



December 12, 2022

Mr. William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

RE: Docket No. FMC-2022-0066
Demurrage and Detention Billing Requirements

Dear Mr. Cody:

Please accept these comments on behalf of the U.S. Dairy Export Council (USDEC) and the National Milk Producers Federation (NMPF) and their members with regards to the Federal Maritime Commission's notice of proposed rulemaking (NPRM) on demurrage and detention billing requirements for ocean carriers (VOCCs), marine terminal operators (MTOs) and non-vessel operating common carriers (NVOCCs).

USDEC is a non-profit, independent membership organization representing the global trade interest of U.S. dairy farmers, dairy processors and cooperatives, dairy ingredient suppliers and export trading companies. Its mission is to enhance U.S. global competitiveness and assist the U.S. industry to increase its global dairy ingredient sales and exports of U.S. dairy products. USDEC and its 100-plus member companies are supported by staff in the United States and overseas in Mexico, South America, Asia, Middle East and Europe.

NMPF develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies. NMPF provides a forum through which dairy farmers and their cooperatives formulate policy on national issues that affect milk production and marketing. NMPF's contribution to this policy is aimed at improving the economic interests of dairy farmers, thus assuring the nation's consumers an adequate supply of pure, wholesome and nutritious milk and dairy products.

Overview

On behalf of dairy farmers and producers, we appreciate the positive work that the Federal Maritime Commission (the Commission) has conducted on the topic of detention and demurrage charges. The Commission's Interpretive Rule on Detention and Demurrage released in May 2020 was a well-intentioned

effort to head off the abuses by carriers that erupted during the supply chain crunch of 2020-2022, although ultimately it did not curtail the carriers' abuse of these charges. The Fact Finding Investigation 29 mission that Commissioner Rebecca Dye has undertaken has brought valuable transparency and greater understanding of the ways in which these charges are intended to facilitate container and terminal space efficiency, as well as the many ways in which the charges have been abused by ocean carriers. The report that resulted from this investigation affirmed the challenges our members faced with detention charges and helped inform the Ocean Shipping Reform Act (OSRA) of 2022's new rules on these charges and related invoicing, as well as other regulatory action by the Commission.

Based on reports from our members, dairy exporters have faced extensive, unfair detention charges from ocean carriers which cost them significant resources to either pay or contest. This involved situations where "free time" windows were changed and containers were called back early, when charges were assessed when vessel schedules changed at no fault of the exporter, when terminals were closed and unavailable for container returns, among other dubious circumstances. Invoices for these charges have often been unclear, complicating efforts by shippers to discern whether the charges were legitimate, undermining their ability to seek mitigation for improper charges.

While surveys we have conducted of our members more recently indicate that dairy exporters' experiences with sufficient invoices and resolving questionable detention charges have improved, over two-thirds of respondents reported having ongoing challenges with improper detention charges. Based on that experience, we feel that this rulemaking is an appropriate and necessary step by the Commission to further regulate the issuance of detention and demurrage invoices by ocean carriers and marine terminal operators. We filed [comments](#) in April in response to the Commission's initial Advanced Notice of Proposed Rulemaking on this matter, and we appreciate that many of those views have been incorporated into this NPRM.

We feel it is important to note that these rules may not apply in the same fashion with respect to import cargo and demurrage charges, and that shippers and other stakeholders involved in addressing those circumstances may have differing opinions on this rule as it relates to billed parties.

Scope and Applicability

We appreciate the FMC seeking to apply the proposed Demurrage and Detention Billing Requirements regulation to all entities that may have a role in invoicing shippers for container free time charges, including not only VOCCs but also MTOs and NVOCCs. Each of these parties may have a role in issuing detention and demurrage invoices, and as such the rules should apply to them all.

- With respect to MTOs, we would encourage the Commission to consider amending the proposal that allows MTOs to bill shippers directly. Elsewhere in the regulation the Commission notes that only parties with contractual relationships should be billing for detention and demurrage charges, and in general, shippers do not have contractual relationships with the MTOs. It may be preferable to have the MTOs invoice the carrier that delivered the container to the ports or is responsible for its movement, since the carriers (or NVOCCs) are typically the entity that has a contractual relationship with the shipper. This would help avoid the challenge of engaging with unknown parties at the MTOs, instead of with the VOCCs or NVOCCs where the shipper has an established relationship. Carriers and MTOs will already need to augment information sharing to assure that carriers have the necessary information regarding container availability for the new invoice detail requirements, so this data should be easily shared between MTOs and the respective carrier.

Invoice Contents

We commend the FMC for expanding beyond the requirements of OSRA with respect to invoice information requirements. Augmenting the legislatively required information to include details such as the bill of lading, billing date and due date, the dates corresponding to the charges, information on how the charge rate was calculated, a website with instructions on how to contest a charge, and defined timeframes on when to seek mitigation or refund of the charges. These are straightforward steps to assure that the billed party can effectively evaluate whether the charge is appropriate or not, and to guide them in the process of seeking resolution of the charge, if it is found to be wrong.

