations where most containers are mounted on chassis, there is no customer relationship between truckers and chassis providers or involvement in chassis provisioning decisions made by others. Moreover, since over 50% of the freight movement in the mid-south is merchant haulage, meaning that the shipper or designated trucker bears responsibility for the freight delivery, this lack of ability to resolve problems is systemic. For this reason, I support greater chassis "choice" for motor carriers and shippers on merchant haulage moves. ...

The Memphis Team concluded that the essential qualities of a high performing gray chassis pool are: 1. Adequate supply of interoperable chassis; 2. Safe and good quality chassis; 3. Reasonable access to chassis: "choice on merchant haulage;" and 4. Most critical, a pool manager, with authority and accountability for chassis supply. I am pleased to say that there is wide support for a gray chassis pool in Memphis. ... OCEMA ... members and executive leadership were present at the meeting and also supported the gray chassis pool initiative. The two major chassis providers were also represented at the December meeting.

Dye Statement, https://www.fmc.gov/statement-of-dye-stb-demurrage.

- 41. OCEMA has expressly recognized the operational inefficiencies that result from the use of dedicated or single-provider chassis pools. Further, OCEMA has articulated the attributes and benefits of a neutrally-managed interoperable and competitive gray pool, including the benefits to motor carriers.
- 42. For example, in the CCM presentation *Interoperability Matters! The Interoperable Gray Pool Model, Enhancing Supply Chain Efficiencies*, OCEMA made the following points, among others, (slides 5, 9):

POSITIVE IMPACT OF A NEUTRAL MANAGER

- Single point of contact for supply chain stakeholders allows for "ease of doing business" and consistent service.
- Impartial and transparent control across all equipment providing quality road ready chassis
- •Being *Non-asset based* facilitates an "open competition" environment through low barriers to entry.

FOR MOTOR CARRIERS

In a CCM Interoperable Pool the Motor Carrier enjoys the **freedom to use the chassis of his choice on multiple container moves without having to unhook from the chassis.** This saves time and money; is safer, and allows the motor carrier to be more efficient thus adding much needed truck capacity to the supply chain.

In a CCM Pool, given a broader range of chassis suppliers, Motor Carriers can **negotiate better terms and lower rates.** This can differ by region depending on the area they are operating in and volumes required.

CCM, https://www.slideshare.net/ConsolidatedChassisManagement/interoperability-matters-the-interoperable-gray-chassis-pool.

This OCEMA statement of gray pool attributes and benefits sets out clear criteria against which the justness and reasonableness of oceans carriers' regulations and practices regarding chassis pools may be fairly assessed under § 41102(c). Importantly, these criteria include *both* interoperability and chassis choice.

RESPONDENTS' UNJUST AND UNREASONABLE CONDUCT

- A. Respondents' Conduct Restricts Chassis Competition and Creates Inefficiencies in CCM-Managed Pools.
- 43. Notwithstanding OCEMA's policy statements favoring chassis choice and gray pools, OCEMA members acting through the governing boards of CCM and its affiliates have adopted and maintained rules that expressly authorize ocean carriers participating in a chassis pool to reject or frustrate interoperability and chassis choice. Ocean carrier members of CCM-managed pools have engaged, and continue to engage, in patterns and practices of conduct to exploit such rules to prevent or frustrate chassis choice that IMCC members wish to exercise.
- 44. In particular, the CCMP Operations Manual gives ocean carriers veto power over motor carrier chassis choice and prevents motor carriers from exercising "the freedom to use the chassis of [their] choice." Section 5.7 of the CCMP Operations Manual, Version 4.2 (July 20, 2020), https://www.ccmpool.com/UploadedDocuments/Membership/Resources/LEGAL-45198472v1-CCMP-Ops-Manual-v42.pdf states: "under the Choice Program, Usage Days may be directed to another User [e.g., a contributor whose chassis is being used for a particular movement] when the Container Line Operator and the User for whom the Container Line Operator is a Customer *authorize a deviation from the default assignment.*" (emphasis added). OCEMA members and affiliated entities have engaged, and continue to be engaged in, a pattern and practice of refusing motor carrier requests for "deviations" as a matter of course. IMCC members have received innumerable denials—often with identical boilerplate language—rejecting motor carrier requests to designate a chassis provider other than the default chassis provider.
- 45. An example of such communications from a CCM staff member to an IMCC member that had requested such a deviation to the chassis provider of its choice states:

