



May 1, 2018

Rachel Dickon, Secretary  
Federal Maritime Commission  
Washington, DC 20573-0001

Re: West Coast MTO Agreement, FMC Agreement No. 201143-017

Dear Secretary Dickon:

The National Industrial Transportation League (“NITL” or the “League”) hereby submits its comments and concerns to the Federal Maritime Commission (“FMC”) regarding the amendments to the West Coast MTO Agreement (Agreement No. 201143-017) (“WCMTO Agreement”) for which notice was published by the FMC on April 19, 2018 (83 Fed. Reg. 17411). The proposed amendments would establish a truck appointment system for the pickup or drop off of cargo at all terminals at the ports of Los Angeles and Long Beach, CA and replace the existing Traffic Mitigation Fee (“TMF”) assessed only on containers moving through the ports during peak periods with a flat container fee assessed on import cargo moving during both peak and offpeak work shifts.

The League strongly supports terminal operations at our nation’s seaports that will reduce congestion and improve the environment, while still ensuring efficient and competitive cargo handling practices. NITL generally does not oppose terminal truck appointment systems which can help manage truck congestion at marine terminals. However, our members have concerns regarding the propriety of the proposed container fee which eliminates the incentive for importers to move their cargo during offpeak periods and, thus, may result in an increase in congestion during peak terminal operations—contrary to the very purpose of the original Pier Pass program.

Our members are also concerned about the lack of transparency as to whether the revenue projected to be collected under the proposed container fee bears a direct relationship to the costs of the LA/Long Beach offpeak terminal operations; or if the new users fees will simply become a new operating revenue stream for the terminal operators. Additionally, insufficient information is available to determine if the appointment systems will be adequate to meet the needs of the shipping public and create efficient cargo operations. Accordingly, the League asks the Commission to investigate these concerns and request additional information that will enable the Commission to determine if the amended WCMTO Agreement would be contrary to the Shipping Act.

NITL was founded in 1907 and its member companies range from some of the largest users of the nation’s transportation systems to smaller companies engaged in the shipment and receipt of

goods. The League represents the “voice of the shipper” in transportation policy matters and many members are importers and exporters who require competitive and efficient international ocean transportation services and cargo handling at our nation’s seaports.

The current PierPass OffPeak program established night and weekend work shifts for cargo drop off and pick up at the Ports of Los Angeles and Long Beach in 2005 to address congestion, air quality and security. To incentivize use of and help pay for the offpeak shifts a TMF of \$72.09/TEU is assessed against cargo moving during peak hours, i.e. Monday through Friday between 3 a.m. to 6 p.m. weekdays and 8 a.m. to 5 p.m. Saturdays, with certain exceptions.

Although PierPass has been successful in shifting the handling of substantial volumes of cargo at the ports to the offpeak hours, thereby reducing congestion during peak hours, it has caused severe truck congestion between the hours of 3:00-6:00 p.m. as trucks line up in terminal queues for the night shift in order to avoid assessment of the TMF. The amendments to the WCMTO Agreement are apparently designed to address this congestion at the terminals and allow for greater flexibility via the appointment system. Specifically, the current \$72.09/TEU fee on peak moves will be replaced by a flat per container fee of \$31.52/TEU (and a \$63.04 fee for all other container sizes) for cargo moving during both peak and offpeak shifts and all twelve terminal operators at the ports will establish an appointment system for the pickup and drop off of cargo.

The League believes that more information and analysis is needed for the Commission to determine and the shipping public to understand if the replacement of the current TMF (and its corresponding incentives) with an across the board container fee for virtually all import cargo will cause substantial volumes of traffic to migrate back to daytime terminal operations. If the proposed changes actually result in a reduction in use of the nighttime operations, then such a result would undermine the very basis upon which industry had supported the original PierPass program.

Further, the lack of transparency as to whether the collectively established container fee would be limited to funding the operation of the night/weekend shifts as claimed is another significant concern. Although some BCOs will experience a cost increase (nighttime gate users) and others will experience a cost decrease (daytime gate users), there are real questions as to whether the container fees will become a new general revenue source for terminal operations and create a windfall for the terminal operators. It would not be reasonable for the peak/offpeak container fees to be a subterfuge for a new West Coast terminal profit center carried on the backs of US importers.

