

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. FMC-2022-0066-0090**

**Demurrage and Detention Billing Requirements**

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**COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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The National Industrial Transportation League (“NITL” or the “League”) hereby submits these comments addressing the issues raised in the Federal Maritime Commission’s (“FMC” or “Commission”) rulemaking published in the Federal Register on October 14, 2022 concerning demurrage and detention billing requirements.<sup>1</sup> NITL commends and supports the FMC’s continuous efforts to address the concerns raised by U.S. shippers and other ocean shipping stakeholders with respect to demurrage and detention rules and practices, including its 2020 interpretative rule,<sup>2</sup> and advance notice of proposed rulemaking on demurrage and detention billing requirements.<sup>3</sup> NITL also commends the Commission for taking expeditious actions to implement the recently adopted Ocean Shipping Reform Act of 2022 (“OSRA 2022”)<sup>4</sup>, including the issuance of this rulemaking.

NITL respectfully requests the Commission to promulgate final demurrage and detention billing requirements consistent with NITL’s comments and recommended revisions to the agency’s proposed rules as set forth as **Appendix A** to these comments. Further, based on the significant changes from current billing practices and complexity of the issues raised in this rulemaking, NITL requests that the Commission (i) establish a second round of comments to enable parties to reply to submissions filed by other stakeholders in this proceeding; and (ii) schedule a hearing following the submission of reply comments to allow interested parties to explain the impacts and potential unintended consequences of the proposal identifying the contracting shipper as the only party who can be appropriately billed for demurrage or detention.

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<sup>1</sup> *Demurrage and Detention Billing Requirements*, 87 Fed. Reg. 62341 (Oct. 14, 2022) (“NPRM”).

<sup>2</sup> *Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 Fed. Reg. 29638 (May 18, 2020) (“Interpretative Rule”).

<sup>3</sup> *Advance Notice of Proposed Rulemaking on Demurrage and Detention Billing Requirements*, 87 Fed. Reg. 8506 (Feb. 15, 2022) (“ANPRM”).

<sup>4</sup> Pub. L. 117-146 (June 16, 2022).

## **I. Statements of Interest.**

Founded in 1907, NITL has been a trade association representing The Voice of the Shipper across truck, rail, intermodal, ocean, and barge. NITL members represent a wide variety of commodities and businesses, who rely on efficient, competitive, and safe marine, rail, and highway transportation systems within the United States and beyond to meet their supply chain requirements and the needs of their customers. NITL's shipper members include those who move consumer goods, manufacturers, agriculture, chemicals, steel, forest products, fuels, food and more. NITL members spend billions in freight dollars annually and employ millions of people. Many League members are importers and exporters that use the services of VOCCs, NVOCCs, 3PLs, freight forwarders, and motor carriers, among others. The League was at the forefront of the efforts to develop and adopt OSRA 2022, as well as the OSRA 1998 reforms to the Shipping Act of 1984. The League supports an ocean transportation regulatory system that fosters competitive, dependable, and efficient ocean transportation that meets the commercial needs and demands of U.S. exporters and importers.

## **II. Comments.**

As Commissioner Rebecca Dye recognized in the Commission's Fact-Finding No. 29 recommendations, there have been long-standing concerns regarding demurrage and detention billing practices of common carriers and marine terminal operators ("MTOs"). Specifically, demurrage and detention billing practices often were not timely or transparent and lacked sufficient detail for billed parties to audit the invoices and determine whether they are responsible for the assessed charges. The Commission had the opportunity to address these

issues in the Interpretative Rule; however, the Commission instead opined that these issues “are better addressed in the context of specific fact patterns rather than in this interpretative rule.”<sup>5</sup>

During periods of severe port congestion and supply chain disruptions during the pandemic, the amount of demurrage and detention charges assessed by ocean carriers increased significantly, generating close to \$9 billion of revenue between 2020 and 2022.<sup>6</sup> U.S. importers and exporters have continued to face significant challenges with invoices that are untimely, assess ever increasing charges, yet lack the details needed for billed parties to determine whether they are responsible for paying these charges. In many cases, ocean carriers have assessed these charges to parties that were not responsible for the underlying delays, unduly penalizing the parties that are not responsible for the retrieval, tender, or return of the containers from or to the terminals. Ultimately, these charges did not serve the incentive function of demurrage and detention practices, contravening the Commission’s Interpretative Rule.

