



FEDERAL MARITIME COMMISSION
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October 28, 2022

Mr. Michael Symonanis
Acting Chair
National Shipper Advisory Committee

Dear Acting Chair Symonanis:

On behalf of the Federal Maritime Commission (Commission), this responds to Recommendation 1 from the National Shipper Advisory Committee (NSAC) submitted on August 31, 2022.

NSAC Recommendation 1: A recommendation to codify regulation in concert with the Interpretive Rule that prohibits any unreasonable application of charges on containers for Early Return Dates (ERD) changes, documentation cut dates, and cargo cut dates while shifting the burden of proof to vessel operators and strengthening requirements for reasonable and timely dispute resolution.

Commission Response

The imposition of any demurrage or detention charge, regardless of cause, is subject to the general prohibition contained in 46 U.S.C. § 41102(c) against failure “to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” This includes charges resulting from changes to the Earliest Return Dates (ERD). Accordingly, when vessel-operating common carriers (VOCCs) assess demurrage or detention fees, the Commission’s interpretive rule on demurrage and detention (46 C.F.R. § 545.5) applies. The reasonableness of any charge is evaluated against the standard in 46 U.S.C § 41102(c) and the interpretative rule. The Commission will evaluate the reasonableness of demurrage practices against the practice’s ability to serve the primary purpose as financial incentives to promote freight fluidity.

Although neither section 41102(c) nor the interpretive rule shifts the burden of proof to VOCCs, the Commission will take this recommendation into consideration.

Additionally, the Commission is undertaking a rulemaking aimed at strengthening requirements for reasonable and timely dispute resolution with respect to all demurrage and detention invoices received by shippers. On February 15, 2022, in response to an interim recommendation from *Fact Finding Investigation 29*, the Commission issued an advance notice of proposed rulemaking (ANPRM) seeking to regulate the billings and billing practices of both common carriers and marine terminal operators (MTOs).¹ After considering comments received in response to the ANPRM and requirements in the *Ocean Shipping Reform Act of 2022*, the Commission recently issued Notice of Proposed Rulemaking.² The proposed regulation would require a

¹ Demurrage and Detention Billing Requirements, 87 Fed. Reg. 8506 (proposed Feb. 15, 2022). Documents related to this rulemaking are available under Docket No. FMC-2022-0066 on www.regulations.gov.

² Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341 (proposed Oct. 14, 2022). Comments on the proposed rule are due December 13, 2022, and may be submitted through www.regulations.gov.

demurrage or detention invoice contain sufficient information to enable the billed party to readily identify a contact to whom they may direct questions or concerns related to the invoice and understand the process to request fee mitigation, refund, or waiver. In addition, it would require billing parties to include the URL address of a publicly accessible portion of their website that provides a detailed description of the information and documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver. The proposed regulation would also require billing parties to resolve fee mitigation, refund, or waiver requests within 30 days of receiving the request.

In addition to strengthening requirements for reasonable and timely dispute resolutions with respect to demurrage and detention invoices, the proposed regulation would also:

- Adopt the list of minimum information that common carriers must include in demurrage or detention invoices as mandated in OSRA and codified at 46 U.S.C. 41104(d)(2);
- Add to the list referenced immediately above additional information that must be included in or with a demurrage or detention invoice;
- Further define prohibited practices by clarifying which parties may be billed for demurrage or detention charges; and
- Establish billing practices that billing parties must follow when invoicing for demurrage or detention charges.

Your recommendation includes two additional matters. First, you recommended the Commission investigate carriers charging demurrage or detention fees when Cargo Receiving Windows are changed without sufficient notice. The Commission previously engaged issues surrounding ERDs in the Fact-Finding Investigation No. 29 A summary of the findings can be found in the *Fact Finding Investigation 29* Final Report, which is on the Commission website.³

Your recommendation also suggested the Commission prohibit MTOs from invoicing shippers directly for detention and demurrage charges that are not compliant with VOCCs' ERD at time of motion. Again, section 41102(c) prohibits the imposition of unjust and unreasonable regulations including those related to the assessment of demurrage and detention charges. If a shipper believes that common carrier or MTO practices related to the assessment of demurrage or detention charges are unreasonable, there are multiple avenues for shippers to file complaints at the Commission, or report the alleged unreasonable conduct for investigation.

Thank you for sharing this recommendation of the NSAC. Per the requirements set forth in legislation establishing the NSAC, these recommendations will be published on the Commission website and will be submitted to the appropriate Congressional committees. Please direct any questions regarding this response to the NSAC Designated Federal Officer.

Sincerely,

William Cody
Secretary

³ Fact Finding Investigation 29 Final Report, *Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. 41102(c)* at 37 (May 31, 2022), available at: <https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf>.