



# The Bottom Line

DECEMBER 2020 | VOL. 66

## FMC EXPANDS DEMURRAGE AND DETENTION INVESTIGATION

### Summary

The Federal Maritime Commission recently approved a Supplemental Order that expands the authority of Fact Finding #29, "International Ocean Transportation Supply Chain Engagement." The expanded investigation will seek to determine if policies and practices related to detention and demurrage, container return, and container availability for U.S. export cargoes violate 46 U.S.C. 41102(c).

### 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. In December 2019, the Federal Maritime Commission adopted an interpretive rule on demurrage and detention under the Shipping Act. The recommendations included:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and
- Consistent notice to cargo interests of container availability.

The final rule provides guidance on how the Commission is likely to rule if a complaint is filed with the agency. In other words, it provides the support for NVOCCs and cargo interests to protest the unreasonable application of these types of charges.

### Current Status

In late March, with Chinese production gaining momentum and port facilities worldwide experiencing delays due to staff shortages and increased sanitation procedures, the FMC issued an order authorizing Commissioner Rebecca Dye to identify operational solutions to cargo delivery system challenges related to

COVID-19. The pandemic conditions combined with import volumes interrupted by the pandemic have created a crisis in the supply chain. It is evident that there is currently almost debilitating extreme congestion occurring at the ports of NY/NJ and LA/LB. Regardless, there is a continued propensity of the carriers and marine terminal operators to continue to assess demurrage and detention even though the slow down on the movement of containers in and out of the ports is beyond the control of NVOCCs and shippers. In response to the deluge of complaints reaching the FMC, on November 19, 2020, the Commission issued a supplemental order expanding the scope of FF 29.

Topics of concern for the expanded investigation include:

- Availability of intermodal chassis at the ports of Los Angeles and Long Beach and the availability of containers.
- Application of the new FMC interpretive rule on detention and demurrage, policies on the return empty loads that restrict empty container delivery, and charge detention during this time. Of particular concern is the allegation that truckers could be blacklisted for complaint.
- Availability of skilled longshore labor to perform loading and unloading with larger than ever vessel sizes and vessel calls with all-time high cargo volume.
- Information that beneficial cargo owners (BCO's) have restocked their warehouses and are failing to pick up cargo at marine terminals, or alternatively storing cargo at their facilities, and failing to unload containers and release chassis back into trade.

### Impact

The Commission has a compelling responsibility to investigate the situations that currently exist in our major port gateways. The Commission is concerned that certain practices of ocean carriers and their marine terminals may be amplifying the negative effect of bottlenecks at these ports and may be contrary to provisions in the Shipping Act of 1984. The potentially unreasonable practices of carriers and marine terminals regarding container return, export containers, and demurrage and detention charges in the Ports of Los Angeles, Long Beach, and New York/New Jersey present a serious risk to the ability of the United States to handle trade growth.

#### RESOURCES:

- [Interpretive Rule on Demurrage/Detention Under Shipping Act \(FMC\)](#)
- [Commission Approves Supplemental Order—Fact Finding 29 \(FMC\)](#)