In enacting OSRA 2022, a primary focus of Congress was to address and improve demurrage and detention billing practices. Congress recognized the importance of ensuring greater transparency and billing accuracy and avoiding the use of the charges to generate revenue as opposed to their proper role as a network efficiency-enhancing mechanism. As such, Congress revised the Shipping Act to improve demurrage and detention billing practices and increase accountability for carriers and terminals who fail to comply with new statutory requirements and rules of the Commission. Among other things, Congress prohibited common carriers from issuing an invoice for demurrage or detention charges unless the invoice includes specific information to show that the charges comply with 46 C.F.R. Part 545.<sup>7</sup> OSRA 2022

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<sup>5</sup> Interpretative Rule at 29662.

<sup>6</sup> NPRM at 62342.

<sup>7</sup> OSRA 2022 at Sec. 7(a)(1), (codified at 46 U.S.C. § 41104(a)(15))

mandated minimum information that common carriers must include in their demurrage and detention invoices.<sup>8</sup> Congress also established that common carriers' failure to include the required information will relieve the billed parties from their obligation to pay the demurrage or detention invoices.<sup>9</sup>

In addition to these significant revisions, Congress required the Commission to initiate a rulemaking further defining the prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges.<sup>10</sup> In promulgating these rules, Congress instructed the Commission to "only seek to further clarify reasonable rules and practices related to the assessment of detention and demurrage charges to address the issues identified in the final rule published on May 18, 2020, entitled "Interpretive Rule on Demurrage and Detention Under the Shipping Act" (or successor rule), including a determination of which parties may be appropriately billed for any demurrage, detention, or other similar per container charges."<sup>11</sup>

NITL commends the Commission for issuing this NPRM in response to the OSRA 2022 mandate and its prior ANPRM regarding demurrage and detention billing practices. NITL supports many aspects of the proposal that effectively address the need for timely, transparent, and accurate invoices. NITL also appreciates the Commission's attempt to establish a straightforward approach for demurrage and detention billings that would be relatively simple to apply and enforce in practice.

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<sup>8</sup> *Id.* at Sec. 7(a)(2), (codified at 46 U.S.C. § 41104(d)(2)).

<sup>9</sup> *Id.* at Sec. 7(a)(2), (codified at 46 U.S.C. § 41104(f)).

<sup>10</sup> *Id.* at Sec. 7(b)(1).

<sup>11</sup> *Id.* at Sec. 7(b)(2).

Notwithstanding our strong support for the Commission’s efforts, NITL members are very concerned about the proposal that would require all demurrage and detention billings to be invoiced *solely* to the shipper who contracts for the carriage and for whose account the transportation or storage is provided, even when such contracting party is not the party who is in the best position to affect efficiencies in the retrieval or delivery of containers to the carrier’s facility. In OSRA 2022, Congress directed the Commission to “determine which *parties* can be appropriately billed” seeming to recognize that in the variable and complex world of shipping transactions more than one party is likely to be an appropriate party. Yet, the Commission’s proposed one-size-fits-all billing rule does not account for this complexity or the distinct responsibilities of various parties that are best positioned to affect whether demurrage and detention charges are assessed. Modifying the restrictive “contracting party” rule is needed to better align billing practices with the network efficiency incentivizing purpose of demurrage and detention as recognized in the Interpretive Rule. Further, the Commission’s rule should address the core issues that Congress was concerned about when it enacted OSRA 2022 – i.e., unreasonable carrier and terminal billing practices. But, shifting all billing responsibility solely to the contracting shipper misses the mark and would allow some unreasonable practices documented in the NPRM to continue.

As shown in the revisions to the Commission’s proposed rule set forth in Appendix A, among other things, NITL believes that the Commission should revise its proposal to: (1) more properly align demurrage and detention billings and payment liability to rest with those “responsible” parties who are in the better position to affect the efficient retrieval, delivery, and return of containers; (2) add additional elements and modestly revise the minimum information required to be included in demurrage and detention invoices; and (3) remove the 30-day

timeframe for invoiced parties to raise requests for fee mitigation, waivers and refunds to provide adequate time for the review and audit of invoices and avoid potential adverse impacts on the ability of parties to file formal complaints challenging the reasonableness of billing practices and assessed charges.

NITL provides its comments on the specific proposed rules below.

**A. Purpose**

NITL supports the Commission’s stated purpose of the regulations. NITL also believes that the Commission should revise the provision to clarify that these rules provide not only “minimum” invoice requirements but also “minimum” procedures that billing parties need to follow to ensure reasonableness with respect to their demurrage and detention billing practices.

