



FEDERAL MARITIME COMMISSION

800 North Capitol Street, N.W.
Washington, DC 20573-0001

Phone: (202) 523-5725
Secretary@FMC.gov

June 30, 2022

Mr. Brian Bumpass
Chair, National Shipper Advisory Committee

Dear Chairman Bumpass:

On behalf of the Federal Maritime Commission, this letter responds to Recommendation 1 from the National Shipper Advisory Committee (NSAC) submitted on May 6, 2022. The statute that created NSAC provides a 60-day timeline for the Commission to respond in writing to NSAC recommendations, publish the recommendations on the FMC website, and submit the recommendations to Congress. Your full recommendation and this response will be posted to the FMC's website and submitted to Congress in order to fulfill these statutory requirements. Please thank the NSAC for its diligent work and thoughtful recommendation.

NSAC Recommendation 1: A recommendation to codify regulation in concert with the Interpretive Rule incentivizing the movement of cargo that prohibits any unreasonable application of charges on containers for Dwell Fees while shifting the burden of proof to vessel operators and/or marine terminals and strengthening requirements for proper dispute resolution.

Commission Response

The dwell fees cited in the NSAC's full recommendation are 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." Therefore, when these fees are charged to a shipper, the Commission's interpretive rule on demurrage and detention contained in 46 C.F.R. § 545.5 applies. The interpretative rule broadly defines demurrage to include any charges assessed that relate to the use of marine terminal space. It is the purpose of the fee, not the label or title, that is controlling. The various types of dwell fees outlined in your recommendation meet this definition of demurrage. Further, the interpretative rule made clear that it applies when these types of fees are imposed on shippers by a Marine Terminal Operator (MTO) or an ocean common carrier.

The reasonableness of the dwell fees is evaluated against the standard in § 41102(c) and the interpretative rule. The reasonableness of demurrage practices will be assessed against the ability to serve their primary purpose as financial incentives to promote freight fluidity. This includes the general principle that shippers, intermediaries, and truckers should not be penalized by demurrage charges when they cannot retrieve containers despite having met all of their obligations to retrieve the cargo. In addition, the interpretative rule highlights the importance of accessible and clear demurrage and detention policies on the reasonableness assessment.

Additionally, there should be clear parameters and metrics for when a fee starts/stops and dispute resolution, under § 41102(c) and the interpretive rule.

The Commission has taken several actions related to your recommendations. The Commission will continue its aggressive enforcement policy, including application of the interpretive rule in situations where demurrage charges are assessed despite cargo being unavailable. This situation is present in two of the Commission's existing enforcement cases. In addition, the Commission recently sought comment in an Advance Notice of Proposed Rulemaking on whether it should regulate elements of the demurrage and detention billing process, including situations where MTOs impose fees directly on shippers. The Commission is evaluating the 80 comments it received, as well as this NSAC recommendation, in considering whether to issue a Notice of Proposed Rulemaking. Further, the Commission will consider NSAC's recommendation on adding a burden-shifting regime to future regulatory efforts on dwell fees.

Your full recommendation includes two additional matters. First is the question of whether dwell fees can be extended to the account of the cargo (or the importer). Under 46 U.S.C. § 40501(f), an MTO may impose its schedule of rates immediately on a shipper (or an ocean carrier). You also raise concerns about what is described as a "pay first, argue later" regime. Such practices are already subject to the Commission's interpretive rule and will continue to be evaluated for reasonableness against the interpretive rule, including whether there is an adequate dispute resolution process.

In addition, Public Law No. 117-146, the Ocean Shipping Reform Act of 2022, requires the Commission to do a new rulemaking to clarify the interpretative rule on detention and demurrage and add additional detail based on our experience since its promulgation on May 18, 2020. It would be appropriate, along with a number of Final Recommendations related to detention and demurrage included in the recently released Final Report for Fact Finding 29 ("Effects of the COVID-19 Pandemic on the U.S. International Ocean Transportation Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c)"), to include this recommendation on "dwell time" in this rulemaking because, as noted above, dwell fees are governed by the incentive principle of the interpretive rule.

Thank you for NSAC's proactive role in advising the Federal Maritime Commission on policies related to the competitiveness, reliability, integrity, and fairness of the international ocean freight delivery system. Please contact me or the Designated Federal Officer for the NSAC to confirm receipt of this response and if you have any questions.

Sincerely,

William Cody
Secretary