- A recommendation to improve upon this would be to include, either on the invoice or the accompanying website, a specific note that reminds the billed party that if the information is incorrect or details are missing, then the shipper is not obligated to pay that invoice. Not all dairy exporters are fully aware of the new rules under OSRA, and this would help inform them about their protections against paying incorrect invoices. This could be co-located with the statement required by to be included on invoices certifying the charge's consistency with the FMC's rules and that the charges did not result from carrier or MTO actions.
- We also recommend that the FMC take steps to define and provide direction for billing parties with respect to the term "basis" in the context of the requirement for an invoice to provide the "basis for why the invoiced party is the proper party of interest and thus liable for the charge". While this may seem a simple term, it directly relates to the attributable responsibility for a charge, free-time determinations and accessibility of the terminal and container, among other considerations. The "basis" could be legal/regulatory in nature or focus on logistical and scheduling information and could vary widely based on the intended or perceived scope and definition of "basis". The FMC should address that "gray area" and help assure accountability by billing parties.

Billing Practices & Timeframes

The Commission appropriately set reasonable timeframes of 30 days for issuance of detention or demurrage charges, following the end date of when the charges accrued. We have heard reports of dairy exporters getting invoices months after the container was shipped, which complicates their ability to assess the legitimacy of the charges. These timeframes will better allow shippers to verify the accuracy of charges and take action to resolve or contest those charges if they are disputed. The Commission also proposed to apply a 30-day timeframe for the billed party/shipper to contest or seek mitigation of the charge, and for the carrier to resolve disputes or provide returns within that same window.

- The Commission should clarify if a carrier may cure an invoice that may be lacking certain information or include an error. If a carrier seeks to submit a corrected invoice, must that be completed within the 30-day timeframe, or would the clock restart? Presumably, the 30 days commencing at the end of the charge accrual timeframe would mean that any corrective action a carrier takes with invoices must remain within the original 30-day timeframe.
- The Commission seeks comments on situations where a carrier issues a detention or demurrage invoice to an NVOCC, which must then pass that charge along to a shipper. Due to the relationships between carriers and NVOCCs, a timeframe of 30-days or less for inter-carrier invoicing to occur is reasonable, and a corresponding timeframe of 30 days to transmit that invoice to a shipper would be reasonable.
- With respect to the timeframe for a shipper or billed party to dispute the charge, we would encourage the Commission to consider an extended timeframe of 45 to 60 days. Carriers have an advantage of information in the issuance of these charges, as the movement of containers and the oversight of related charges is their fundamental business. Dairy exporters and other shippers have less staff

capacity and information resources with which to evaluate invoices and determine if the charges are legitimate, and whether to dispute those charges. Since the Commission has also proposed for invoices to be sent to the party which is contracting with the carrier (which may be a freight forwarder or other entity) and not necessarily the shipper, there may be a delay in the shipper obtaining the invoice and making a dispute determination. For these reasons, additional time for a shipper to dispute a charge is warranted.

- Regarding the 30-day timeframe for a carrier or other entity to respond to a request for charge mitigation or refund, the Commission should consider providing further guidance as to how these dispute mechanisms may work. Conceivably, a carrier could wait until day 29 and respond that they have evaluated the dispute request and determine that no mitigation is in order. If a shipper maintains their dispute, what recourse do they now have? Must the shipper then file a charge complaint or other complaint with the Commission? Should the Commission be informed when a dispute request is submitted to maintain oversight and transparency of carriers' response methods? The functioning of this dispute process and how it must be executed within the 30-day timeframe is unclear.

The Commission has also proposed to limit who a carrier or MTO can send a detention or demurrage invoice to the party that contracted with the carrier for the carriage of goods. This may at times be the beneficial cargo owner (BCO) but may also be a freight forwarder or other entity. The Commission has proposed allowing invoices to be sent to secondary parties or *consignees*.

- The provision of invoices to both the contracted party and a consignee may create confusion where both the BCO and a secondary party, such as a freight forwarder, receive a duplicative invoice. To avoid duplicative billing scenarios, the Commission should consider allowing a contracted party to provide to the carrier the name of an alternate entity or person who should be the recipient of any detention or demurrage invoices. This process to identify a third party to receive detention or demurrage invoices, should include steps to obtain and confirm the approval of that alternate invoice recipient. This will provide the shipper the option of who is to be the billed party for any charges, rather than affording that discretion to the carrier, and address any confusion that may result from multiple parties receiving invoices.
- In any shift away from including drayage providers as billed parties for detention charges, the FMC should consider how this may impact the shippers' access to information about how and when a container may be available for retrieval and whether charges are appropriate for given timeframes. While the common carrier "shall bear the burden of establishing the reasonableness of any demurrage or detention charges" the removal of the drayage provider from the charge process may place the shipper in a position to be less informed and capable to dispute charges.

We are grateful to the Commission's ongoing attention to the challenges involved in ocean carrier detention and demurrage invoices. The Commission's proposal has responded to many of the comments that we provided in April and we appreciate your consideration of these views as you work to finalize this Demurrage and Detention Billing Requirements rulemaking.

Sincerely,



Jaime Castaneda
Executive Vice President for Policy Development & Strategy