As discussed we cannot update these at this time. As you know, it is critical for the pool to be able to identify the User and properly assign usage. Accordingly, SACP must follow the operating rules as set out in the User Agreements and Operations Manual. Since the inception of the Choice Program the process has been that usage is assigned to the container by default. *Choice is available only when the container owner indicates that they permit exceptions to the default assignment*. These are the rules that all pool participants have been operating under. We suggest that you contact your principal on these merchant haulage moves (the shipper) or the relevant ocean carrier.

(emphasis added)

46. CCM publishes a table on its website listing each port and intermodal terminal served by a CCM-managed pool and each ocean carrier serving them. The table then notes the ocean carrier's "published chassis policy." CMM, https://www.ccmpool.com/Membership/Chassis-Providers/Index.aspx. Numerous Respondents list specific IEPs that must be used to move their containers. Others require an exception request and prior approval, which are regularly denied. All of this conduct violates the Shipping Act.

B. Respondents Use the IEP Contracting Process to Prevent Chassis Choice and Overcharge Motor Carriers for Chassis on Merchant Haulage.

- 47. In addition to rules-based regulations and practices that prevent chassis choice, the respondent ocean carriers mandate that IEPs enter into contracts that compel IEPs to overcharge motor carriers for chassis for MH movements. As Commissioner Dye has noted: "[A]lthough carriers have transferred ownership of chassis to IEPs, they still exert significant control over chassis provision—and thus availability—through their contracts with IEPs. That control not only applies to *carrier haulage* moves, but also can limit provider choice under *merchant haulage* even though shippers are billed for chassis use." Dye Statement, https://www.fmc.gov/statement-of-dye-stb-demurrage/ (emphasis added).
- 48. Through these contracts, respondent ocean carriers eliminate competition for MH chassis nationwide by awarding such chassis contracts to IEPs on the basis of CH *alone* even

though the winning contractor is designated as the default provider for *both* CH and MH chassis. This practice not only restrains competition for MH chassis but also forces chassis providers to overcharge for MH movements and undercharge for CH to obtain the contract award. These MH overcharges are paid by motor carriers, which are the direct purchasers of chassis leasing services. Motor carriers have no option other than to pay the default IEP whatever price is necessary in order for the IEP to offset the undercharge on CH movements.

49. Indeed, respondent ocean carriers cite their designation of an IEP as the default chassis provider as the reason for denying chassis choice. For example, one respondent ocean carrier denied an IMCC member chassis choice, explaining:

I'm am [sic] truly sorry, but unfortunately HMM <u>cannot</u> give consent to CCM to allow open choice. As I have stated before, we have a contract that requires HMM to utilize DCLI exclusively for both CH and HM [sic] haulage and giving consent to allow open choice would put HMM in violation of the contract.

[postscript to copied CCM staff member:] Please note that HMM does not consent with this request and cannot grant open choice!

(emphasis added)

- C. Respondents Restrict Competition at Non-CCM Ports and Terminals and Are Expanding the Geographic Scope of Their Restrictive Conduct by Abandoning CCM Pools.
- 50. Respondent ocean carriers further restrict chassis choice at non-CCM ports and terminals through box rules that assign chassis "usage" and thus reimbursement to their designated IEP rather than to competing chassis providers. The Commission has recognized that ocean carriers "exert control over chassis via 'box rules.'" *See Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 Fed. Reg. 29,638, 29,653 (May 18, 2020) (footnotes omitted). These box rules apply to MH movements as well, and are used by respondent ocean carriers at key ports and terminals, including the Ports of Los Angeles and Long Beach.

