

**INTERIM REPORT OF THE FEDERAL MARITIME COMMISSION  
ON FACT FINDING INVESTIGATION 28  
CONDITIONS AND PRACTICES RELATING TO DETENTION, DEMURRAGE, AND  
FREE TIME IN INTERNATIONAL OCEANBORNE COMMERCE**

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**COMMENTS OF THE COALITION FOR FAIR PORT PRACTICES**

The Coalition for Fair Port Practices (“Coalition”) is a group of trade associations representing thousands of importers, exporters, drayage providers, freight forwarders, customs brokers, and third-party logistics providers (“3PLs”). As the original initiators of Petition P4-16, we are pleased to provide these comments in response to the Federal Maritime Commission’s (“Commission” or “FMC”) Interim Report on Fact Finding Investigation 28 Relating to Detention and Demurrage practices issued on September 4, 2018 (“Interim Report”).

The Coalition thanks the Commission for undertaking this investigation in response to our original petition on the issue of detention and demurrage practices and the feedback it received in response, including the hearings in January 2018. We continue to stand ready to work with the Commission to improve marine terminal and carrier practices in this area.

In our original petition, we asked the Commission to initiate a rulemaking proceeding for the purpose of interpreting the Shipping Act of 1984 to clarify what constitutes “just and reasonable rules and practices” with respect to the assessment of demurrage, detention, and per diem charges by ocean carriers and marine terminals. Specifically, we proposed a policy statement for adoption by the Commission and requested 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 circumstances beyond the control of shippers, receivers, or truckers.

Following the hearings and progression of the fact-finding investigation, the FMC issued its Interim Report which details the agency's preliminary observations on detention, demurrage, detention and free time practices and identified the following six issues for further consideration and possible action:

- Transparent, standardized language for demurrage, detention, and free time practices.
- Clarity, simplification, and accessibility regarding demurrage and detention billing practices and dispute resolution processes.
- Evidentiary guidelines that would help resolve demurrage and detention disputes.
- Notice of container availability and a reasonable opportunity to retrieve cargo.
- An optional billing model wherein marine terminal operators bill cargo interests directly for cargo storage on terminal and ocean carriers bill cargo interests directly for use of container.
- Creation of a Shipper Advisory Board or Innovation Team.

To assist the Commission with its evaluation of the key issues it has identified, the Coalition has outlined a specific set of practices that we believe could greatly improve transparency and efficiencies and reduce confusion and disputes in the area of detention and demurrage charges. Our specific recommendations follow.

### **UNIFORM DEFINITIONS**

The Coalition recommends that the following definitions be adopted by ocean carriers, marine terminals, shippers, brokers, truckers, and 3PLs nationwide.

- 1) **Demurrage:** A fee that is applied to a container or equipment during the period when it is located within a marine terminal. The charge may include a fee for the use of the land and a fee for the use of the equipment.
- 2) **Detention:** A fee that is applied to the use of equipment when it is located outside the perimeter of a marine terminal.
- 3) **Container Availability.** A container shall become available only when it is actually accessible for pick up at the port terminal, including that access to the container is not inhibited by congestion; port, terminal or yard closures; lack of appointments; or similar circumstances.
- 4) **Free Time.** The free time clock begins on the day a container becomes available, except if a container is subject to a government hold for inspection of the cargo, free time shall begin at the commencement of the government hold.
- 5) **Containers Subject to a Government Hold to Inspect Cargo.** Upon the release of a government hold for cargo inspection (i) any remaining free time period for the container subject to the hold shall be suspended until the container becomes available in accordance with the definition above, or (ii) if the container is “in demurrage” such demurrage shall cease until the container becomes available in accordance with the definition above.

Discussion: Terminals and ocean carriers use different definitions for these key terms.

As the Commission has rightly pointed out in its Interim Report, the differences in terminology create confusion. In addition, terminals and carriers tend to start the free time clock when a container is discharged from a vessel whether or not it is actually available for pick up. This causes even more confusion and can result in the assessment of demurrage when a container is

not available for pick up as a result of terminal and carrier operations or other circumstances beyond the control of the BCO or trucker.