**B. Scope and Applicability**

NITL supports the proposed scope and applicability of the regulations to invoices issued by common carriers, i.e., VOCCs and NVOCCs, and marine terminals to BCOs and other parties who affect the efficient use of containers and terminal space, but not invoices between ocean carriers and terminals which was not the focus of OSRA 2022 or complaints raised at the Commission. NITL is suggesting only minor clarifying changes to the Commission’s proposed scope and application of the detention and demurrage billing requirements to ensure consistency based on other changes proposed by NITL to certain definitions included in the NPRM.

As detailed in NITL’s comments on the ANPRM, the inclusion of NVOCCs within the scope of this rule is appropriate.<sup>12</sup> As the Commission recognized, in many instances, NVOCCs invoice beneficial cargo owners (“BCOs”) directly for demurrage and detention charges, and NVOCCs are often the only party interacting with the BCOs. Thus, regulating NVOCCs’

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<sup>12</sup> See NITL Comments in Docket No. 22-04 (April 8, 2022).

demurrage and detention billing practices in their role as common carriers is necessary to ensure that the billed parties receive timely invoices and understand the charges.

In the NPRM, the Commission also noted that, while MTOs do not often have a direct relationship with BCOs, they are nevertheless included to address those cases where an MTO directly invoices a BCO. NITL agrees with the Commission's approach, however, it believes that, due to the normal contractual relationships between the parties involved in international ocean transportation cargo movements, billings by MTOs direct to BCOs should be discouraged as MTOs contract directly with the ocean carriers, but not the BCOs.

### **C. Properly Issued Invoices and Billable Parties for Demurrage and Detention**

In the NPRM, the Commission proposed to limit the term "properly issued invoices" to those invoices issued by a billing party to a person who has "contracted with the billing party for the carriage or storage of goods" and is "the person for whose account the billing party provided ocean transportation or storage." Further, "A billing party cannot issue an invoice to any other person."<sup>13</sup> Thus, the contracting party is the only party who can be billed and responsible for payment of the charges.

The Commission's rule departs significantly from current billing norms and practices for demurrage and detention and is based on its belief that the contracting party, i.e., the shipper of record, is the person "with the most knowledge of the shipment" and in the "best position to understand and dispute the charge." The Commission seeks to "simplify the current system" and address complaints that multiple parties have received invoices for the same shipment potentially resulting in duplicative payments. Additional justification for this rule is the Commission's mistaken belief that most shipping transactions in the U.S. trades involve negotiated demurrage

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<sup>13</sup> NPRM at 62357.



and detention contract terms between the carrier and contracting shipper, thereby, hindering disputes by non-contracting parties.

As the Commission has recognized, the international supply chain is complex and the circumstances that cause delays in the retrieval and delivery of loaded and empty containers are highly fact specific.<sup>14</sup> As a policy matter, the Commission has decided to assign billing and payment liability for demurrage and detention *solely* to the contracting shipper, even when a party divorced from the contract is in the better position to affect the timely retrieval or delivery of containers to terminal facilities and the occurrence of the charges. It is true that the party who is more likely to have knowledge and understand the billed charges can include the contracting shipper, but this will not *always* be the case.

NITL is concerned that the simple but inflexible “contracting party” approach will divert accountability away from the parties who are best able to influence network efficiencies in the cargo delivery network consistent with the long-recognized purpose of demurrage and detention charges and the Commission’s Interpretive Rule. This rule states that, in assessing the reasonableness of demurrage or detention practices, the Commission will “consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.”<sup>15</sup> However, the proposed billing rule would restrict responsibility for demurrage or detention charges to the “contracting party for the carriage or storage of goods” regardless of their control over the retrieval, delivery, or return of containers from and to the carriers’ facilities.

In determining appropriate parties to be billed, the Commission’s rule should place responsibility on the party who is best able to comply with a carrier’s reasonable demurrage and

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<sup>14</sup> Id. at 62349.

<sup>15</sup> 46 C.F.R. § 545.5(c)(1).

detention rules, except when an alternative party requests and assumes this responsibility in a written agreement with the carrier other than the bill of lading contract. Based on long-standing customary practices for U.S. exports and imports, the responsible persons for demurrage and detention charges often differ based on the unique roles and responsibilities performed by the participants in these transactions. Problems with the “contracting party” rule are perhaps best illustrated where an overseas supplier is the contracting party for U.S. imports or an overseas receiver is the contracting party for U.S. exports, and such overseas parties who may have little to no influence over the retrieval and tender of containers would be the sole party to be billed for all demurrage and detention. Specifically, underlying a vessel booking for ocean transportation is typically a contract for the sale of goods that allocates to either the seller or buyer responsibility for the transportation and “delivery” of the shipment. This responsibility is often governed by internationally recognized Incoterms that allocate risks and responsibilities between the parties, including certain terms that place responsibility on the overseas seller or buyer of goods to contract for the transportation services.<sup>16</sup>

