

RECENT DETENTION AND DEMURRAGE DEVELOPMENTS

By Stephen M. Uthoff¹

Introduction

“A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.²” This prohibition against unreasonable practices has been the basis for several recent complaints concerning demurrage and detention practices. The Federal Maritime Commission (the “Commission”) has, on at least two occasions, promulgated interpretive rules in an effort to provide the scope of and basis for claims under this statutory provision³. But nevertheless, complaints concerning unjust demurrage and detention charges continued.

With the advent of the Ocean Shipping Reform Act of 2022⁴ (“OSRA 2022”) and the Commission’s recent rulemaking at 46 C.F.R Part 541, the demurrage and detention landscape has changed dramatically for vessel operating common carriers (“VOCC”), marine terminal operators (“MTO”), non-vessel common carriers (“NVOCC”) and motor carriers.

How did we get here?

The Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998

Ocean transportation entities, including VOCCs, NVOCCs and MTOs continue to be substantially regulated by the federal government by and through the Commission. The Commission was established in 1961 by executive order as an independent regulatory body⁵. The Commission is charged with regulating common carriers by water and other persons involved in the oceanborne foreign commerce of the United States, including NVOCCs and MTOs, under

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² 46 U.S.C. §41102(c).

³ 46 C.F.R. §§ 545.4 and 545.5.

⁴ Public Law No: 117-146, June 16, 2022.

⁵ See Reorganization Plan of 1961, 75 Stat. 840 (1961).

provisions of the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998 (“OSRA”)⁶ and OSRA 2022.

The Commission has shepherded in the modernization of the transportation industry. The advent of containerization brought about the need for regulatory change. The Shipping Act of 1984⁷ provided needed changes to the industry. For example, it first allowed transportation under private service contracts offered by VOCCs or carrier conferences instead of public tariffs and clarified that carriers could offer rates for intermodal transportation.⁸ Section 18 of the 1984 Act required the Commission to collect and analyze data concerning the 1984 Act’s impact on the ocean shipping industry as a whole over a five year period. It further required the Commission to submit a report to congress on its findings. The Section 18 Report on the Shipping Act submitted by the Commission to congress in September 1989 and its progeny, provided the support for the passage of OSRA. OSRA was seen as a deregulation effort to allow the ocean transportation industry more flexibility and the ability to react to a changing marketplace. For example, OSRA ended the authority for liner conferences to regulate their members’ service contracts; allowed for confidentiality of rates in service contracts offered by VOCCs⁹ and gave the Commission enhanced authority to provide exemptions from existing statutory provisions.¹⁰

Notwithstanding the deregulation afforded by OSRA, the Commission remains an active steward of the maritime transportation industry. Its self-styled mission statement is “[t]o foster a fair, efficient and reliable international ocean transportation system and to protect the public from unfair and deceptive practices.”¹¹ The Commission’s regulatory responsibilities include, *inter alia*:

1. Reviewing agreements among ocean common carriers and marine terminal operators (MTOs) relating to service in the U.S. foreign oceanborne trades, to ensure that they do

⁶ 46 U.S.C. §40101 et. seq. The FMC is also responsible for administering section 19 of the Merchant Marine Act, 1920 (46 U.S.C. 42101-42109); the Foreign Shipping Practices Act of 1988 (46 U.S.C. 42301-42307); sections 2 and 3, Public Law 89-777, Financial Responsibility for Death or Injury to Passengers and for Non-Performance of Voyages (46 U.S.C. 44101-44106); and other applicable statutes. See 46 CFR §501.2(a)

⁷ Hereinafter the “1984 Act”.

⁸ See generally former 46 U.S.C. Appx. §1707 now 46 U.S.C. §40501.

⁹ 46 U.S.C. §40502

¹⁰ 46 U.S.C. §40103

¹¹ http://www.fmc.gov/about/mission_and_vision_statements.aspx

not cause substantial increases in transportation costs or decreases in transportation services.

2. Providing a forum for exporters, importers and other members of the shipping public to obtain relief from ocean shipping practices or disputes that impede the flow of commerce and otherwise cause economic harm.
3. Protecting the shipping public against economic harm by investigating rates, charges, classifications, and practices of common carriers, MTOs, and OTIs operating in the foreign commerce of the U.S., and acting to stop unjust or unlawful practices.¹²

Fact Finding 28 and Interpretive Rule 46 C.F.R. §545.5.