We believe a uniform definition of “container availability” that focuses on starting the free time clock when a container actually becomes available would help create efficiencies and reduce congestion at our nation’s seaports since truckers would not be dispatched to pick up containers until they are actually available. The Coalition has also addressed the issue of routine government holds on containers that relate to an inspection of the cargo. However, we note that current free time and demurrage practices vary as to government holds. The Coalition asks the Commission to consider such practices in evaluating this issue, including the practices as set forth in the tariff of the port of Long Beach.

There is also confusion over the use of the terms detention and demurrage. In some case, carriers will charge both demurrage and detention separately, and in other cases the rental fee for the equipment is included in demurrage. In still other cases the ocean carrier “double dips,” charging a demurrage fee that includes the equipment and then piling on additional equipment charges. This is confusing and raises serious fairness concerns. The Coalition asks the FMC to adopt definitions of the terms that make it clear that demurrage (which might include an equipment charge) is charged while the container is on the terminal, and detention is charged when the equipment is not.

#### **NOTIFICATION OF CONTAINER AVAILABILITY**

The Coalition recommends the following practices with respect to the notification of container availability.

- 1) **Publication of free time and container hold information on ocean carrier webpages:** Carrier websites should uniformly provide information regarding

container availability, the commencement of free time, and the number of free days left under their published tariff schedule, as well as any holds that might be placed on the container. MTOs should work with carriers to provide this information in a timely manner

- 2) **Information on yard closures:** Marine terminal operators should notify carriers and announce on public-facing webpages any yard closures as soon as they are known to the marine terminal operator.
- 3) **Push Notifications:** Carriers should send notifications to the BCO of container availability via e-mail or other electronic means. Carriers should also notify BCOs of marine terminal yard closures.

Discussion: Under current practices, BCOs and their service providers such as truckers, brokers or 3PLs spend an enormous amount of time scouring terminal operator and carrier webpages looking for basic information about containers. While terminals complain that shippers wait until the last free day to pick up containers, they do very little to assist truckers or BCOs in figuring out whether a container is available. Even worse, truckers are frequently the last to know when portions of a container yard are closed.

At the same time, it's unclear how much information the terminal shares with carriers, who would logically have the commercial relationship with BCOs and possibly their truckers to assist in communicating this information. Providing basic and uniform information in a public facing webpage would go a long way to eliminate problems for all stakeholders. Even better would be a uniform process where marine terminals are required to notify carriers, and carriers are required to push that information to BCOs. Providing the basic information about when a

container becomes “available,” and how many free days remain, would help BCOs move their freight faster with fewer problems, and would reduce marine terminal congestion.

We urge the FMC to make specific webpage and/or push notifications a requirement for all marine terminal operators and ocean carriers.

### **WHEN A CONTAINER IS NOT AVAILABLE**

The Coalition recommends the following process in instances where a trucker arrives at a terminal to pick up a container that the carrier has indicated is “available,” and discovers that the container is not.

**“Container not Available” Trouble Ticket:** In instances where a carrier has notified a trucker that a container is available but when the trucker arrives at the gate, the container is not available, the marine terminal should provide a special trouble ticket that provides the following information: (i) the container number, (ii) the day, (iii) the hour, (iv) the specific location within the terminal, and (v) a description of the reason for the container not being available. The Commission may want to develop a standard list of reasons a container might not be available, such as weather, terminal equipment issues, terminal systems issues, congestion, labor issues, and/or other reasons. The trucker would not be required to surrender this ticket upon exiting the terminal.

Discussion: Under current practices, when a trucker attempts to pick up a container that has become unavailable, he/she is rarely given any documents proving that he/she was at the terminal or made any attempt to retrieve the cargo. In some terminals, truckers are issued an “exit ticket” but this document rarely provides the container number or the date and is usually taken from the trucker when he/she exits the terminal. The Coalition believes that marine terminals should have an obligation to provide documentation of all attempts to pick up

containers that have been notified as available but turn out not to be. The provision of this documentation would also support the Commissioner's desire to create evidentiary standards that would help to efficiently resolve disputes over demurrage charges.

We urge the Commission to require container-not-available notices to truckers. And to work with stakeholders to develop a uniform set of data fields for such trouble tickets.