No direct commercial relationship exists between the terminal operators on the one hand and importers and exporters on the other. Thus, importers and exporters have no commercial means for negotiating fair and reasonable charges that are directly related to the quality of terminal services they receive. The terminal operators should seek to recover their general operating costs, including the proposed truck appointment system, from their commercial dealings with their ocean carrier customers, rather than from collectively established user fees imposed on importers and sanctioned by the federal government.

Accordingly, the Commission should seek additional information from the WCMTO Agreement and investigate whether the collectively-set container fees could result in an unreasonable

increase in transportation cost contrary to the Shipping Act.<sup>1</sup> Specifically, the Commission should investigate the revenue projections based on collection of the container fee during years 1-3, whether such collections will reasonably match the cost of operating the offpeak shift, whether and how excess collections will be accounted for, and why an even higher container fee would be assessed for container sizes other than a TEU. At the very least, the Commission should require modifications to the WCMTO Agreement to ensure that both the agency and the shipping public have transparency as to relationship between the container fee collections and the actual costs of the night gate operations.

Regarding the establishment of truck appointment systems, the amendments to the WCMTO Agreement provide broad authority to its members to discuss, agree upon and enforce rules, regulations, procedures and practices for such systems. The amendments state in part that:

(iv) ..... [The parties] are authorized to discuss and agree on various features of appointment systems, such as appointment windows, times at which appointments will be offered during peak and off-peak shifts, including the last appointment on various shifts, consequences of failure to honor an appointment, systems or portals through which appointments can be made, and ways to use appointment systems to spread container traffic across different shifts or times of the day or night. The members may reach agreement on, and implement, common practices with respect to their individual appointment systems or any common systems or portals as they may agree to adopt.<sup>2</sup>

Again, while the League is not opposed to terminal appointment systems in general, legitimate questions exist as to how the LA and Long Beach terminals will operate their appointment systems once the incentive to use the night gates is eliminated? Will there be a sufficient number of daytime appointments available?; If no appointment is available, will the terminals extend free time?; Will there be adequate flexibility and customer service to address missed appointments, critical shipments, or other contingencies? Will the lack of an adequate supply of appointments force importers to readjust their supply chains at higher costs and risks of delays?

These questions warrant further inquiry and investigation by the Commission, including to determine whether the any future collective and uniform actions by the WCMTO Agreement members could lead to unreasonable decrease in service.<sup>3</sup> Indeed, Commissioner Dye is now conducting a separate investigation into marine terminal and ocean carrier demurrage, detention and free time practices<sup>4</sup> and there is clearly some overlap between that investigation and the

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<sup>1</sup> Under the Shipping Act of 1984, as amended, only the Commission has the authority to challenge an Agreement that it determines “is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.” 46 U.S.C. § 41307(b). The Commission’s sole remedy is to seek to enjoin the operation of the Agreement through injunctive relief in the courts. *Id.*

<sup>2</sup> See Revised WCMTO Agreement Art. II(a)(iv).

<sup>3</sup> 46 U.S.C. § 41307(b).

<sup>4</sup> FMC Fact Finding No. 28, *Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce*, March 5, 2018.

impact that the proposed LA/Long Beach truck appointment system will have on such practices. Thus, the League urges the Commission and Commissioner Dye to seek additional information from the WCMTO Agreement as to how the proposed amendments will impact such practices, including when free time will begin?; whether free time will be extended if no appointments are available after cargo is offloaded from vessels?; how the LA/LB appointment system will impact the ocean carriers' legal duty to tender cargo for delivery and provide a reasonable period of time for cargo pick-up?; what happens if a trucker appointment is missed due to terminal operations and inefficiencies?

For the foregoing reasons, the League urges the Commission to request more information and undertake a thorough review of the reasonableness and lawfulness of the proposed amendments to the WCMTO Agreement. The Commission should investigate whether the collective imposition of the flat container fee on import cargo moving during both peak and offpeak terminal shifts may result in an unreasonable increase in transportation costs to the extent that the fee will generate revenues in excess of the cost of operating the nighttime operations. At the very least, the Commission should require changes to the WCMTO Agreement to provide the agency and shipping public with transparency as to the relationship between the projected and actual revenues collected from the container fees and the actual costs of the offpeak terminal operations so that the agency can properly determine and monitor compliance with the Shipping Act. Finally, the Commission should also investigate whether the workings of the proposed truck appointment systems are sufficiently competitive and flexible or if they could result in an unreasonable decrease in service.

Sincerely,



Jennifer Hedrick  
Executive Director  
National Industrial Transportation League

cc: Wayne Rohde, Esquire