On December 7, 2016, The Coalition for Fair Port Practices filed a Petition for Rulemaking¹³ requesting the Commission to “initiate a rulemaking proceeding, pursuant to 46 C.F.R. § 502.51, for the purpose of adopting a rule that will interpret the Shipping Act of 1984, as amended, and specifically 46 U.S.C. §41102(c), to clarify what constitutes ‘just and reasonable rules and practices’ with respect to the assessment of demurrage, detention, and per diem charges by ocean common carriers and marine terminal operators when ports are congested or otherwise inaccessible. Specifically, Petitioners are proposing a rule for adoption by the Commission and request specific guidance as to the reasonableness of such charges when port conditions prevent the timely pick up of cargo or the return of carrier equipment because of broad circumstances that are beyond the control of shippers, receivers, or drayage providers.”¹⁴

After receiving 110 comments filed in response to the petition, the Commission conducted two days of public hearings which included testimony from VOCCs, MTOs, and motor carriers. Ultimately the Commission decided that a non-adjudicatory fact finding investigation was warranted and on March 5, 2018, it initiated Fact Finding Investigation No

¹² The Federal Maritime Commission, *Strategic Plan, Fiscal Years 2014-2018*, November 20, 2013, pg. 5.

¹³ FMC Docket P4-16

¹⁴ Docket P4-16, Petition, page 1

28 into the conditions and practices relating to detention, demurrage, and free time.¹⁵ Fact Finding Officer Commissioner Rebecca Dye found:

“• Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;

• All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and

• Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain. [and]

... that significant benefits to the U.S. international ocean freight delivery system, and the American economy as a whole, would result from:

- 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;
- Consistent notice to cargo interests of container availability...”¹⁶

Thereafter, on September 19, 2019 the Commission initiated a proposed rulemaking for an interpretive rule on demurrage and detention under the Shipping Act¹⁷. The Commission’s proposed rule would provide instruction on how the Commission will interpret 46 U.S.C. §41102(c) and 46 C.F.R. §545.4(d)¹⁸ in the context of demurrage and detention charges. Response to the proposed rulemaking was robust with over 100 comments received

¹⁵ Order of Investigation, Fact Finding Investigation No. 28
https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/

¹⁶ Fact Finding No. 28, Final Report page 32.
https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/

¹⁷ FMC Docket 19-05

¹⁸ 46 C.F.R. §545.4(d) is part of a prior interpretive rule establishing elements for a successful claim for reparations to include, among other qualifications, that (d) “the practice or regulation is unjust or unreasonable”.

from various stakeholders. Ultimately on April 28, 2020, the Commission published its interpretive rule at 46 C.F.R. §545.5 as follows:

“ § 545.5 Interpretation of Shipping Act of 1984 — Unjust and unreasonable practices with respect to demurrage and detention.

(a) Purpose. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) Applicability and scope. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including “per diem,” assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (“regulated entities”) related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.

(c) Incentive principle—

(1) General. In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) Particular applications of incentive principle—

(i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) Empty container return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

(iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may

consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

(d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

(f) Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.”

It is worth mentioning that this interpretive rule also addressed the tension between the UIIA and the Commission’s jurisdiction under the Shipping Act to regulate VOCCs and MTOs. Significantly, the Commission as part of the final rule, noted: “Ocean carrier practices, whether incorporated in the UIIA, or not, are within the Commission's purview under section 41102(c).”¹⁹

COVID-19 and Fact Finding No. 29

“Supply chain”, an innocuous term known to logistics professionals, found itself thrust into the mainstream vernacular when there were perceived and actual shortages of PPE, ordinary household staples, construction materials, auto parts etc. with the advent of COVID-19. The list of goods that were affected by supply chain issues is exhaustive. In the context of this demurrage and detention framework, ships remained at anchor unable to load and unload cargo; terminals became congested, to put it mildly, and were unable to timely provide for the throughput of loaded containers and receipt of empties; chassis shortages occurred; off-dock storage was depleted and was at maximum capacity.

