Pacific Coast Council of Customs Brokers & Freight Forwarders Association, Inc.

◆ Customs Brokers & International Freight Forwarders Assn. of Washington State ◆ Columbia River Customs Brokers and Forwarders Assn. ◆ Custom Brokers & Forwarders Assn. of Northern California ◆ Los Angeles Customs & Freight Brokers Assn. ◆ San Diego District Customs Brokers Assn.

Before the
Federal Maritime Commission
Docket No. 22-04

The **Pacific Coast Council of Customs Brokers and Freight Forwarders** (Pacific Coast Council or 'PCC') submits these **Comments** regarding the **Federal Maritime Commissions Advance Notice of Proposed Rulemaking on Demurrage and Detention Billing Requirements Docket.**

The Pacific Coast Council www.PacificCoastCouncil.org represents over 8,000 independent licensed customs brokers, freight forwarders and employees of the company members of the 5 local associations along the nation's largest international trade gateway:

- San Diego Customs Brokers Assn
- Los Angeles Customs Brokers and Forwarders Assn
- Northern California Customs Brokers and Forwarders Assn
- Columbia River Customs Brokers and Freight Forwarders Assn
- Customs Brokers and Intl Freight Forwarders Assn of Washington State

As the facilitators of ocean (and air) imports and exports through all ports in the United States, but with particular focus on the Pacific Coast where supply chain challenges have gained significant public and Federal attention, our members can provide unique visibility into the demurrage and detention issues which are the subject of the current ANPRM.

Associations representing the beneficial cargo owners are submitting Comments in the present Docket. We support their responses to the various questions, as our interests are aligned. In particular we support the requirement to include of all the elements set forth in **Question 6**, with a detention or demurrage invoice.

Focus of Pacific Coast Council Comments: Deadlines, Billing of Third Parties

For the purposes of providing constructive views to the Commission, our Comments focus upon issues in the Docket relating to invoicing deadlines (Question 7), and unrelated or third-party billing.

Question 7: Deadlines on receipt of detention or demurrage invoices.

The centerpiece of the Commission's Interpretive Rule on Demurrage and Detention Practices, April, 2020 is the question of container availability. If not available, detention or demurrage should not be charged. We are often asked by the BCO clients for information relating to the movement of the container, in particular delays due to mandated Customs and Border Protection exams, or those of other Federal agencies involved in import enforcement/inspection, with which we work to facilitate the entry of imports into US commerce.

If the invoice arrives months later, it becomes very difficult to establish if the container was available or not, and thus whether the detention charge was reasonable or not. We are also in a position to know other information relevant to container availability, for instance, if the trucker was able to secure a terminal gate appointment, or not, and if the gate was actually open at the appointment time.
If weeks and months pass before a detention or demurrage invoice arrives, then providing accurate information as to these events becomes very difficult, if not impossible. And this information is critical to the 'free time' calculation, specifically, whether the clock should stop when the container was not available.

For these reasons, we believe the Commission should impose a deadline, preferably 3 weeks (21 days) but in any case, not to exceed 30 days.

Questions 8 and 9: Multiple Parties and Invoiced Party Identity

8. Do common carriers invoice multiple parties for demurrage and/or detention charges? If multiple parties are invoiced for charges, should the billing party be required to identify all such parties receiving an invoice for the charges at issue?
9. Should the billing party be required to identify the basis of why the invoiced party is the proper party in interest and therefore liable for the charges? (*i.e.,* as shipper, consignee, beneficial cargo owner, motor carrier or an agent, or as a party acting on behalf of another party pursuant to the common carrier's merchant clause in its bill of lading.)

The parties that are included in the Carriers' "Merchant Clause" in their Bills of Lading., are placed there arbitrarily. The importer often names the customs broker as the "notify party". for Customs purposes. However, we find we have been included, even though we have no part in the transportation negotiation, handling, either on the seas, or at the marine terminals, or inland transport (unless a CBP exam is required). We have no

relationship with the ocean carrier. We haven't known, accepted or even known about responsibility to pay detention/demurrage bills on behalf of an importer or exporter.

We recommend that the FMC issue a rule *prohibiting* carriers from adding a party on the B/L unless that party understands and accepts (in writing) such responsibility.

Carriers bill charges to brokers/forwarders who have no physical control of the movement of the container. The incorrect party being billed, and lack of information is what is mostly binging deputed. In fact we have been billed even on carrier "Store Door" delivery where the carrier (under Bill of Lading terms) assumes full logistic delivery responsibility. The Customs broker plays no role, yet the carrier will bill us the detention or demurrage.

The carriers are billing the party of least resistance. It appears the first and easiest choice under the "Merchant Clause" is to bill the US customs broker on import shipments as there would be minimal effort on the carrier's part (since the carrier's shipper may be based overseas), and the carrier prefers to avoid imposing detention/demurrage on a current or future customer BCO. Instead, the carrier lawyers pursue a small US customs broker with whom the carrier has not had, and likely will never have, any commercial relationship.

At the same time, carriers are using broker/forwarders as their collection and payment party. Under what authority does a carrier bill any party which has no contractual or title interest in the transportation of the cargo?

The billing party should indicate all parties being invoiced and furnish backup documentation to invoiced party.

Merchant Clause: - Notify Party:
The Customs broker is not a party to the carrier's contract of carriage. We never take title of the cargo, have any contractual agreement with the carrier, shipper, or ultimate consignee, to have any actual or implied responsibility for payment of any charges. There is no written or implied responsibility with carriers or terminal operators to be responsible for the collection of any charges against the cargo. **The FMC should issue a rule prohibiting carrier's and terminal operators from billing parties only shown as a notify party on the Bill of Lading** without a written agreement for payment. The FMC should restrict the "Merchant Clause" to the Beneficial Cargo Owner, the Shipper, and the Ultimate Consignee receiving the physical cargo.

The billing party should direct invoicing to the proper party of interest in the movement of the Cargo. The "Beneficial Cargo Owner" and the "Shipper" are the two parties who have a financial interest in the actual cargo movement and have contractual obligation with the carrier in its movement. Carriers have knowledge of who the responsible parties are by either the original Bill of Lading shipper designation or the title endorsement on the Bill of Lading as required for release of the cargo from the carrier's custody.

Customs Broker's and Ocean Transportation Intermediaries/Forwarders offer regulatory services in meeting various governmental requirements for imports and exports. Like a Certified Public Accountant, a Broker or Forward does not automatically assume any financial responsibility unless by specific contractual agreement with the importer or shipper.

Transportation information is required for preparation and filing required government documentation. A customs broker or forwarder can only obtain some of this information from the carrier or terminal operator. For security reasons the broker or forwarder must be shown as a "notify party". On import shipments, many times the customs broker is neither notified nor approves this designation. The notify party does not imply any financial responsibility as interpreted by the carrier "Merchant Clause".

Even when the carrier knows the responsible foreign party (BCO shipper – the carrier's customer) they evoke the "Merchant Clause" and charge the US customs broker because they claim it is "against their policy and must bill a US party". The carrier arbitrarily deems us to be their responsible U.S. party. Thus, the carriers use the "Merchant Clause" in order to bill the US customs brokers, essentially using them to collect and/or pay charges, often without being furnished any backup documentation on how the charges incurred or why they are being billed to the customs broker.

Conclusion

The Pacific Coast Council urges the FMC to promulgate a rule limiting carriers to bill demurrage/detention/sundry charges to parties with contractual shipping agreement, financial interest, or physical receipt under bill of lading transfer title. Such a limitation should specifically, exclude the "notify party".

Respectfully Submitted,

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