



The Bottom Line

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FMC ISSUES FINAL RULE ON DEMURRAGE AND DETENTION

Summary

On April 28, 2020, the Federal Maritime Commission (FMC) issued its long-awaited interpretive rules on the reasonableness of carrier and marine terminal operator (MTO) policies and practices when assessing demurrage and detention.

Background

Demurrage refers to the charges assessed after discharge of an import container, after the expiration of free time, and before the container is recovered from the port. For export containers the charges would apply after the in-gate of the full load, after the expiration of free time, and before the container is loaded on the outbound vessel.

Detention, or Per Diem, refers to the charges assessed after a container is recovered from the port, after the expiration of free time, and before the container is returned to the care of the steamship line at the port.

Initially adopted to incentivize cargo owners in the efficient collection and return of containers, these fees have been the target of significant displeasure in recent years. The FMC's investigation into port demurrage and detention practices originated in December of 2016. A petition requested that the FMC issue a ruling following significant port disruption in 2015. The FMC received more than 110 comments to the petition and held public hearings. On March 5, 2018, the FMC voted to commence a fact-finding regarding demurrage and detention practices, selecting Commissioner Rebecca Dye to lead the study.

Current Status

As the primary principle, the final rules adopt that when assessing the reasonableness of demurrage and detention practices, the Commission will look to whether they are meeting their intended purpose as financial incentives to facilitate the prompt and efficient movement of freight (the "Incentive Principle"). Although the Commission recognized that these charges might be justified to reimburse regulated entities for the costs associated with the use of equipment and terminal space, tariff items of this nature should not be regarded as a blank check to run up charges without regard to the actual cost to the carriers and MTOs.

The rules list factors the FMC would consider when determining the overall reasonableness of these types of charges in complaint cases. The FMC also indicated that the factors listed were not meant to be exclusive and that it would consider additional factors if presented in any given case. Essentially, the rules list

seven factors the Commission might consider when determining the reasonableness of demurrage and detention in a complaint case.

These are:

- **Cargo Availability:** Whether a carrier or MTO practice provides a shipper a reasonable opportunity to retrieve its cargo (once it becomes physically available) or return containers before assessing demurrage and detention.
- **Empty Container Return:** Instances where empty containers cannot be returned for no fault of the NVOCC or shipper and detention is nonetheless assessed will likely be found to be unreasonable.
- **Notice of Cargo Availability:** An essential prerequisite to any assessment of demurrage is that the carrier and/or MTO provide some notice that the cargo is physically available.
- **Government Inspections:** In a complaint investigation, the Commission will look to whether assessing demurrage and detention under the specific circumstances in any given case was warranted, and whether the assessment serves the Incentive Principle.
- **Demurrage and Detention Policies:** The FMC would also consider the existence, accessibility, content and clarity of their demurrage and detention policies and whether they reflect the entities' actual practices.
- **Transparent Terminology:** The Commission may consider the extent to which carriers and MTOs have appropriately defined the terms used in their demurrage and detention tariffs and practices, the accessibility of those definitions, and the extent to which the definitions differ from how the terms are generally used.
- **Non-Preclusion:** The FMC is not bound to follow any prescribed formula in determining whether a challenged practice is reasonable, but may instead consider additional factors, arguments and evidence as needed.

Impact

Demurrage and detention are understandable when applied in ways that incentivize efficient cargo movement through ports and marine terminals. The final rules will not mean the end of unreasonable demurrage and detention billing practices, as they only provide guidance on how the Commission is likely to rule if a complaint is filed with the agency. In other words, it is now up to NVOCCs and cargo interests to protest the unreasonable application of these types of charges just because invoices and claims are made. Eventually, consistent application of these rules will encourage the carriers and MTOs to review their practices and commence acting more responsibly.

RESOURCE:

[Interpretive Rule on Demurrage and Detention Under Shipping Act \(FMC\)](#)