¹⁹ 46 CFR 545.5, Final Rule, 85 FR at 29649

On March 31, 2020, 18 days after then President Trump declared a national emergency concerning COVID-19, the Commission launched Fact Finding No. 29. Commissioner Dye was appointed Fact Finding 29 Officer. As part of the fact finding mandate, Commissioner Dye was to identify commercial solutions to supply chain issues and develop commercial solutions to port congestion.²⁰ However, based upon information initially gathered, a supplemental order was issued by the Commission on November 20, 2020 to investigate carriers in the ports of New York, New Jersey, Los Angeles and Long Beach to determine if the carriers in those ports were employing practices in violation of 46 U.S.C. §41102(c). In relation to detention and demurrage the supplemental order required investigation into:

- “• **Container return practices** - in particular, practices that impact the efficient drayage of empty containers to marine terminals for carrier pickup;
- **Demurrage and detention practices** - specifically whether carriers' policies, practices, and procedures align with the principle, central to the Commission's Interpretive Rule on demurrage and detention, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity...”²¹

The Fact Finding Officer thus pivoted from investigating commercial solutions to the COVID-19 supply chain issues to an effort to gather information on violations of the Shipping Act.²² The Fact Finding Officer did so with gusto. Via a press release titled “Advice to the Trade” invited the public to provide information via email to the Commission.²³ Many complaints concerned demurrage and detention charges resulting from the inability to pull full or

²⁰ See Final Report on Fact Finding No. 29, page 4

<https://www2.fmc.gov/readingroom/docs/FFno29/Fact%20Finding%2029%20Final%20Report.pdf/>

²¹ Order: International Ocean Transportation Supply Chain Engagement - Possible Violations of 46 U.S.C. § 41102(c), (Nov. 19, 2020).

²² Final Report on Fact Finding No. 29, Page 30

²³ FMC Press Release: *Fact Finding 29: Advice to the Trade*, (Dec. 17, 2020), <https://www.fmc.gov/Fact-Finding-29-advice-to-the-trade/>.

return empty containers to the respective terminals.²⁴ Shippers and motor carriers were also encouraged to contact the Commissions Bureau of Enforcement for specific actionable violations of the Act.²⁵ The Fact Finding Officer also issued several information demands to MTOs and VOCCs demanding information on empty container returns, export cargo receiving timelines, demurrage and detention and MTO and VOCC's efforts to comply with the 46 C.F.R. §545.5.²⁶

Generally, from a commercial perspective the Fact Finding Officer found that the increase of ocean freight costs were as a result of unique market forces brought on by COVID-19 and were simply an exaggerated product of ordinary market forces of supply and demand.²⁷ In contrast, however, it was also found that certain ocean carriers were not in compliance with the "incentive principle" found in the interpretive rule on demurrage and detention.²⁸ Commissioner Dye also reminded the public that the incentive rule may be enforced by way of complaints and enforcement actions brought under 46 U.S.C. §41102(c).²⁹

As a result of Fact Finding No. 29, the Fact Finding Officer made several interim and final recommendations which included:³⁰

- 1) Minimizing barriers to private party action including protections against retaliation;
- 2) Clarifying Commission and industry processes;
- 3) Encouraging assistance with Commission investigations including an effort to amend the Shipping Act to authorize the Commission to order refund relief in addition to civil penalties in enforcement proceedings;
- 4) Suggested rulemaking on empty container returns;
- 5) Suggested rulemaking on earliest return dates; and
- 6) Rulemaking to define merchant haulage and carrier haulage;

The resulting report from Fact Finding No. 29 would provide fodder for the changes to be made to the Shipping Act of 1984 vis OSRA 2022 and the recently implemented regulation at 46 C.F.R. §541 et. seq. concerning demurrage and detention billing practices.

²⁴ Final Report on Fact Finding No. 29, Page 31.

²⁵ Final Report on Fact Finding No. 29, Page 31.

²⁶ Final Report on Fact Finding No. 29, Page 32.

²⁷ Final Report on Fact Finding No. 29, Page 44-45.

²⁸ 46 C.F.R. §545.5.

²⁹ Final Report on Fact Finding No. 29, Pages 6-7.

³⁰ See Final Report on Fact Finding No. 29, Pages 41-60 for the complete list.