- 51. Moreover, over the past two years, respondent ocean carriers have withdrawn from key CCM pools, particularly the Gulf Consolidated Chassis Pool ("GCCP") and the Chicago & Ohio Valley Consolidated Chassis Pool ("COCP"). CCM has formally notified stakeholders that GCCP and COCP will close on August 19, 2020 and that the pools' contracts with chassis contributors and users will be terminated as of that date.
- 52. At the ports and intermodal terminals served by GCCP, such as Houston and New Orleans, each respondent ocean carrier has contracted with an IEP to operate a single-provider chassis pool as the default chassis provider. At intermodal terminals in the COCP region, each respondent ocean carrier requires railroads and ramp operators to use chassis from a single-provider pool operated by their default IEP.
- 53. Respondents' abandonment of pro-competitive interoperable pools in favor of single-provider pools harms motor carriers in two ways. First, it imposes rules and practices that eliminate motor carriers' ability to exercise chassis choice. Second, it forces motor carriers to pay improper overcharges for use of designated single-provider pool chassis. As a result, these practices result in motor carriers incurring burdensome costs and inefficiencies.
- 54. Motor carriers cannot constrain the harm from respondent ocean carriers' single-provider pools and unlawful practices by providing their own chassis. Motor carrier-provided chassis are only feasible in a limited number of circumstances involving daily truck drayage of international containers. Obstacles to motor carriers using their own chassis include: the additional costs and inefficiencies associated draying chassis to and from single-provider pool locations, arranging container "flips" between motor carrier-provider chassis and pool-provided chassis, and forgoing opportunities for one-way moves or street turns of equipment. These obstacles not only undermine the viability of motor carrier-provided chassis, but they also

highlight the economic and operational benefits provided by interoperable pools like the now-abandoned GCCP and COCP, such as coordinated asset tracking and chassis assignment.

Accordingly, motor carrier-provided chassis are insufficient to constrain the designated single-provider pool operator from overcharging for MH moves and undercharging for CH moves.

55. Under the Pool-of-Pools ("POP") collaboration established by the major IEPs at the ports of Los Angeles and Long Beach, chassis owned by three chassis providers can be used on an interoperable basis. The POP touts this "gray" chassis pool as promoting efficiency and chassis availability:

Prior to the POP, the operation of multiple independent chassis pools in Los Angeles and Long Beach created situations where chassis in different pools were segregated at facilities for use only by certain user bases, and returnable only to a fraction of the facilities otherwise available to receive chassis. These inefficiencies often resulted in lost time and revenue to a motor carrier, duplicative repositioning, and confusion on terminals and rail ramps. The "gray fleet" that is the POP has smoothed the impacts to chassis operations that would have otherwise occurred in the ever-changing landscape of ocean carrier alliances and terminal operations, increases overall efficiency and availability, and significantly reduces chassis splits.

Pool of Pools, http://www.pop-lalb.com/#tf-about.

56. Nevertheless, due to the box rule regulations and practices of the ocean carrier respondents, while interoperability is achieved, chassis choice is prohibited, to the harm of motor carriers, shippers/receivers, and the international maritime commerce of the United States.

TRAC Intermodal's description of the operation of the Pool-of-Pools makes clear that the effective lack of choice (as to which IEP bills for a chassis) is driven by ocean carrier restrictions, not by the IEPs:

Chassis billing for merchant haulage moves in the Pool of Pools is currently driven off of Ocean Carrier designations of chassis providers for their chassis moves originating within the Pool of Pools. If a Motor Carrier is unsure if an Ocean Carrier has designated a Pool of Pools chassis provider, the Motor Carrier should reach out to the Ocean Carrier for clarification.

