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BEFORE THE
FEDERAL MARITIME COMMISSION

Comments on Notice of Proposed Rulemaking regarding
Interpretive Rule on Demurrage and Detention Under the Shipping Act

NON-CONFIDENTIAL

October 31, 2019

I. Introductory Comments on the FMC’s Notice of Proposed Rulemaking

The American Cotton Shippers Association (“ACSA” or “Association”) hereby submits the following comments to the Federal Maritime Commission (“FMC” or “Commission”) in response to the publication of the Commission’s Notice of Proposed Rulemaking regarding Interpretive Rule on Demurrage and Detention Under the Shipping Act (“Notice of Proposed Rulemaking” or “NPR”),

published in the Federal Register at 84 Fed. Reg. 48,850 (September 17, 2019).¹ With these comments, ACSA intends to provide constructive feedback regarding the Commission's efforts to provide guidance to the industry about how it would assess the reasonableness of the demurrage and detention practices under the Shipping Act.

ACSA is a leading trade association, headquartered in Memphis, TN, that provides a united voice for the cotton merchandising trade of the United States. ACSA's member firms handle over 70% of the U.S. cotton sold in domestic and foreign markets and over 60% of the traded foreign cotton growths in the world. ACSA takes an active role in promoting the increased use of cotton in the U.S. and throughout the world; establishing with other cotton trade organizations national and international standards for trade; collaborating with producer organizations throughout the cotton belt in formulating farm programs; and cooperating with government agencies in the administration of such programs.

ACSA members purchase cotton from producers and sell to consumers all over the world. In addition to helping their customers manage risks from price, location, quality, capacity, cash flow, and currency value, ACSA members bear the responsibilities of managing supply chain logistics to fulfill their contractual obligations of timely and proper delivery to its destination, throughout the globe. The maintenance of intermodal supply chain velocity and integrity is an absolute necessity for our industry.

ACSA submits the comments below in accordance with the Commission's request for the submission of written comments by interested parties on this important issue.

¹ The FMC published a related notice on September 25, 2019, extending the comment period on the NPR to October 31, 2019. 84 Fed. Reg. 50,369 (Sept. 25, 2019).

II. ACSA Applauds the FMC’s Investigation into Detention and Demurrage Practices and Regulations and Strongly Supports the FMC’s Proposed Interpretive Rule.

ACSA strongly supports the FMC’s proposed Interpretive Rule on Demurrage and Detention Under the Shipping Act (the “Interpretive Rule”) and believes that it provides fair guidance on what constitutes reasonable detention and demurrage practices. ACSA applauds the FMC’s investigation into the demurrage and detention charges assessed by ocean common carriers, marine terminal operators, and ocean transportation intermediaries, as well as the crucial work that Commissioner Dye and the Memphis Supply Chain Innovation Team are doing to improve freight fluidity in Memphis and the Mid-South region.

ACSA believes the Interpretive Rule’s implementation would benefit the United States’ ocean-borne shipping industry as well as the industries that depend upon its efficient operation. As noted in these comments, ACSA supports many of the principles underlying the Interpretive Rule and hopes that the insight and practical experiences of shippers relayed in these comments can support the development of effective standards for determining the reasonableness of detention and demurrage practices. In addition, given the Interpretive Rule’s ultimate goal of improving overall freight fluidity and the realities of modern shipping, ACSA urges the FMC to consider applying the principles outlined in the Interpretive Rule to segments of point-to-point ocean-borne shipping that may occur outside the confines of port terminals.

III. ACSA Supports the Interpretive Rule’s Approach to Cargo Availability and Urges Additional Consideration of Intermodal Equipment Availability.