For example, for U.S. imports, when the overseas supplier contracts for the ocean transportation and fulfills its delivery obligation upon the goods arrival at the U.S. port based on the sale of goods term, it has minimal control over the timely pickup of the goods at the U.S. destination. Rather, the consignee/receiver identified on the bill of lading contract is the party best able to influence retrieval of the cargo and should be the appropriate party to be billed, rather than the contracting party located overseas. The reality of this common transaction type is that an overseas supplier who has satisfied the delivery obligations under the sales contract, will be far less likely than the receiver in the U.S. to promptly arrange for retrieval and pay any

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<sup>16</sup> See *e.g.*, Incoterms 2020, CIF (Cost, Insurance, Freight) and DAP (Delivered at Place).

demurrage payments required for release of the goods, and will also be less motivated to resolve disputes. In these cases, invoicing only the “contracting party” rule could delay the release of cargo, thereby reducing efficiencies and increasing the risk of port congestion and supply chain disruptions.

Similarly, as to U.S. exports, when the foreign buyer/receiver contracts for the transportation under the sale of goods transaction, it often has far less control over the timing of the tender of the goods to the carrier’s facility at the U.S. origin than the U.S. supplier identified in the bill of lading contract. Yet, this tender function, and whether a container incurs storage, directly affects the assessment of origin demurrage. In these routine import and export scenarios, the contracting party for the carriage is not the person with the best knowledge of the charges or in the “best position to understand and dispute the charge.”

For detention charges, drayage motor carriers have traditionally been an appropriate party to be billed under longstanding equipment interchange agreements entered with the ocean carriers, such as the Uniform Intermodal Interchange Agreement (“UIIA”), which agreements clearly play a significant role in the management and optimization of container asset utilization. Motor carriers have assumed certain equipment interchange responsibilities for decades under the UIIA, including responsibility for detention. This is because they are often in the best position to control the timing for the return of empty containers after unloading to the U.S. destination facility or delivery of full containers after loading to the U.S. origin facility. These functions fall within the drayage carriers’ customary operations to manage the movement of containers based on the requirements of their BCO customers, the ocean carriers’ tariffs, and their own unique operations. While the drayage motor carrier may not be the only party who contributes to untimely retrieval or deliveries of containers resulting in detention, based on the

highly fact-specific circumstances involved with each transaction, they are often the most knowledgeable party who is best able to understand and the dispute the charge. This is because following notice from the BCO that containers have been unloaded or loaded and are ready for delivery to the carrier's facility, the drayman must coordinate the timely movement of the containers within the applicable time periods, taking account of potentially competing obligations to other BCOs, as well as its interchange responsibilities under the UIIA. Despite the motor carrier's key role in managing container movements and its understanding of the multitude of possible reasons that equipment could not be delivered or returned within the free period (*e.g.*, driver or chassis shortages, lack of terminal appointments, or changes to carrier designated return locations), the Commission's proposal would exclude the motor carrier from ever being the appropriate billable party.

This is not to say that, like NITL members, drayage motor carriers have not also experienced unfair billing and related practices. Indeed, as noted in the NPRM, motor carriers have raised serious and legitimate concerns with duplicative invoices, frequently changing equipment return locations, and egregious terminal lockouts for failure to pay disputed charges, among others. NITL greatly sympathizes with these concerns and condemns in the strongest terms these unreasonable practices. We also support development by the Commission of specific rules to directly prohibit unreasonable practices faced by drayage carriers to the extent not addressed by the current proposal. However, it is important to emphasize that the Commission's proposal to place complete responsibility for all demurrage and detention on the shipper of record, does not address the root cause of the motor carriers' billing complaints, which are based on the *carrier's* and not the shipper's conduct. Rather, to address a number of the motor carrier's concerns identified in the NPRM, the Commission could adopt additional rules that

directly prohibit carriers from invoicing multiple parties and collecting duplicate payments for the same shipment, as well as restricting access to terminals for failure to pay disputed charges.