In the event a Motor Carrier utilizes a Pool of Pools chassis for an Ocean Carrier that has not designated a chassis provider, that usage would be billed by the provider of the specific chassis used (e.g., if a TRAC-contributed chassis is used by a Motor Carrier for an Ocean Carrier who has made no designation of provider within the Pool of Pools, TRAC would bill the Motor Carrier for its chassis usage).

TRAC Intermodal, https://www.tracintermodal.com/wp-content/uploads/2015/04/PoP-FAQ-revsied-April-1-MTCD.pdf, at Q. 16.

Thus, under these box rules, where an ocean carrier designates an IEP, motor carriers must pay the rental rates of each ocean carrier's default chassis provider for MH movements, regardless of the owner of the physical chassis used, precluding price competition among chassis providers for such movements. The matrix below, published by the POP's IEP owners, shows the mandatory IEP assignments of each of the respondent ocean carriers.

Chassis Provider/Ocean Liner company Matrix		
DIRECT CHASSISLAN, INC.	TPAC	FLEXI -VAN LEASING
DCLPChassis@DCLI.com	TPSP@TracIntermodal.com	FLBP_General@Flexi-Van.com
www.DCLI.com	www.TracIntermodal.com	www.Flexi-Van.com
Ocean Liner companies	Ocean Liner companies	Ocean Liner companies
CSAV	APL	Polynesian
Hapag-Lloyd	Evergreen	PIL
Hyundai Merchant Marine (HMM)	Yang Ming	Ocean Network Express (ONE)
Maersk	ZIM	
Mediterranean Shipping Company (MSC)	CMA-CGM	
Pasha Hawaii	Wan Hai	
Hamburg Sud	SM Lines	
Cosco	Orient Overseas Container	

See, Pool of Pools, http://www.pop-lalb.com/reports/POP_FAQ10-1-19.pdf, at Q. 27.

EACH OCEAN CARRIER RESPONDENT'S UNJUST AND UNREASONABLE REGULATIONS AND PRACTICES

- 57. Each of the respondent ocean carriers who are OCEMA members have participated in the adoption and/or continuation of CCMP Operations Manual Section 5.7 –either directly through membership on the governing boards of CCM and its affiliates, or indirectly by instructing those governing boards through their membership in OCEMA. Each OCEMA member continues to participate in the adoption of the regulations and practice of CCM and its affiliates either directly or by instructing the governing boards of CCM and its affiliates, including with respect to closing CCM pools.
- 58. CMA engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, CMA prevented and continues to prevent chassis choice by designating the use of TRAC Intermodal in ports and intermodal terminals served by the closing GCCP, such as the ports of Houston and New Orleans, and the closing COCP, such as intermodal terminals at Chicago. Similarly, CMA restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider TRAC Intermodal. CMA further engages in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.
- 59. **COSCO** engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at the closing CCM ports and/or intermodal terminals. For example, COSCO prevented and continues to prevent chassis choice by designating the use of a single provider, DCLI, as the

default provider in ports and intermodal terminals served by the closing GCCP, such as at the ports of Houston and New Orleans, and the closing COCP, such as intermodal terminals at Chicago. Similarly, COSCO restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider DCLI. COSCO further engages in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.

60 Evergreen engaged in and continues to engage in the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, notwithstanding SACP's rules enabling chassis choice, Evergreen's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville, restricted and continues to restrict chassis usage to only DCLI. Evergreen also engages in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, Evergreen prevented and continues to prevent chassis choice by designating the use of a single provider, DCLI, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the port of Houston, and the closing COCP, such as intermodal terminals at Chicago. Similarly, Evergreen restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider TRAC Intermodal. Additionally, Evergreen charges motor carriers a chassis "per diem" for CH movements, which is not the motor carrier's responsibility. As a result, Evergreen

improperly denies the motor carrier chassis choice, and then subjects motor carriers to a "per diem" overcharge for both MH and CH movements.