OSRA 2022 and 46 C.F.R. §541 et. seq: Changes to demurrage and detention billing practices.

OSRA 2022, went into effect on June 16, 2022. It was a sea change (forgive the pun) to the Shipping Act in its efforts to protect the shipping public to perceived unjust demurrage and detention practices. For example, it added protections against retaliation against any shipper, ocean transportation intermediary or motor carrier that has “filed a complaint against the common carrier, marine terminal or ocean transportation intermediary; or...any other reason.”³¹ OSRA 2022 also for the first time explicitly set forth the necessary information for any demurrage or detention invoice at 46 U.S.C. §41104:

“(a) In general. A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—

(15) invoice any party for demurrage or detention charges unless the invoice includes information as described in subsection (d) showing that such charges comply with—

(A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and

(B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled “Interpretive Rule on Demurrage and Detention Under the Shipping Act” (or successor rule);...

(d) Detention and demurrage invoice information.

(1) Inaccurate invoice. If the Commission determines, after an investigation in response to a submission under section 41310 [46 USCS § 41310], that an invoice under subsection (a)(15) was inaccurate or false, penalties or refunds under section 41107 [46 USCS § 41107] shall be applied.

(2) Contents of invoice. An invoice under subsection (a)(15), unless otherwise determined by subsequent Commission rulemaking, shall include accurate information on each of the following, as well as minimum information as determined by the Commission:

(A) Date that container is made available.

³¹ 46 U.S.C. §41102(d).

- (B) The port of discharge.
- (C) The container number or numbers.
- (D) For exported shipments, the earliest return date.
- (E) The allowed free time in days.
- (F) The start date of free time.
- (G) The end date of free time.
- (H) The applicable detention or demurrage rule on which the daily rate is based.
- (I) The applicable rate or rates per the applicable rule.
- (J) The total amount due.
- (K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
- (L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
- (M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges."

In addition, §41104 provides that "[f]ailure to include the information required under subsection (d) on an invoice with any demurrage or detention charge *shall eliminate any obligation of the charged party to pay the applicable charge.*"³²(emphasis added). Simply put, no longer is there any doubt: if an invoice fails to comply with the requirements of OSRA 2022, it need not be paid. And any attempt to collect on an inaccurate invoice could result in penalties and a refund. Furthermore, as suggested by the Final Report on Fact Finding No. 29, any person or entity which violates the Shipping Act (as amended by OSRA or OSRA 2022) can now be held liable for civil penalties or in addition to or in lieu of a civil penalty, can be liable for a refund of the associated charges resulting from a Commission enforcement proceedings.³³ OSRA 2022 also established the charge complaint procedure (more fully discussed below).³⁴

OSRA 2022 also mandated further action by the Commission:

³² 46 U.S.C. §41104(f).

³³ 46 U.S.C. §41107(a).

³⁴ 46 U.S.C. §41310

“(1) In general. Not later than 45 days after the date of enactment of this Act, the Federal Maritime Commission shall initiate a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges. The Federal Maritime Commission shall issue a final rule defining such practices not later than 1 year after the date of enactment of this Act.

“(2) Contents. The rule under paragraph (1) shall only seek to further clarify reasonable rules and practices related to the assessment of detention and demurrage charges to address the issues identified in the final rule published on May 18, 2020, entitled ‘Interpretive Rule on Demurrage and Detention Under the Shipping Act’ (or successor rule), including a determination of which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.”³⁵

With the passing of OSRA 2022, the Commission promptly jumped in and issued interim advisories concerning procedures for filing and processing charge complaints³⁶ and demurrage and detention billing practices³⁷. The commission made it clear that there was no “phase in” period for the new requirements for OSRA 2022.³⁸

Also in response to OSRA 2022 (and to continue the work first started in Fact Finding No. 28) the Commission published a notice of proposed rulemaking on October 13, 2022 addressing demurrage and detention billing practices.³⁹ After receipt and review of 274 comments from all aspects of the shipping industry, including beneficial cargo owners, trade groups, Congress and other executive agencies, the Commission published its final rule, now codified as 46 C.F.R. §541 et. seq.⁴⁰ The final rule will be effective May 28, 2024 with the exception of 46 C.F.R. §§ 541.6 and 541.99 which the Commission will announce the effective date in the future. 46 C.F.R. Part 541 is attached hereto in its entirety for ease of reference.