### **APPOINTMENT SYSTEM RECOMMENDATIONS**

The Coalition recommends the following procedures for terminals with appointment systems.

- 1) **Forty-eight Hour Guarantee:** Terminal appointment systems should guarantee the availability of an appointment within 48 hours of notice of container availability.
- 2) **Log Records:** Terminal appointment systems should provide BCOs/truckers with access to log records that track attempts to make appointments.
- 3) **Priority Appointments:** Terminal appointment systems should give priority appointments to containers that has been issued a "container-not-available" trouble ticket.

Discussion: BCOs and truckers have encountered wide-spread difficulties in obtaining appointments from marine terminals. While terminals are quick to accuse shippers of "waiting until the last free day," to pick up containers or make appointments, the reality is that it is frequently difficult to obtain appointments, and if a trucker arrives at a terminal with an appointment only to discover that the container is not available, or if he/she losing the appointment because of long truck lines outside the terminal gate, then it is almost inevitable that the BCO will be charged demurrage. Making appointments after a failed attempt at pickup or as a result of terminal congestion is difficult and time consuming.

Under current practices, BCOs and truckers have no way of documenting their attempts to make appointments short of doing screen captures. We understand that some appointment systems already have log files that track attempts to log in and make appointments but terminals do not provide this information to shippers. We believe shippers and their draymen should have a means for printing out a record of their attempts to book appointments.

We urge the Commission to address terminal appointment systems to require a minimum guarantee of appointment availability, providing priority appointments for any containers issued a container-not-available ticket, and a means for shippers to track their efforts to make appointments.

### **STOPPING THE FREE TIME AND DEMURRAGE CLOCKS**

The Coalition recommends the following process for stopping the free time and demurrage clock in certain instances.

- 1) **When a “container-not-available” ticket is issued.**
- 2) **When the marine terminal and carrier provide notification of a yard or terminal closure.**
- 3) **When a trucker/BCO cannot obtain an appointment within 48 hours.**

Discussion: The Coalition is aware of marine terminal concerns that we are seeking an unlimited extension of free days. Nothing could be further from the truth. Our members rely on just-in-time supply chains. By and large, shippers do not view marine terminals as warehouses for goods. But when a trucker arrives to pick up a container that is supposed to be available only to discover that it is not, there must be some accommodation made to the trucker and the BCO. We also believe that the concept of "once in demurrage, always in demurrage" regardless of circumstances is inherently unfair, especially if the container goes into demurrage through no



fault of the shipper/trucker. Stopping the free time or demurrage clock for a reasonable period, or resetting it, is one way to induce marine terminal operators to reduce the container-not-available problem. This recommendation strikes at the heart of the Coalition's original petition seeking guidance in those instances where a container cannot be moved because of factors beyond the shipper/trucker's control.

Similarly, if a marine terminal operator closes a portion of the yard, or the entire terminal, the free time clock should stop or automatically reset. It is unreasonable for carriers and marine terminals to expect to be paid demurrage in situations where bad weather, systems failures, labor strife, or some other situation forces the closure of a terminal or portions of a terminal.

Finally, we believe that the free time or demurrage clock should stop or even be reset if a trucker/BCO is unable to schedule an appointment within 48 hours of a container becoming available. Requiring the reset would provide a huge inducement to marine terminals to make sure their appointment systems and yard operations are adequate for the volume of trade. Otherwise they ought to be extending free time.

We urge the Commission to adopt a rule that requires the extension or the reset of free time or the exemption of demurrage in instances where a container is not available for reasons beyond the shipper/trucker's control, or where a shipper cannot obtain a timely appointment.

### **ADDITIONAL COMMENTS ON THE QUESTIONS RAISED IN THE INTERIM REPORT**

As noted above, the Interim Report outlines six specific areas where the Commission is seeking comment and guidance from stakeholders. Below you will find additional thoughts of the Coalition on these topics.

- 1. Transparent, standardized language for demurrage, detention, and free time practices.**

The recommendations above attempt to provide a starting place for the development of transparent, standardized language for demurrage, detention and free time practices. The coalition urges the Commission to develop uniform definitions of the terms “container availability,” “detention,” and “demurrage,” as well as the development of a uniform “container-not-available” trouble ticket.