- 61. **Hapag-Lloyd** engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, Hapag-Lloyd prevented and continues to prevent chassis choice by designating the use of a single provider, TRAC Intermodal, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the port of Houston, and the closing COCP, such as intermodal terminals at Chicago. Similarly, Hapag-Lloyd restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider DCLI. Hapag-Lloyd further engages in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.
- 62. **HMM** engaged in and continues to engage in the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, notwithstanding SACP's rules enabling chassis choice, HMM's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville, restricted and continues to restrict chassis usage to only DCLI. HMM also engages in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, HMM prevented and continues to prevent chassis choice by designating the use of a single provider, DCLI, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the intermodal terminal in El Paso, and the closing COCP, such as intermodal

terminals at Chicago. Similarly, HMM restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider DCLI. HMM further engaged in and continues to engage in the contracting practices alleged in paragraphs 48-49 at said ports and intermodal terminals resulting in overcharges to IMCC members.

- 63. Maersk engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, notwithstanding SACP's rules enabling chassis choice, Maersk's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville restricted and continues to restrict chassis usage to only DCLI. Maersk also engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50, 52-56, in at least one non-CCM port and/or intermodal terminal. For example, Maersk prevented and continues to prevent chassis choice by designating the use of a single provider, DCLI, as the default provider in ports and intermodal terminals, such as at the ports of Houston, New Orleans, and the intermodal terminal at Chicago. Similarly, Maersk restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider DCLI. Maersk further engaged in and continues to engage in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.
- 64. **MSC** engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example,

notwithstanding SACP's rules enabling chassis choice, MSC's published policy at the ports and intermodal terminals of that Pool, including Atlanta, Charleston, and Jacksonville restricts chassis usage to only DCLI. MSC also engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, MSC prevented and continues to prevent chassis choice by designating the use of a single provider, DCLI, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the ports of Houston and New Orleans, and the closing COCP, such as intermodal terminals at Chicago. Similarly, MSC restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider DCLI. MSC further engaged in and continues to engage in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.

65. **ONE** engaged in and continues to engage in in each form of the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, as a member of the SACP, notwithstanding the goal of the Pool to provide chassis choice, ONE's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville is to default chassis usage to TRAC Intermodal unless an exception is requested and approved. However, ONE routinely denied and continues to deny exception requests. ONE also engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, ONE prevented and continues to prevent chassis choice by designating the use of a single provider, TRAC Intermodal, as the

default provider in ports and intermodal terminals served by the closing GCCP, such as at the ports of Houston and New Orleans. ONE also prevented and continues to prevent chassis choice by designating the use of a single provider, Flexi-Van, at the closing COCP, such as intermodal terminals at Chicago. Similarly, ONE restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider Flexi-Van. ONE further engaged in and engages in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.

- 66. **Wan Hai** engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 50 and 55-56, in at least one non-CCM port and/or intermodal terminal. For example, Wan Hai restricts chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider TRAC Intermodal. Wan Hai further engaged in and continues to engage in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.
- 67. Yang Ming engaged in and continues to engage in each form of the unlawful conduct alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, as a member of the SACP, notwithstanding the goal of the Pool to provide chassis choice, Yang Ming's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville, is to default chassis usage to TRAC Intermodal unless an exception is requested and approved. However, Yang Ming routinely denied and continues to deny exception requests. Yang Ming also engaged in and continues to

engage in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, Yang Ming prevented and continues to prevent chassis choice by designating the use of a single provider, TRAC Intermodal, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the ports of Houston, and the closing COCP, such as intermodal terminals at Chicago. Similarly, Yang Ming restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles and Port of Long Beach, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider TRAC Intermodal. Yang Ming further engaged and continues to engage in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.