Further, the Commission has shielded truckers and other parties from demurrage and detention billings based on its belief that “Parties involved in a continuous commercial relationship have made an investment in that relationship and are highly motivated to timely and effectively resolve problems as they arise in order to maintain a mutually beneficially relationship.”<sup>17</sup> While this may be true in certain cases, primarily for large volume shippers who make meaningful volume commitments under service contract arrangements, it reflects a misunderstanding that there are many thousands of shipments that move solely under bill of lading contracts and not negotiated agreements. Even for shipments governed by service contracts, most simply incorporate carrier tariff rules for demurrage and detention, since small to mid-sized shippers lack sufficient negotiating leverage to alter these terms. Recent severe congestion occurring at our nation’s ports also demonstrated that large volume shippers with longstanding contractual arrangements with ocean carriers struggled with unreasonable demurrage and detention billings and dispute resolution.

Based on the foregoing, NITL supports the Commission establishing distinct rules identifying appropriate billable parties for demurrage and detention charges that operate as default rules. For demurrage, the default rules would place responsibility for the charges on the “local” parties, i.e., the U.S. consignee/receiver identified in the bill of lading for imports and the U.S. shipper identified on the bill of lading for exports, who are in the best position to influence freight fluidity and the occurrence of the charges at the carrier’s facility. For detention, the appropriate billable party would default to the drayman who has assumed responsibility for the

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<sup>17</sup> NPRM at 62349.

equipment under an equipment interchange agreement. An exception to the default rules would exist when a person other than the party described immediately above requests to be the billed to party and this responsibility is reflected in a written instrument other than the bill of lading.

To implement the default rules and exception for appropriate billable parties, and ensure proper allocation of responsibility for demurrage and detention charges, NITL believes that the Commission should delete the definition of the term “Billed party” in the “Definitions” section and add the following:

*Billable party for demurrage* means (i) at the U.S. origin the shipper who is responsible under the bill of lading contract of carriage to tender and deliver to the carrier’s facility one or more containers loaded with cargo, and (ii) at the U.S. destination the consignee/receiver who is responsible under the bill of lading contract of carriage to receive from the carrier’s facility one or more containers loaded with cargo. An exception to this rule applies when a person requests to be the billable party for demurrage and memorializes this responsibility in an executed written instrument other than the bill of lading contract of carriage.

*Billable party for detention* means the drayage carrier who is responsible to deliver loaded and/or empty containers to the carrier’s facility and has assumed responsibility for the equipment under an interchange agreement. An exception to this rule applies when a person requests to be the billable party for detention and memorializes this responsibility in an executed written instrument other than the bill of lading contract of carriage.

Further, consistent with these comments, NITL believes that the Commission should revise the “properly issued invoices” rule as follows:

The billing party shall issue an invoice for demurrage charges to the billable party for demurrage and an invoice for detention charges to the billable party for detention. The billing party shall not collect duplicative demurrage or detention with respect to a single shipment from more than one party.

#### **D. Definitions**

With respect to other definitions included in the NPRM, NITL supports the proposed definition for “Demurrage or detention invoice”, which is sufficiently clear and straightforward.

For “Demurrage or detention” charges, the Commission has proposed a definition that corresponds to the agency’s Interpretive Rule. While this is an acceptable definition, NITL believes that even further clarity could be achieved from separate definitions for the terms “demurrage” and “detention” due to their distinct characteristics from each other, and to avoid any possible interpretation that the terms could be used interchangeably. Specifically, NITL proposes that the Commission replace the definition of the term “Demurrage or detention” and add the following separate definitions for these terms:

*Demurrage* means any charge, including “storage,” “dwell fee” or other-named charges assessed by ocean common carriers, marine terminal operators, or non-vessel operating common carriers or their agents against containerized cargo for the use of the space in the facility as occupied by the containerized cargo.

*Detention* means any charge, including “per diem” or other-named charges assessed by ocean common carriers or non-vessel operating common carriers or their agents for the use of shipping containers as interchanged during the execution of a shipment with the carrier.

In addition, NITL recommends that the Commission clarify the definition of the term “Billing dispute” to include the possibility of a dispute over the “billable party” and the definition of “Demurrage or detention invoice” to allow invoices to be transmitted electronically.

#### **E. Contents of Invoice**

NITL supports the FMC’s proposed minimum information required to be included in demurrage and detention invoices, subject to the comments detailed here. Minimum content requirements for invoices were mandated by OSRA 2022 in order to improve their transparency and accuracy, and to enable invoice recipients to determine their responsibility for the charges.<sup>18</sup> The Commission has also added additional elements addressing shipment identification, timing, rate, and dispute resolution information. NITL agrees with inclusion of the bill of lading number,

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<sup>18</sup> OSRA 2022 Section 7(b).

and also with adding the basis for why a specific party was the billed to party, subject to any confidentiality restrictions that may exist under a confidential contract if the contracting party is not a “billable party.”