**2. Clarity, simplification, and accessibility regarding demurrage and detention (a) billing practices and (b) dispute resolution processes.**

Detention and demurrage billing practices and dispute settlement practices are confusing, inconsistent among carriers and marine terminal operators, and frequently non-transparent. One of the biggest issues BCOs face in dealing with both billing and dispute resolution is the propensity of carriers and marine terminal operators to “pass the buck” back and forth, leaving the BCO uncertain about who to contact or how precisely to dispute a charge.

These difficulties are much greater for smaller shippers and BCOs forced to pay detention and demurrage at the gate in order to ransom their containers. Larger shippers have negotiated arrangements with ocean carriers that make it somewhat easier for them to dispute charges.

For this reason, the Coalition recommends that all disputes over detention and demurrage should be between the ocean carrier and the BCO simply because the commercial relationship exists *only* between the BCO and the ocean carrier. The marine terminal operator is, in effect, the ocean carrier’s contractor for terminal services. We believe it is inappropriate for terminals to ransom containers at the gate.

If a marine terminal operator is unable to provide appointments in a timely fashion or is frequently closing portions of the yard without notifying truckers or BCOs, that ought to be an issue the ocean carrier cares about. Allowing ocean carriers to pass the buck to marine terminals

means BCOs lose their negotiating power. More important, without direct customer feedback, neither the ocean carrier nor the marine terminal has any incentive to improve performance. Quite the contrary in fact, since detention and demurrage fees are frequently viewed as a revenue stream.

In addition to requiring that the billing come from the ocean carrier, the Coalition recommends that all ocean carriers be required to post their dispute settlement process as part of their public tariff. This settlement process should provide step-by-step instructions on how to initiate a dispute, who to contact, and the evidence required to dispute a charge.

**3. Explicit guidance regarding types of evidence relevant to resolving demurrage and detention disputes.**

In our process recommendations the Coalition suggests two important changes that would provide additional evidence for settling disputes. The first is the development of a uniform “container not available” trouble ticket that provides the day, time, area of the terminal, and reason why a container is no longer available.

In addition, we urge the Commission to require terminal appointment systems to have a printable log that shows a truckers’ attempts to make appointments for specific containers. Evidence such as this goes hand in glove with a requirement that appointments be available within 48 hours of notice of container availability.

It is worth noting, that the Coalition is more interested in developing a system where there are fewer disputes to settle. Requiring the availability of appointments within 48 hours of a container becoming available would go a long way to solving many of the systemic problems the Coalition’s membership has encountered. In addition, while we understand the reluctance of marine terminal operators and ocean carriers to stop or reset the free time clock, the we believe

requiring them to do so in certain instances will provide a strong inducement for them to improve the efficiency of their operations.

**4. Consistent notice to shippers of container availability.**

The Coalition's process recommendations address this question. The FMC should develop a uniform definition of "container availability" and should, at a minimum, require marine terminals and ocean carriers to provide information about container availability, free time, and container holds on public-facing webpages. Ocean carriers should be required to provide notice via email or other electronic means to BCOs about container availability, Custom or other governmental holds on containers, and information about yard closures.

Giving BCOs and their truckers adequate notice of container availability – and additional information such as the start of the free-time clock, and the number of free days remaining under the terms of the published tariff – is a simple way to ensure that shippers don't show up on the last free day.

**5. An optional billing model wherein (a) MTOs bill shippers directly for demurrage; and (b) VOCCs bill shippers for detention.**

The Commission's hearings on the Coalition's petition pointed out the difficulties BCOs face in settling disputes because of the myriad billing processes of both carriers and marine terminal operators. At first blush it seems as if it might make sense to offer up an alternative option. But the Coalition strongly opposes this approach for several reasons.

First, BCOs have no commercial relationship with marine terminal operators. Terminal services are provided under a contract that the terminal operator has with the ocean carrier. While carriers may mark up the terminal operators' demurrage fees, our members would prefer to deal exclusively with ocean carriers. The reason is simple. BCOs have contractual relationships with the carriers, which means they can negotiate both rates and, more important,

services. They can also bring market pressure to bear on carriers in ways that they cannot with marine terminal operators.