Alleged in paragraphs 43-44, in at least one CCM port and/or intermodal terminal. For example, as a member of the SACP, notwithstanding the goal of the Pool to provide chassis choice, Zim's published policy at the ports and intermodal terminals of that Pool, including at Atlanta, Charleston, and Jacksonville, is to default chassis usage to TRAC Intermodal unless an exception is requested and approved. However, Zim routinely denied and continues to deny exception requests. Zim also engages in each form of the unlawful conduct alleged in paragraphs 50-56, in at least one non-CCM port and/or intermodal terminal as well as at closing CCM ports and/or intermodal terminals. For example, Zim prevented and continues to prevent chassis choice by designating the use of a single provider, TRAC Intermodal, as the default provider in ports and intermodal terminals served by the closing GCCP, such as at the ports of Houston and New Orleans, and the closing COCP, such as intermodal terminals at Chicago. Similarly, Zim

restricted and continues to restrict chassis choice by enforcing the box rule regulations and practices at the Port of Los Angeles, thereby denying motor carriers freedom of choice by requiring chassis usage to be billed by its default provider TRAC Intermodal. Zim further engaged in and continues to engage in the contracting practices alleged in paragraph 48 at said ports and intermodal terminals resulting in overcharges to IMCC members.

69. In each instance in which a respondent ocean carrier designates a default or mandatory IEP, IMCC members must pay a price for chassis usage for MH movements that is above a cost-based price for such usage, including a rate-of-return, while such respondent ocean carrier pays a price for CH usage that is below that cost-based price. Such CH undercharge is financially supported by revenues from the IEP's MH overcharges, and such Respondent's designation of a default or mandatory IEP for MH is undertaken with the effect of providing the designated IEP with the ability to generate revenue to support such CH undercharges.

CAUSE OF ACTION

RESPONDENTS' UNJUST AND UNREASONABLE REGULATIONS AND PRACTICES VIOLATE 46 U.S.C. § 41102(C)

- 70. The IMCC incorporates by reference the facts and allegations stated in paragraphs 1-69 as if fully set forth herein.
- 71. The interchange and assignment of motor carrier chassis relates to the "receiving, handling, storing, or delivery of property" under § 41102(c). *See Petition of the Association of Bi-State Motor Carriers*, 30 S.R.R. 104 (2004) (finding that truck detention rules fall within the scope of § 41102(c) because they "are integral to the loading and unloading of cargo from common carriers, the interchange of containers and chassis, and the ultimate delivery of property for shippers.").

72. Distribution Services, Ltd. v. Transpacific Freight Conference of Japan, 24

S.R.R. 714 (1988) is the seminal case setting out the principles for determining violations of 46

U.S.C. § 41102(c). See Interpretive Rule on Demurrage and Detention Under the Shipping Act,

85 Fed. Reg. at 29,651 (citing Distribution Services for "the well-established principle that to

pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended

purpose, that is, 'fit and appropriate for the end in view.'"). In Distribution Services, the

Commission found in violation of that section a rule of a conference operating under an effective

FMC agreement that precluded reimbursement for container transloading unless that transloading

was undertaken by a third party. In so doing, the FMC held:

Section 10(d)(1) derives from the second paragraph of section 17 of the 1916 Act. In *Port of San Diego* ... the Commission stated with respect to section 17:

Section 17 requires that the practices of terminals be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the ends in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.

The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable.

24 S.R.R. at 721. The Commission also noted: "[a] regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose." *Id.* at 722.

73. CCMP Operations Manual Section 5.7 is unlawful because it is unreasonable, going beyond what is necessary to achieve the requirements of gray pool management. Not only does Section 5.7 undercut OCEMA's stated policy of chassis choice, but it is the opposite of