³⁵ 46 U.S.C. §41102 note.

³⁶ <https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/> - July 14, 2022; <https://www.fmc.gov/fmc-announces-interim-procedures-for-processing-charge-complaints/> - December 1, 2022.

³⁷ <https://www.fmc.gov/industry-advisory-demurrage-detention-billing-practices/> - July 22, 2022.

³⁸ See, Office of General Counsel, *Timing of Certain Provisions of the Ocean Shipping Reform Act*, June 24, 2022; <https://www.fmc.gov/wp-content/uploads/2022/06/FMCGCOpiniononOSRA22.pdf>

³⁹ 87 FR 62341

⁴⁰ 89 FR 14330.

46 C.F.R. Part 541 expands on the demurrage and detention invoicing requirements found in OSRA 2022. On top of the additional information required to be placed on the invoices themselves as required by §541.6, the regulation also limits the timing of the invoices and the parties to which invoices may be issued. A VOCC must issue invoices within 30 days of the date of the last charge. If it fails to do so, the invoiced party has no obligation to pay the invoice⁴¹ even if an original invoice was issued to an incorrect party and needed to be reissued.

Significantly the Commission also put limits on who may be the “billed party”. Generally, “billed party” is defined as “the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge.”⁴² The Commission went on to establish that the billed parties are now very limited. Instead of motor carriers under the UIIA or peripheral persons which may be captured by VOCC’s “merchant” clauses in their bills of lading⁴³ the billed parties are limited to the person for whose account the billing party⁴⁴ provided ocean transportation *and* who contracted with the billing party for the transportation or the consignee⁴⁵. A billing party CANNOT issue an invoice to any other person.⁴⁶ Also if a billing party issues an invoice to the person who contracted with them or the party for whom ocean transportation was provided, it cannot also issue an invoice to a separate consignee.⁴⁷

The regulation also has additional limits on collectability and timing of invoices. Like OSRA 2022 the regulation confirms, the “failure to include any of the required minimum information in this part in a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge”.⁴⁸ In addition to the requirements to issue invoices within 30 days, a billed party has *at least* 30 days to challenge the invoice and once challenged the billing party *must* attempt to resolve the dispute within 30 days unless otherwise agreed among the parties.⁴⁹ The Commission acknowledged that these time frames were shorter than

⁴¹ 46 C.F.R. §§451.7(a) & (d).

⁴² 46 C.F.R. §541.3

⁴³ NEED CITE AND LANGUAGE

⁴⁴ A “billing party” can be a VOCC, NVOCC or MTO, 46 C.F.R. §541.3.

⁴⁵ 46 C.F.R. §541.4(a).

⁴⁶ 46 C.F.R. §541.4(c).

⁴⁷ 46 C.F.R. §541.4(b).

⁴⁸ 46 C.F.R. §541.5.

⁴⁹ 46 C.F.R. §541.8.

were allowed under the UIIA, but found the reciprocal 30 day window as a balance to the needs of the billing and billed parties.⁵⁰ Notwithstanding this dispute resolution timing, the Commission commented “[t]his rule does not impact traditional cargo lien rights.”⁵¹

In addition to the changing demurrage and detention invoicing parameters, OSRA as well as the Commission’s regulations also set forth new enforcement mechanisms.

Post OSRA 2022 Enforcement with the new Charge Complaint procedure.

Prior to the implementation of OSRA 2022 there were three different ways a private party could enforce violations of the Shipping Act on an administrative level⁵²: a private formal complaint⁵³; a private small claims complaint⁵⁴; and a request for Commission investigation⁵⁵. Each of these methods had certain drawbacks. Litigation of a private formal complaint is similar to civil litigation with an accelerated docket. Attorney’s fees, internal administrative burdens and unfamiliarity with the Commission’s rules and procedures⁵⁶ could provide a barrier to this type of relief. In some cases, litigation at the Commission may be more onerous than litigating in a federal or state court, given the abbreviated time frames allowed for disclosures that are required within seven days of date the answer is filed and a requirement that discovery be completed in 150 days⁵⁷ in addition to the short timeframes for issuance of an initial decision by the ALJ.

