

**DETENTION AND DEMURRAGE
THE BACKGROUND OF OCEAN TRANSPORTATION'S
PREVALENT SUBJECT OF DISPUTE**

Presented to
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This moderator's paper provides general background for the 2024 TLA Conference panel entitled Recent Detention and Demurrage Disputes, Legislative Developments and Rulemaking: How They Affect the Carriage of Goods from Origin to Final Destination. The panelists will elaborate on related points, including recent regulatory and other legal developments in this contentious subject of intermodal transportation.

Definitionally, demurrage and detention are charges, usually stated in terms of dollars/container/day after expiration of any free days, levied by ocean carriers against, as those carriers typically put it, the "Merchant." Demurrage charges arise for the Merchant's failure to timely collect cargo at a seaport after delivery; detention (colloquially referred to as "per diem") charges arise for the Merchant's failure to timely return empty containers.

The history of this aspect of ocean shipping economics is long and complex. Detention and demurrage concepts were intended to be an exception, and not a rule, that serve two purposes: equitable compensation and incentivization (penalization). Specifically, industry and law combined to incentivize fluid and efficient movement at ports through ancillary charges which ocean carriers could equitably charge in specified circumstances arising from delayed return of their equipment. But detention and demurrage were not designed to create an ocean carrier profit center. When industry and government perceived ocean carriers to be treating them as such, the law changed course as this panel will explain.

The Evolving Environment

The landscape of demurrage and detention was complicated by modern shipping volumes and the pandemic. For example, in March 2022, the Port of Los Angeles reported that 41% of its imports incurred demurrage, i.e., 25,258 out of the 61,944 shipments which showed containers five days overdue after discharge. In the U.S., the charging of detention and demurrage is a regulated contractual undertaking, subject to oversight by the U.S. Federal Maritime Commission ("FMC"). Until recently, this regulation was loosely administered under FMC's enforcement of provisions of the Shipping Act, 46 U.S.C. §41102, entitled "General Prohibitions," which provides:

- c) 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

FMC regulations at 46 CFR § 545.5, entitled “Interpretation of Shipping Act of 1984 - Unjust and unreasonable practices with respect to demurrage and detention,” provide in pertinent part:

d) 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.

Historically, these statutory and regulatory provisions and their interpretation have been vague, resulting in minimal power actually exercised by FMC. In recent years, FMC undertook “fact finding missions” and other studies to explore the nature and extent of carriers charging detention and demurrage abusively. These revealed various ocean shipping industry infrastructure problems; inefficient importer practices; lack of last mile and warehouse planning; inadequate federal regulation and support; and other issues. But FMC only issued guidelines and recommendations in response.

Who is responsible for payment?

At the heart of the issue is the expansive list of entities ocean carrier contracts, typically bills of lading or sea waybills per their incorporated terms and conditions, which provide that the “Merchant” is responsible for detention and demurrage. A typical ocean carrier waybill’s definition section contains the following:

‘Merchant’ includes the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person.”

In addition to shippers and consignees, this definition has been argued to include surface and ocean freight forwarders, non-vessel operating common carriers, beneficial cargo owners, and even financial institutions with security in cargo. Drayage operators, motor carriers, warehousemen and other logistics service providers may not be specifically named, but they can find themselves the subjects of detention and demurrage invoicing if they are named on waybills as the “receiver of goods,” or by way of their contracts with importers/exporters, and their roles in causing delays in container pickup and return. The Uniform Intermodal Interchange Agreement, which many ocean carriers require their trucker partners to enter into, has provisions imposing liability for detention and demurrage charges on truckers in order to transport carrier-owned containers and other equipment. These terms can be as or more onerous than those imposed by contracts of carriage.

Delays can be occasioned, and at least arguably usually are, through no culpable fault of a “Merchant.” Port issues, such as congestion and supply chain disruption, can result in no available appointments for truckers to pickup or return containers. Ports frequently require dual transactions, i.e., allowing truckers to deliver empty containers if they are booked to retrieve loaded ones. Until recently, chassis availability was an issue. Incorrect, late or lost documentation, and Customs delays, can also cause delays. And of course, issues within motor carrier businesses, such as labor and equipment shortages; and customer-trucker communication deficiencies, can cause delay.

Not a New Problem

Again, detention and demurrage issues are not new. Pervasive carrier mergers improved their efficiency but worsened that of land-based service providers. Three global alliances comprising the ten largest ocean carriers that control over 80% of the industry’s service providers impacted market dynamics. With vessels now able to hold as many as 21,000 containers, vessel loading and offloading require longer time periods, impeding more fluid container movement at ports.