- choice. "A regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose." *Id.* (finding unlawful a rule of a conference operating under an in-effect Commission agreement).
- 74. The systematic denials, by ocean carrier respondents and OCEMA-affiliated entities, of motor carrier requests for non-default chassis usage, and the use of box rules to prevent chassis choice in non-CCM pools, are unlawful. These unreasonable and unjust practices are excessive and not appropriate to the management of gray pools, and undercut the stated OCEMA policy of chassis choice. *See id.* at 721 ("[A]s applied to terminal practices, we think that 'just and reasonable practice' most appropriately means a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.").
- 75. Respondent ocean carriers' practice of negotiating CH pricing but designating the winning chassis lessor as the default provider for both CH and MH chassis is unlawful because it eliminates motor carriers' ability to negotiate MH chassis rates and service terms among competing chassis providers, overcharges motor carriers on MH movements, and undermines the stability of gray pools, contrary to OCEMA policy in favor of gray pools. Such contract provisions are not reasonably necessary to ensure the availability of sufficient chassis for MH. Respondent OCEMA members, acting directly and by means of their participation in the governing boards of CCM LLC and its affiliates, have adopted and maintained Section 5.7 of the CCMP Operations Manual prohibiting chassis choice except with the consent of the affected ocean carrier. Such continuing misconduct constitutes failure "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of 46 U.S.C. § 41102(c).

- 76. Respondent ocean carriers have adopted policies and practices, including failure to consent to choice under CCMP Operations Manual section 5.7, and adoption and implementation of box rules or similar regulations and practices having the effect of precluding choice of chassis provider for MH movements. Such continuing misconduct constitutes failure "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of 46 U.S.C. § 41102(c).
- 77. Respondent ocean carriers have adopted and implemented regulations and practices by which they solicit and enter into contracts for the supply of chassis in connection with the movement of a Respondent's cargo containers, and award the contract conditioned on a grant of the exclusive right to provide chassis for MH movements. As a result of this misconduct, IMCC members are overcharged for chassis on MH movements for which they are the direct purchasers of such chassis rental services, while respondent ocean carriers receive the benefit of undercharges for chassis for CH movements. Such continuing misconduct constitutes failure "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of 46 U.S.C. § 41102(c).
- 78. The Respondents who are members of the CCM Pool Agreement have engaged in an unjust and unreasonable practice by withdrawing from the GCCP and the COCP and/or designating default single provider pools. Respondents thereby maintained their default IEP's unchecked ability to undercharge the Respondent for CH moves and compensate by overcharging motor carrier for chassis used for MH moves. Ocean carriers' contracts with a designated default IEP are based on a presumed percentage mix of CH and MH moves assigned

to the default IEP. The higher the proportion of MH moves that are made using the default IEP's chassis, the greater the aggregate of overcharges that support CH pricing undercharges. However, participation in a pool that allows chassis choice may reduce the percentage of MH moves assigned to the default IEP and the funds available to support CH undercharges. Thus, the ocean carrier has an incentive to withdraw from gray pools and instead to use inefficient single-provider pools without chassis choice. To preserve these MH overcharges and CH undercharges, the Respondents have withdrawn from the GCCP and the COCP and/or have designated single-provider pools for CH and MH movements at the respective ports and inland terminals within the regions of those closing pools in violation of 46 U.S.C. § 41102(c).

79. Respondents' misconduct constitutes precisely the type of abuses of the maritime shipping public cited in the Commission's recently-adopted Policy Statement, 46 C.F.R. §545.4 clarifying the appropriate scope of § 41102(c) complaints:

The Commission believes that the interpretation and application of § 41102(c) should be properly aligned with the broader common carriage foundation and purposes of the Act. The interpretive rule is consistent with the purposes of the Shipping Act and focuses Commission activities on regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States.

Commission Interpretative Statement, 83 Fed. Reg. 45367, 45372 (Sept. 7, 2018).

INJURY

80. Members of the IMCC have suffered, and will continue to suffer, injury from the Respondents' continuing violations of 46 U.S.C. § 41102(c). These injuries include the inefficiencies and costs associated with IMCC members' inability to contract with the chassis provider of their choice on MH movements and to participate in interoperable chassis pools, as a result of Respondents' restrictive regulations and practices. IMCC members have further

suffered financial injury through their direct payment of overcharges for chassis used for MH movements.