The small claims procedure, while less onerous, could still be a substantial burden on a complainant. A small claims complaint must include all supporting evidence and a legal brief to support the claim⁵⁸.

Last, an aggrieved party could make a complaint to the Commission requesting investigation and relief. But prior to OSRA 2022, if the Commission were to find a violation of the Shipping Act, it was only authorized to issue civil penalties which are paid to the U.S.

⁵⁰ 89 FR 14351

⁵¹ 89 FR 14353

⁵² In addition, a complainant may have a private right of action to file claims in a court of competent jurisdiction see generally *Sealand Service, Inc. v. Murray & Sons, Inc.*, 824 F.2d 740, 744 (9th Cir. 1987).

⁵³ 46 C.F.R. §§502.61(a) and 502.62.

⁵⁴ 46 C.F.R. §§502.61(a) and 502.301

⁵⁵ 46 C.F.R. §§502.61(b) and 502.63

⁵⁶ See 46 C.F.R. part 502; also, to the extent not covered by the Commission’s rules, the FRCP will generally apply. See 46 C.F.R. §502.12.

⁵⁷ 46 C.F.R. §502.141 et. seq.

⁵⁸ 46 C.F.R. §502.304

Treasury and not refunds or other reparations(damages) which could be awarded to the complainant under the formal petition or small claims pathways.

After OSRA 2022, the potential enforcement mechanisms changed. Parties are still allowed to file a formal complaint or small claims complaint. However, OSRA 2022 also created the charge complaint mechanism.⁵⁹ The charge complaint is an attempt to provide a pathway for relief for unlawful practices under 46 U.S.C. §§41102 and/or 41104(a). A charge complaint is an extension of the Commission’s enforcement function, not a replacement for private complaints which seek full reparations on behalf of the real party in interest. As the Commission stated in its informal guidance on charge complaints dated July 14, 2022: “When the Commission receives sufficient information, it will promptly initiate an investigation, which could ultimately result in a civil penalty and order for a refund of charges paid. ... *Investigations by the Commission are for law enforcement purposes and do not constitute representation as attorney for the complainant or a guarantee of refunds.*”⁶⁰ (emphasis added).

Charge complaints are not mandatory and do not address any and all Shipping Act violations; only allegations of unlawful charges per 46 USC §§41102 and 41104(a). A party can bypass the charge complaint procedure and move forward with the more traditional formal complaint or small claims complaint process. The Commission has published interim procedures for submitting charge complaints⁶¹ and guidance thereon. The charge complaint scope and procedure can be summarized as follows:

Who may file?: Only a shipper, consignee, trucker or third party which has been invoiced by or has paid charges to a common carrier may file a Charge Complaint.⁶²

What are the proper targets of a Charge Complaint?: A Charge Complaint may only be filed against a common carrier.⁶³

What types of charges may be challenged?: Charges issued by a common carrier that are not in compliance with 46 USC §41102 and 41104(a). This is a broad category and is most often

⁵⁹ 46 U.S.C. §41310

⁶⁰ <https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/>

⁶¹ The Commission has attempted to publish “user friendly” guidance for charge complaints including interim procedures, guidance on charge complaint procedures and an on-demand webinar for Charge Complaints as part of its OSRA 2022 implementation.

⁶² 46 U.S.C. §41310(a)

⁶³ Id.

concerning demurrage and detention. Certain charges cannot be challenged by way of a Charge Complaint such as:

- charges invoiced or assessed prior to the effective date of OSRA on June 16, 2022.
- charges assessed by a marine terminal operator or party other than a common carrier (unless assessed on behalf of the common carrier).
- charges that have not yet been invoiced or assessed by the common carrier.
- charges assessed on export cargo loading on a vessel at a non-U.S. port, or on import cargo discharging from a vessel at a non-U.S. port.
- complaints related to other carrier actions that do not dispute an assessed charge.⁶⁴
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The detailed mechanisms of filing and processing Charge Complaints are beyond the scope of this paper but can be easily accessed via the Commission's web page at <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>.