Notwithstanding, NITL believes that the Commission should revise the proposed “contents of invoice” requirements to add additional shipment identifying information, clarify requirements to be consistent with the changes to billing practices proposed above, and limit the dispute resolution information to require carrier contact details, specifically as follows:

In subsection (a) of § 541.6, NITL recommends that the Commission add two new minimum information elements – i.e., shipment booking number and shipper reference number – that are intended to assist shippers with the review and audit of the invoices. The revision to subsection (a)(4) is intended to align with other changes made in the definitions and properly issued invoices sections.

NITL’s proposed revisions in the subsection (b) phrase is intended to emphasize that the billing party is obligated to assess charges accurately.

NITL’s changes in subsection (d) are intended to focus on the need to include carrier contact details for addressing invoice questions and disputes but to eliminate extraneous information that could result in carriers unilaterally imposing unreasonable procedures that require unduly burdensome information and/or documentation to be submitted to request a fee mitigation, refund, or waiver. Further, as detailed below, NITL believes that the Commission should not impose a timeframe for requesting refunds, etc. Eliminating these requirements would also be consistent with OSRA 2022, which only requires demurrage or detention invoices



to include the “email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.”<sup>19</sup>

#### **F. Issuance of Demurrage and Detention Invoices**

NITL supports the Commission’s proposal to include a 30-day timeframe for billing parties to issue the demurrage or detention invoices. A common complaint expressed to the Commission and Congress was the issuance of stale invoices many months after the charges were incurred which increases the difficulty to verify the accuracy of the charges. The proposed 30-day time period would adequately address this concern and presumably carriers should be able to comply with this requirement once they make any necessary adjustments to align their invoicing systems with the new requirements.

However, NITL has several suggestions to improve the proposed provision.

First, NITL believes that the Commission should clarify in the final rule that the time periods can be modified in mutually negotiated contracts. Dictating a 30-day timeframe without any deference to parties’ business needs would fail to provide the needed flexibility for parties.

Second, unless a carrier has granted a billable party credit, they often require full payment of demurrage charges before they release imported cargo. NITL understands that some carriers continue to assess charges during the time spent to process these payments after payment has been made by the billed party or its agent. This practice is clearly unreasonable and against the fundamental goals of demurrage and detention charges, as they fail to incentivize cargo or equipment velocity and penalize BCOs for a payment processing delay that is not in their reasonable control. The Commission should clarify in the final rule that these billing practices will not be viewed as reasonable by the Commission.

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<sup>19</sup> OSRA 2022 Section 7(a)(2).

In a similar vein, the Commission should address in the final rule those instances where payment is a prerequisite for cargo release at the U.S. destination or vessel loading at the U.S. origin and require issuance of the invoice when payment of the charges is required. Thus, NITL recommends revisions to subsection (a) of proposed § 541.7 as follows:

A billing party must issue a demurrage or detention invoice within thirty (30) days from the date on which the charge was last incurred or, when payment of the charges is required for delivery or release of containers, whichever is earlier. If the billing party does not issue demurrage or detention invoices within the required timeframe, then the billed party is not required to pay the charge.

Furthermore, the Commission should delete subsection (b) of proposed § 541.7 addressing the instances when invoices are sent to incorrect parties. Instead of dictating timeframes for these exceptional circumstances, NITL believes that the Commission should let the parties resolve these issues through reasonable and conventional business practices.

#### **G. Requests for fee mitigation, refund, or waiver**

In the NPRM, the Commission proposed to require billed parties to submit their requests for fee mitigation, refund, or waiver within 30 days of receiving the detention or demurrage invoice, and to require billing parties to resolve these claims within 30 days of the requests. While NITL appreciates the Commission's efforts to promulgate timelines to expediate the resolution of claims, shippers need more time and flexibility in disputing invoices and resolving billing disputes.

In enacting OSRA 2022, Congress was primarily concerned about unreasonable carrier practices for delayed billings and was not focused on detailed requirements when a shipper must notify a carrier of a billing dispute for demurrage or detention charges. NITL members unequivocally believe that the current 30-day timeframe is insufficient to receive and properly audit demurrage or detention disputes, which can be highly fact-specific. This is especially the

case for large volume shippers with complex supply chains or when agents may be used for the receipt and initial payment of charges.

Further, NITL is concerned that any non-compliance with the proposed 30-day period for raising disputes could be construed as a condition precedent to filing a formal complaint challenging the charges, effectively reducing the applicable statute of limitations for such claims.