ACSA supports the Interpretive Rule’s approach to cargo availability and again recognizes particularly the Memphis Supply Chain Innovation Team’s efforts on this issue as it affects freight fluidity in Memphis and the Mid-South region. As noted in the Interpretive Rule’s discussion of the

“Incentive Principle,” the purpose of demurrage and detention charges are to incentivize cargo movement and the productive use of assets, including containers and port or terminal land.² While cargo is often treated as available when it is unloaded from the vessel, ACSA’s members are assessed demurrage and detention charges for delays caused by circumstances outside their control that make cargo practically unavailable. As noted in the Interpretive Rule and in FMC’s Fact Finding Investigation No. 28’s Final Report (the “Final Report”), the circumstances causing delayed cargo pickups include congestion at terminals, lack of available appointments, cargo being held by customs for inspections, cargo becoming inaccessible because of its being kept in a “closed” area or terminal, and inclement weather conditions.³

ACSA concurs with the Interpretive Rule’s principle that detention and demurrage policies cannot likely be reasonable if they fail to account for these extenuating circumstances and continue to assess detention and demurrage fees even while cargo is not **actually** available.⁴ Further, ACSA agrees that reasonable detention and demurrage policies must include terms that suspend penalties and charges when cargo is not actually available, including when cargo is undergoing government inspection.⁵ Moreover, multiple transportation nodes exist throughout the intermodal supply chains of exporters, like ACSA members, which have the potential to create cargo delays – triggering detention and demurrage fees when cargo is, in fact, unavailable. Therefore, to be reasonable, when free time ends and detention and demurrage begins must be linked to the point in time when cargo actually becomes available. As the Interpretive Rule indicates, this approach would also require FMC to consider terminal appointment systems in making reasonableness determinations, as some minimum amount of appointment availability is necessary to provide adequate cargo availability.⁶ Applying these standards for determining

² Interpretive Rule at 2.

³ Interpretive Rule at 7; FMC, *Fact Finding Investigation No. 28 Final Report* (“Final Report”) at 7, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.

⁴ Interpretive Rule at 7-8.

⁵ *Id.*

⁶ Final Report at 20.

reasonableness would ensure that detention and demurrage practices provide real, effective incentives for efficient cargo pickup and do not unreasonably burden ocean transport intermediaries for delays caused by uncontrollable circumstances.

While ACSA supports the principles raised in the Interpretive Rule regarding cargo availability, the current version of the Interpretive Rule still fails to adequately address the link between intermodal equipment availability, including chassis, and cargo availability. This omission is significant given that chassis availability was cited throughout the Final Report as a major cause of terminal congestion and cargo unavailability, and has been a key challenge raised by shippers during the FMC’s investigations into detention and demurrage practices.⁷ It was also a major focus of the Memphis Supply Chain Innovation Team’s White Paper, which, as part of the FMC’s investigation into detention and demurrage practices, sought to improve supply chain efficiency around the Memphis Hub.⁸ The White Paper’s specific recommendation on the implementation of an interoperable chassis gray pool only underscores the inextricable link between chassis availability, cargo availability, and freight fluidity more broadly.⁹ To be as effective as possible, the Interpretive Rule must account for the issues affecting chassis allocation and availability, including the “captive chassis” phenomenon created by box rules established between carriers and equipment providers.¹⁰ In establishing reasonableness standards for detention and demurrage practices, ACSA urges FMC to explicitly account for whether ocean-borne cargo has been made unavailable for pick up as a result of chassis unavailability and to treat chassis unavailability as requiring the suspension of demurrage and detention charges.

⁷ Final Report at 4, 7.

⁸ The Memphis Hub is a major intermodal freight hub and is home to five Class I railroads, the largest cargo airport in North America, and the country’s fourth busiest inland port.

⁹ The Memphis Supply Chain Innovation Team, *A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity*, <https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf>

¹⁰ *Id.*

IV. ACSA Supports the Interpretive Rule’s Approach to Assessing Notice of Cargo Availability.

ACSA supports the FMC’s determination that the type of notice and manner by which notice of cargo availability is communicated are critical to determining the reasonableness of detention and demurrage practices.¹¹ ACSA also agrees that to whom notice is given and the clarity of information about when and where cargo may be retrieved are relevant reasonableness considerations, and that the timing, accessibility, and method of notice all impact the ability of shippers to pick up available cargo efficiently. Thus, ACSA supports the Interpretive Rule’s position that reasonable demurrage practices must link the timing of notice to the start of free time.¹² ACSA also supports with the Interpretive Rule’s proposal that “push notifications” should be considered superior form of notice and that their use should be accounted for when determining the reasonableness of detention and demurrage practices.