After submitting a charge complaint, the Commission will request information from the responding common carrier and possibly third parties. After investigation the Commission will notify all parties of the result of the investigation. Thereafter there are basically three potential outcomes: 1) the common carrier voluntarily refunds or waives the charge; 2) the Commission determines that no further action is needed on the complaint based on the results of the investigation; or 3) the matter is referred to the office of enforcement for a potential petition to the Commission for an order to show cause against the common carrier as to why the charges should not be promptly refunded⁶⁵. If the Commission votes to proceed with an order to show cause, the matter is referred to an administrative law judge for formal proceedings. If this occurs, the Commission's Office of Enforcement will prosecute the matter against the common carrier.

Importantly, for demurrage or detention charges the common carrier will bear the burden of proof for establishing the reasonableness of those charges and compliance with OSRA 2022. If it is found that a carrier's charges did not comply with the Act after submission of the charge complaint, in addition to any refund, a civil penalty shall be applied to the common carrier.⁶⁶

The charge complaint procedure has proven to be a significant tool for Commission enforcement. As of September 2023, a little over a year after implementation of OSRA 2022, the

⁶⁴ <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>

⁶⁵ See generally 46 U.S.C. §41310(c)

⁶⁶ 46 U.S.C. 41310(d).

ommission announced that approximately \$1.7 million had been *voluntarily* waived or refunded⁶⁷.

There's a New Sheriff In Town!

While the title to this section is not completely accurate since the Commission has been in existence since 1961, recent events have seen the Commission flex its authority to combat real or perceived unfairness, inefficiencies and potential violations of the Shipping Act, as amended, especially with respect to detention and demurrage charges. In addition to the charge complaint procedure, the Commission has added an additional administrative law judge to handle the increasing load of complaints being filed.

It remains to be seen how OSRA 2022 and 46 CFR part 541 will play out in the industry including the obvious tension between the UIIA which traditionally allowed billing directly to the motor carrier and these new rules which require invoicing to the bill of lading party:

In addition to addressing demurrage and detention issues, the Commission also has eyes on other issues for the industry. As recently commented by Commissioner Bentzel addressing some of these concerns⁶⁸:

“I voted to approve the Final Demurrage and Detention (D&D) Rule released today. This rule has been a long time coming. D&D penalties provide an important tool to protect the shipping public from market abuses caused by excessive delays in the pick-up of cargoes from marine terminals, and to ensure the prompt return of containers to ocean carriers which facilitates the optimal use of terminal space and containers. The final rule takes necessary steps to protect shippers from being unfairly assessed D&D penalties while protecting truckers that are not consignees or in privity of contract from being assessed D&D penalties....

Finally, the pandemic brought many supply chain issues to a head. This D&D rule impacts and connects areas of billing; however, work still remains on information sharing, in-transit visibility, and standardization of lexicon and defining operational status. Current geopolitical events are drastically impeding the movement of containerized cargo through both the Panama and Suez Canals and once again illustrating the need for better data on cargo shipping, and the need for more to be done to ensure industry transparency.”

⁶⁷ <https://www.fmc.gov/fmc-discusses-osra-implementation-consumer-assistance-accomplishments/>

⁶⁸ <https://www.fmc.gov/statement-of-commissioner-carl-w-bentzel-on-the-demurrage-and-detention-billing-requirements-final-rule/>

“PART 541—DEMURRAGE AND DETENTION

Subpart A—Billing Requirements and Practices

541.1 Purpose.

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Subpart B [Reserved] ...

Subpart A—Billing Requirements and Practices

§ 541.1 Purpose.

This part establishes the minimum information that must be included on or with demurrage and detention invoices. It also establishes procedures that must be adhered to when invoicing for demurrage or detention.

§ 541.2 Scope and applicability.

(a) This part sets forth regulations governing any invoice issued by an ocean common carrier, marine terminal operator, or non-vessel-operating common carrier for the collection of demurrage or detention charges.

(b) This part does not govern the billing relationships among and between ocean common carriers and marine terminal operators.

§ 541.3 Definitions.

In addition to the definitions set forth in [46 U.S.C. 40102](#), when used in this part:

Billed party means the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge.

Billing party means the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.

Consignee means the ultimate recipient of the cargo; the person to whom final delivery of the cargo is to be made.

Demurrage or detention mean any charges, including “per diem” charges, assessed by ocean common carriers, marine terminal operators, or non-vessel-operating common carriers

related to the use of marine terminal space (*e.g.*, land) or shipping containers, but not including freight charges.