While the pandemic exacerbated all of this greatly, ocean carriers had begun treating demurrage and detention as profit centers since at least 2018. Ocean carriers were sending back empty containers ASAP to take advantage of high eastbound rates, creating container shortages on the other end. Guidelines and recommendations FMC issued on December 7, 2018, mostly directed at ocean carriers and marine terminal operators, presented little or no enforcement threat. And for the most part, ocean carriers showed little interest in working with land-based service providers. Shortly after the pandemic’s inception, FMC proclaimed in May 2020 the following:

“Importers, exporters, intermediaries, and truckers should not be penalised by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals because, under those circumstances, the charges cannot serve their incentive function.”

As FMC Chairman Daniel Maffei put it, “We may have been too optimistic about the ocean carriers’ ability to self-regulate, particularly as it relates to late fees associated with container demurrage and detention.”

Then came the pandemic, which greatly exacerbated the environment. Conditions of world economics, labor shortages in the U.S. and abroad, and supply chain issues caused port congestion on multiple levels. For years, demand greatly exceeded supply. The combined impact of shipping and supply chain dynamics on the U.S. economy was ominous, prompting expedited legislation, i.e., passage on June 16, 2022 of the Klobuchar-Thune Ocean Shipping Reform Act. Colloquially referred to as “OSRA 2022,” this legislation directed FMC to self-initiate investigations of ocean carrier’s business practices and apply enforcement measures. A summary of its central provisions are as follows:

- 1) Shifting of the burden of proof regarding demurrage and detention charges from complainant to ocean carriers to help level the playing field and improve FMC's enforcement capacity.
- 2) Improved transparency by requiring ocean carriers to report to the FMC information about empty containers are being transported.
- 3) Establishment of the FMC Office of Consumer Affairs and Dispute Resolution Services.
- 4) Improved chassis management by authorizing the Bureau of Transportation Statistics to collect data on dwell times for chassis; and authorizing a study.
- 5) FMC received temporary emergency authority to collect data during times of emergency congestion, among other improvements.

Of particular significance are new requirements for ocean carrier detention and demurrage invoicing as provided in 46 U.S.C. §41104(d)(2), specifically:

- (a) Date that container is made available.
- (b) Port of discharge.
- (c) Container number or numbers.
- (d) For exported shipments, the earliest return date.
- (e) The allowed free time in days.
- (f) Start date of free time.
- (g) End date of free time.
- (h) Applicable detention or demurrage rule on which the daily rate is based.
- (i) Applicable rate or rates per the applicable rule.
- (j) 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 FMC's rules on detention and demurrage
- (m) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

While FMC rulemaking was required for full enactment of OSRA 2022, passage of that legislation along with other developments in law and industry had immediate impacts on the environment – as early as the summer of 2022. Port congestion was reduced, and 2023 saw 25% fewer detention claims than 2022 (although U.S. ports still showed the highest claim rates in the world). Carriers gave better attention to the positions taken by invoiced entities in

response to detention and demurrage charges. As will be presented by the panel's presenters, FMC's recent enactment of rulemaking (after the standard process of drafting, notice and comment periods, and formal enactment periods) provides the regulatory framework for FMC's enforcement of OSRA 2022 and its detention and demurrage policies. Now FMC has a defined regulatory protocol with enforcement options that should serve to limit abuse of detention and demurrage invoicing.

Conclusion

Like so many in the ocean shipping industry, detention and demurrage issues are at least as much a business concern as it is a legal one for all concerned. Industry participants want to get and keep business, which requires that they not alienate important partners and customers. The costs of litigation over, or even formally challenging, detention and demurrage may not be justified by the stakes. While regulation and law technically prohibit a service provider from retaliating commercially against a partner or customer which exercises its rights in this arena, industry participants frequently express concern about losing current and prospective standing in the industry by challenging invoicing or practices.

Still, impacted entities such as NVOCCs, forwarders, brokers, truckers and others have options they should consider to reduce their potential exposure. For example, service providers can ask their customers to preclear cargo and issue pickup/delivery instructions in advance (as soon as possible); request extended free time, especially in the context of volume-based services that carriers are most interested in accommodating; and contractually ensure that customers are ultimately responsible for detention and demurrage charges when their own delays give rise to them.

This latest aspect of evolution of ocean shipping regulation as the presenters will explain, is not unique to the U.S. International ocean shipping is governed by worldwide economics and circumstances. Despite international fora and dialogues, countries, for the most part, are left to redress the circumstances individually based on their own legal parameters and political environments. In the U.S., at least, new legislation and agency rulemaking appears to lay promising groundwork that will have its intended effect.