Thus, NITL believes that the FMC should eliminate the 30-day rule for raising waivers or refund requests. Regarding the carriers' practices for dealing with disputes, the FMC should account for Congress' decision to shift the burden of proof to the carrier.<sup>20</sup> Carriers should not adopt burdensome or time-consuming dispute procedures or require shippers to furnish information that the carrier already possesses. Shippers should simply be permitted to provide notice in writing clearly identifying the basis for the dispute and carriers should then promptly investigate and resolve such disputes. Accordingly, NITL recommends that the Commission's rules should be revised as follows:

(a) If a billed party disputes the validity of an invoice for demurrage or detention charges, the billed to party, or the method of invoicing, it may submit the dispute to the billing party in a written format that identifies the disputed elements.

(b) If a billing party receives a billing dispute from a billed party, the billing party must promptly investigate the dispute and provide a timely response with a revised invoice that addresses the disputed elements or with evidence that supports the original or an alternative billing. Until the billing party resolves the billing dispute, the billed party is not required to pay the disputed charge(s).

### **III. Conclusion**

For the foregoing reasons, NITL greatly appreciates the opportunity to submit these comments and respectfully requests that the Commission promulgate a final rule that includes

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<sup>20</sup> OSRA 2022 at Section 7(a)(2) ("Failure to include the information required under subsection (d) on an invoice with any demurrage or detention charge shall eliminate any obligation of the charged party to pay the applicable charge.").

revisions to its proposed rules for demurrage and detention billing practices as reflected in Appendix A, which changes are supported by these comments. Additionally, based on the significant changes from current billing practices and the complexity of the issues raised in this rulemaking, NITL requests that the Commission (i) establish a second round of comments to enable parties to reply to submissions filed by different stakeholders in this proceeding; and (ii) hold a hearing to allow affected parties to explain the impacts and potential unintended consequences of its proposal that requires the contracting shipper for whose account the transportation or storage is provided to be the sole billed-to party for all demurrage and detention.

Respectfully submitted,

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Dated: December 13, 2022

## Appendix A

### NITL Revisions to Proposed 46 C.F.R. Part 541

#### § 541.1

##### **Purpose**

This part establishes the minimum information that must be included on or with demurrage and detention invoices. It also establishes minimum procedures that must be adhered to when invoicing for demurrage or detention.

#### § 541.2

##### **Scope and applicability**

(a) This part sets forth regulations governing any invoice issued by an ocean common carrier, marine terminal operator, or non-vessel operating common carrier to a billable party for demurrage or billable party for detention or their designated agent for the collection of demurrage or detention charges.

(b) This regulation does not govern the billing relationships among and between ocean common carriers and marine terminal operators.

#### § 541.3

##### **Definitions**

In addition to the definitions set forth in 46 U.S.C. 40102, when used in this part:

*Billing dispute* means any disagreement with respect to the validity of the charges, the billable party, or the method of invoicing raised by the billed party recipient of the invoice or its agent to the billing party.

~~*Billed party* means the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge.~~

~~*Billable party for demurrage* means (i) at the U.S. origin the shipper who is responsible under the bill of lading contract of carriage to tender and deliver to the carrier's facility one or more containers loaded with cargo, and (ii) at the U.S. destination the consignee/receiver who is responsible under the bill of lading contract of carriage to receive from the carrier's facility one or more containers loaded with cargo. An exception to this rule applies when a person requests to be the billable party for demurrage and memorializes this responsibility in an executed written instrument other than the bill of lading contract of carriage.~~

~~*Billable party for detention* means the drayage carrier who is responsible to deliver loaded and/or empty containers to the carrier's facility and has assumed responsibility for the equipment under an interchange agreement. An exception to this rule applies when a person requests to be the billable party for detention and memorializes this responsibility in an executed written instrument other than the bill of lading contract of carriage.~~

*Billing party* means the ocean common carrier, marine terminal operator, or non-vessel operating common carrier who issues a demurrage or detention invoice.