Second, BCOs have had a decade of experience dealing with MTOs as part of the West Coast Marine Terminal Operators Agreement (WCMTOA) and the operation of PierPass in the ports of Los Angeles and Long Beach. While PierPass was originally developed to mitigate traffic in and around the Southern California ports, it has clearly become a revenue stream for marine terminal operators. Over the years, BCOs have requested transparency with respect to the PierPass fees and currently find themselves facing a situation where additional fees are going to be placed on every container in the port of Los Angeles and Long Beach in order to fund an appointment system that should be a regular cost of doing business. Since BCOs have no commercial relationship with MTOs, our ability to shape the proposed appointment system or any aspect of the so-called PierPass 2.0 system is virtually non-existent even though BCOs will be paying for the system.

In our view, if the Commission encouraged the development of an “optional” billing model that would allow demurrage to be billed by MTOs, BCOs would very quickly find themselves in a mandatory billing system over which they would have no power to negotiate.

The Coalition recommends that carriers be the main billing entity for demurrage and detention, the main entity for all dispute settlement, and the main entity for providing information about container availability through their webpages and push notifications to BCOs. For too long, carriers have attempted to push these functions off to their marine terminal operators, with the result that their customers are left with inadequate systems and poor communication that leads to inefficiency and terminal congestion in addition to unfair application of detention and demurrage fees.

## **6. An FMC Shipper Advisory or Innovation Team.**

The Coalition strongly supports the creation of a shipper advisory innovation team. For many years, the voice of the ports' customers has been ignored in shaping business practices and public policy at the nation's ocean gateways. We believe that a permanent shipper advisory group would help the Commission better understand the needs of BCOs and their truckers. In addition, transportation executives from BCOs can be a valuable resource to the Commission and other stakeholders as the ports, terminal operators, and ocean carriers implement new technologies and business practices.

For example, one problem that will require the cooperation of all stakeholders and a technological solution is developing a means to measure total turn-time from the moment a trucker enters the line at a terminal gate to the moment the trucker leaves the terminal. In addition to measuring total turn time, all marine terminals need to work with BCOs and truckers to develop the ability to provide a time stamp at the moment a trucker enters the line outside the terminal. That time stamp ought to be sufficient for a trucker to meet his appointment window.

Truckers with appointments quite often end up in lines so long that their appointment window closes while they are waiting. If a trucker has waited days to get an appointment, and then has to wait hours just to enter a terminal, the imposition of demurrage charges seems unfair. In this instance, the main reason for the demurrage charges is the inefficiency of the terminal operation.

Today, few terminal operators measure total turn time, and no terminal to our knowledge has a means for time stamping the moment when a trucker gets in line. Innovation teams including BCOs and truckers and terminals should make the development of this a high priority.

## **IMPLEMENTATION**

While the Coalition believes that the development of demurrage and detention best practices is a worthwhile endeavor, we remain convinced that the Commission must provide a regulatory framework and guidance in this area. Merely developing best practices is unlikely to change current ocean carrier and marine terminal behavior. The track record of marine terminals and ocean carriers on efforts to develop best practices is practically non-existent. Indeed, ocean carriers and marine terminals regularly push back on such efforts claiming that they will hinder competition.

Furthermore, at the hearings and during the Commission's subsequent investigation, the propensity for marine terminals and ocean carriers to point fingers at one another makes the development of mutually agreed upon best practices particularly difficult. Finally, to the extent that the development of best practices is perceived by terminals and carriers to have an impact on their revenue stream, it will further reduce the incentives to adopt best practices. For this reason, we strongly support the Commission taking action to provide a regulatory framework and specific guidance in this area.

## **CONCLUSION**

Once again, the Coalition thanks the Commission for its efforts on this topic, and for its thorough and thoughtful Interim Report. We stand ready to provide any further information or guidance the Commission may request. We respectfully ask the Commission to consider adopting the detention and demurrage process improvements we have recommended in these comments.

Respectfully submitted,

**THE COALITION FOR FAIR PORT  
PRACTICES**

Dated: November 21, 2018