Demurrage or detention invoice means any statement of charges printed, written, or accessible online that documents an assessment of demurrage or detention charges.

Person means an individual, corporation, or company, including a limited liability company, association, firm, partnership, society, or joint stock company existing under or authorized by the laws of the United States or of a foreign country.

§ 541.4 Properly issued invoices.

(a) A properly issued invoice is a demurrage or detention invoice issued by a billing party to:

(1) The person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo; or

(2) The consignee.

(b) If a billing party issues a demurrage or detention invoice to the person identified in paragraph (a)(1) of this section, it cannot also issue a demurrage or detention invoice to the person identified in paragraph (a)(2) of this section.

(c) A billing party cannot issue an invoice to any other person.

§ 541.5 Failure to include required information.

Failure to include any of the required minimum information in this part in a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.

§ 541.6 [Reserved]

§ 541.7 Issuance of demurrage and detention invoices.

(a) A billing party must issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

(b) If the billing party is a non-vessel-operating common carrier, then it must issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received. If such a billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received, then the billed party is not required to pay the charge.

(c) A non-vessel-operating common carrier (NVOCC) can be both a billing and billed party in relation to the same charge. When an NVOCC is acting in both roles, it can inform its billing party that the charge has been disputed by the NVOCC's billed party. The NVOCC's billing party must then provide an additional thirty (30) calendar days for the NVOCC to dispute the charge upon this notice.

(d) If the billing party invoices an incorrect person, the billing party may issue an invoice to the correct billed party provided that such issuance is within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue this corrected demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

§ 541.8 Requests for fee mitigation, refund, or waiver.

(a) The billing party must allow the billed party at least thirty (30) calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees from the billing party.

(b) If a billing party receives a fee mitigation, refund, or waiver request from a billed party, the billing party must attempt to resolve the request within thirty (30) calendar days of receiving such a request or at a later date as agreed upon by both parties.

§ 541.9–541.99 [Reserved]

2. Delayed indefinitely, add § 541.6 to read as follows:

§ 541.6 Contents of invoice.

(a) *Identifying information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the container(s) to which the charges apply and at a minimum must include:

(1) The Bill of Lading number(s);

(2) The container number(s);

(3) For imports, the port(s) of discharge; and

(4) The basis for why the billed party is the proper party of interest and thus liable for the charge.

(b) *Timing information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the relevant time for which the charges apply and the applicable due date for invoiced charges and at a minimum must include:

(1) The invoice date;

- (2) The invoice due date;
- (3) The allowed free time in days;
- (4) The start date of free time;
- (5) The end date of free time;
- (6) For imports, the container availability date;
- (7) For exports, the earliest return date; and
- (8) The specific date(s) for which demurrage and/or detention were charged.

(c) *Rate information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated and must include at a minimum:

- (1) The total amount due;
- (2) The applicable detention or demurrage rule (e.g., the tariff name and rule number, terminal schedule, applicable service contract number and section, or applicable negotiated arrangement) on which the daily rate is based; and
- (3) The specific rate or rates per the applicable tariff rule or service contract.

(d) *Dispute information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to readily identify a contact to whom they may direct questions or concerns related to the invoice and understand the process to request fee mitigation, refund, or waiver, and at a minimum must include:

- (1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;
- (2) Digital means, such as a URL address, QR code, or digital watermark, that directs the billed party to a publicly accessible website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver; and
- (3) Defined timeframes that comply with the billing practices in this part, during which the billed party must request a fee mitigation, refund, or waiver and within which the billing party will resolve such requests.

(e) *Certifications.* A demurrage or detention invoice must be accurate and contain statements from the billing party that:

(1) The charges are consistent with any of the Federal Maritime Commission's rules related to demurrage and detention, including, but not limited to, this part and [46 CFR 545.5](#); and

(2) The billing party's performance did not cause or contribute to the underlying invoiced charges.

3. Delayed indefinitely, add § 541.99 to read as follows:

§ 541.99

OMB control number assigned pursuant to the Paperwork Reduction Act. The Commission has received Office of Management and Budget approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. The valid control number for this collection of information is 3072–XXXX.”