~~Demurrage or detention mean any charges, including “per diem” charges, assessed by ocean common carriers, marine terminal operators, or non-vessel operating common carriers related to the use of marine terminal space (e.g., land) or shipping containers, but not including freight charges.~~

~~Demurrage means any charge, including storage, dwell fee or other-named charges assessed by ocean common carriers, marine terminal operators, or non-vessel operating common carriers or their agents against containerized cargo for the use of the space in the facility as occupied by the containerized cargo.~~

~~Detention means any charge, including per diem or other-named charges assessed by ocean common carriers or non-vessel operating common carriers or their agents for the use of shipping containers as interchanged during the execution of a shipment with the carrier.~~

~~Demurrage or detention invoice means any statement of charges printed, written, transmitted electronically, or accessible online that documents an assessment of demurrage or detention charges.~~

#### **§ 541.4**

##### **Properly issued invoices**

~~The billing party shall issue an invoice for demurrage charges to the billable party for demurrage and an invoice for detention charges to the billable party for detention. The billing party shall not collect duplicative demurrage or detention with respect to a single shipment from more than one party.~~

~~A properly issued invoice is a demurrage or detention invoice issued by a billing party to the person for whose account the billing party provided ocean transportation or storage.~~

~~(a) This person must have contracted with the billing party for the carriage or storage of goods and is therefore responsible for the payment of any incurred demurrage or detention charge.~~

~~(b) A billing party cannot issue an invoice to any other person.~~

#### **§ 541.5**

##### **Failure to include required information**

Failure to include any of the required minimum information in this part in a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable invoice.

#### **§ 541.6**

##### **Contents of invoice**

At a minimum, an invoice for demurrage or detention charges must include the following information:

(a) *Identifying information.* The invoice must contain sufficient information to enable the billed party to identify the container(s) to which the charges apply, including:

- (1) The Bill of Lading number(s);
- (2) The container number(s);
- (3) For imports, the port(s) of discharge; ~~and~~

(4) The shipment booking number;

(5) The shipper reference number; and

(6) The basis for why the invoiced party is the appropriate billable party who is responsible proper party of interest and thus liable for the charge.

(b) *Timing information.* The invoice must contain sufficient information to enable the billed party to identify the relevant time for which the charges apply, and the applicable due date for invoiced charges, including:

(1) The billing date;

(2) The billing due date;

(3) The allowed free time in days;

(4) The start date of free time;

(5) The end date of free time;

(6) For imports, the container availability date;

(7) For exports, the earliest return date; and

(8) The specific date(s) for which demurrage and/or detention were incurred and charged.

(c) *Rate information.* The invoice must contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated, including:

(1) The total amount due;

(2) The applicable detention or demurrage rule (*i.e.*, the tariff name and rule number, applicable service contract number and section, or applicable negotiated arrangement) on which the daily rate is based; and

(3) The specific rate or rates per the applicable tariff rule or service contract.

(d) *Dispute contact information.* The invoice must 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~~, including the name, email, telephone number and other appropriate contact information of the responsible person to whom invoice questions or notice of a billing dispute must be submitted.

~~(1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;~~

~~(2) The URL address of a publicly accessible portion of the billing party's website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver; and~~

~~(3) Defined timeframes that comply with the billing practices in this part, during which the billed party must request a fee mitigation, refund, or waiver and within which the billing party will resolve such requests.~~

(e) *Certifications.* The invoice must contain statements from the billing party that:

(1) The charges are consistent with any of the Federal Maritime Commission's rules related to demurrage and detention, including, but not limited to, this part and 46 CFR 545.5; and

(2) The billing party's performance did not cause or contribute to the underlying invoiced charges.

#### § 541.7

##### **Issuance of demurrage and detention invoices.**

~~(a)~~ A billing party must issue a demurrage or detention invoice within thirty (30) days from the date on which the charge was last incurred or, when payment of the charges is required for delivery or release of containers, whichever is earlier. If the billing party does not issue demurrage or detention invoices within the required timeframe, then the billed party is not required to pay the charge.

~~(b) If the billing party invoices the incorrect party, the correct billed party must receive an invoice within thirty (30) days from the date the incorrect party disputes the charges with the billing party. An invoice to the correct billed party must be issued within sixty (60) days after the charges were last incurred. If the billed party does not receive demurrage or detention invoices within the required timeframe, then it is not required to pay the charge.~~

#### § 541.8

##### **Billing disputes and Rrequests for fee mitigation, refund, or waiver.**

(a) If a billed party disputes an invoice for demurrage or detention charges and/or requests mitigation, refund, or waiver of fees from the billing party, ~~it must submit the request within thirty (30) days of receiving the invoice, it shall provide notice to the billing party in writing that identifies the nature of the dispute, the specific elements of the invoice in question, and any request.~~

(b) If a billing party receives notice of a billing dispute and/or any fee mitigation, refund, or waiver request from a billed party, the billing party must resolve the billing dispute and any request within thirty (30) days of receiving such a billing dispute and/or request. If the billing party fails to resolve the billing dispute and any fee mitigation, refund, or waiver request within the 30-day deadline, the billed party is not required to pay the charge at issue.