V. ACSA Supports the Interpretive Rule’s Factors for Assessing the Reasonableness of Demurrage and Detention Policies.

ACSA agrees that the features of dispute resolution processes identified in the FMC’s Interpretive Rule, including the clarity and accessibility of instructions, the sufficiency of information included in billing documents, and existence of evidentiary guidance, should be considered in determining the reasonableness of detention and demurrage policies. In addition, ACSA supports the principle proposed in the Interpretive Rule that clear dispute resolution and billing processes should be negotiated and enforced in service contracts strictly and directly between **contracting** parties and that charges owed by cargo interests should not be imposed on third parties.

Whether unresolved disputes build up or are consistently addressed in a timely fashion substantially impacts freight fluidity for ACSA members. Accordingly, in addition to the factors already

¹¹ Interpretive Rule at 9.

¹² *Id.* at 10.

identified in the proposed Interpretive Rule, ACSA believes the Interpretive Rule should consider whether timelines for concluding a dispute resolution processes are explicitly defined in the relevant detention and demurrage policies.

VI. ACSA Supports the Interpretive Rule’s Guidance on Consistent and Transparent Terminology.

As an association of merchants engaged in trading cotton, a global commodity, ACSA strongly supports the Interpretive Rule’s principle that the consistency and transparency of terminology used in detention and demurrage practices and regulations should be considered in determining reasonableness. ACSA agrees with the Interpretive Rule’s accounting for the availability and clarity of terms used in detention and demurrage practices and regulations. In addition, ACSA agrees that, in making reasonableness determinations, the FMC should consider whether these terms’ use or definitions are consistent with their general use in U.S. trade, or if they differ based on location, time period, or context. Finally, ACSA agrees with the principle that detention and demurrage should be defined in terms of what asset is the source of a charge as opposed to location.

VII. ACSA Urges the FMC to Ensure the Scope of the Final Interpretive Rule Accounts for the Realities of Modern Shipping.

As a final matter, ACSA urges the FMC to ensure the scope of the Interpretive Rule accounts for the realities of modern supply chains. Specifically, for a rule addressing detention and demurrage to be effective in improving freight fluidity in ocean-borne trade, its application cannot be isolated to shipping activities occurring at port terminals alone. ACSA’s members engage in international shipping transactions that invariably originate at inland points either in the United States or overseas and terminate at a corresponding inland point either in the United States or overseas. Carriers, responding to the demands of consumers, have crafted service contracts that incorporate inland movements and services,

providing point-to-point distribution. Thus, the reasonableness of detention and demurrage practices and regulations, as they apply to *inland* movements in point-to-point service contracts, have an equally significant impact on the fluidity of all ocean-borne trade.

Given the impact that detention and demurrage practices have on all segments of maritime supply chains, ACSA urges the FMC to craft a final Interpretive Rule that accounts for inland components of ocean-borne shipping transactions. This approach would reflect the reality that unreasonable detention and demurrage practices do not begin and end at port terminals. The FMC currently regulates certain terms of service contracts and tariffs that incorporate inland movements and services. Thus, similarly applying the Interpretive Rule to point-to-point service contracts would be consistent with FMC's regulatory regime.

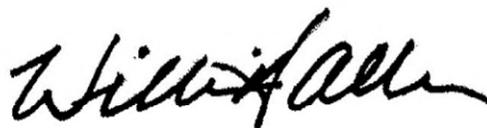
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Thank you for the opportunity to submit comments on this very important topic. ACSA would be pleased to discuss these comments with the Commission if it would be helpful and to participate in any follow-up meetings or events that the Commission may host to discuss potential next steps.

Respectfully submitted,



William H. Allen

President and CEO

American Cotton Shippers Association