- 81. By compelling IEPs to inflate MH chassis prices, respondent ocean carriers have caused significant harm to IMCC members as direct purchasers of chassis for MH movements.

 One measure of such harm in this ocean carrier-controlled and manipulated pricing environment could be calculated on the charge each motor carrier pays for a chassis for an MH movement in excess of the cost of providing such a chassis, including an appropriate rate of return on investment.
- 82. Respondents' violations and overcharges have caused damages to motor carriers represented by the IMCC to be as much as \$1.8 billion during the three years prior to the filing of this Complaint.

REQUEST FOR RELIEF

WHEREFORE, the IMCC respectfully prays for relief as follows:

- 1. Respondents be required to answer the charges herein;
- 2. That after due investigation and hearing, Respondents be found to have violated 46 U.S.C. § 41102(c), as alleged herein;
- 3. That the Commission order the Respondents, including their respective subsidiaries and affiliated companies, to:
 - a. Remove the requirement for ocean carrier and chassis provider consent for motor carrier designation of a chassis provider on merchant haulage container movements from CCMP Operations Manual Section 5.7;

- b. Cease and desist enforcement of CCMP Operations Manual Section 5.7 regarding ocean carrier and chassis provider consent for motor carrier designation of a chassis provider on merchant haulage container movements;
- c. Cease and desist from adopting, maintaining, and/or enforcing any regulation or practice that limits the ability of a motor carrier to select the chassis provider it designates for merchant haulage movements or other movements for which a motor carrier is billed for usage or per diems, or otherwise promotes, advantages, or requires the use of default chassis providers for merchant haulage moves or other movements for which a motor carrier is billed for usage or per diems;
- d. Cease and desist from adopting, maintaining and/or enforcing default provider designations for merchant haulage container movements or other movements for which a motor carrier is billed for usage or per diems, and cease and desist from adopting, maintaining and/or enforcing any regulation or practice that restricts the ability of motor carriers independently to negotiate chassis prices for merchant haulage movements or other movements for which a motor carrier is billed for usage or per diems with the chassis provider of their choice; and
- e. Cease and desist from utilizing single-provider chassis pools that are not interoperable with pools operated by other IEPs at all ports and intermodal terminals serving more than one Respondent under rules that do not permit effective chassis choice for motor carriers for merchant haulage container movements or other movements for which a motor carrier is billed for usage or per diems;

- 4. The IMCC be awarded its reasonable attorneys' fees under 46 U.S.C. § 41305(e); and
- 5. The IMCC be awarded such other relief as the Commission determines to be proper.

REQUEST FOR ORAL HEARING

The IMCC requests an evidentiary hearing to be held in Washington, D.C.

Date: August 17, 2020 Respectfully submitted,

CONSTANTINE CANNON LLP

/s/ W. Stephen Cannon Bv: W. Stephen Cannon, D.C. Bar No. 303727 David D. Golden, D.C. Bar No. 985047 Richard O. Levine, D.C. Bar No. 203877 Seth D. Greenstein, D.C. Bar No. 416733 Osob M. Samantar, D.C. Bar No. 999593 1001 Pennsylvania Avenue, NW Suite 1300N Washington, D.C. 20004 (202) 204-3500 scannon@constantinecannon.com dgolden@constantinecannon.com rlevine@constantinecannon.com sgreenstein@constantinecannon.com osamantar@constantinecannon.com

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Attorneys for Complainant Intermodal Motor Carriers Conference of the American Trucking Associations **VERIFICATION**

Tyler M. Rushforth states that he is Executive Director of Complainant Intermodal Motor

Carriers Conference, that he has read the foregoing Complaint, and that, upon penalty of perjury,

he believes the facts stated therein to be true and correct based upon personal knowledge,

information received from members of the IMCC, and information and belief based on publicly

available sources.

/s/ Tyler M. Rushforth

Tyler M. Rushforth

Dated: August 17, 2020

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