



WHERE IS MY CONTAINER? A NEW ERA IN DETENTION AND DEMURRAGE

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Key Definitions: Demurrage and Detention

Demurrage and 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.” 46 C.F.R. § 541.3.

Note, this definition excludes chassis charges. (“The scope of the term in § 541.3 is the same as the scope of “demurrage or detention” in § 545.5(b). The definition excludes charges related to equipment other than containers, such as chassis, because depending on the context, “per diem” can refer to containers, chassis, or both.”). See Federal Maritime Commission Final Rule, Docket No. FMC-2022-0066, February 26, 2024.

New Detention and Demurrage Billing Procedures and Requirements at the FMC

- A. The Federal Maritime Commission (“FMC”) promulgated new rules regarding the invoicing and collection of demurrage and detention charges. See 46 C.F.R. §§ 541.1 *et seq.*
- B. The purpose of the regulations is to establish, “the minimum information that must be included on or with demurrage and detention invoices.” 46 C.F.R. § 541.1. The regulations “also establish [...] procedures that must be adhered to when invoicing for demurrage or detention.”

Why Were These Changes Necessary?

Costs:

- The FMC found that “over a two-year period between 2020 and 2022, nine of the largest carriers serving the U.S. liner trades individually charged a total of approximately \$8.9 billion in demurrage and detention charges and collected roughly \$6.9 billion.” FR Doc. 2024-10515.

Delay:

- Demurrage and detention charges are notorious for their delay in invoicing. Invoicing could occur several months and up to a year after the underlying transportation was completed. This created issues with disputes, indemnification and rebilling among various parties within the chain of transportation.



Incentive Principal

The “Incentive Principal” is found at 46 CFR § 545.5(c).

Detention and demurrage charges are meant to promote freight fluidity by providing financial incentives. If they are not serving this function, the FMC is likely to find they are unreasonable.

- i. Empty containers cannot be returned;
- ii. Method by which parties are notified that cargo is available for retrieval;
- iii. Government inspections;

Put another way, are the charges due to the fault of the party receiving the invoices? The STB underwent a similar policy shift with respect to rail demurrage in 2019-2020, focusing on the fault of the party responsible for demurrage charges and the goal of demurrage as set forth in 49 U.S.C. § 10746.

Incentive Principal

Labor Strikes and Compounding Detention and Demurrage Costs:

- The FMC added a “non-preclusion” clause to their “Incentive Principle” regulations, which states that “[n]othing in this rule precludes the commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.” 46 C.F.R. § 545.5(f).
- The FMC stated in their rule-making documents that “the rule does not preclude ocean carriers and marine terminal operators from arguing and producing evidence regarding the compensatory aspects of demurrage and detention in individual cases.”

Who is subject to the new billing requirements?

- Ocean common carriers, marine terminal operations and NVOCC’s are the “billing party”. 46 C.F.R. § 541.3.
- The billing party must “properly” issue a demurrage or detention invoice.

What is a “properly issued invoice”?

The FMC’s regulations provide a definition (46 C.F.R. § 541.4):

(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.

What the Invoice Must Contain

Per § 541.6, the invoice must contain specific information including (at minimum):

1. Identifying information (bill of lading and container number, port of discharge for imports)
 - Must also include “[t]he basis for why the billed party is the proper party of interest and thus liable for the charge.”
2. Timing information (relevant dates, allowed free time, start and stop date for free time, container availability date for imports, return date for exports, dates on which charges were assessed)
3. Rate information (total amount due, rate, and applicable rule such as a tariff name, rule number, terminal schedule, or service contract)
4. Dispute information (how the charge can be disputed and who can be contacted for dispute questions re: process)
5. Certification (charges are consistent with the regulations and were not caused by the billing party)

If the invoice fails to contain the foregoing, *it eliminates the obligation of the billed party to pay the charge.* 46 C.F.R. § 541.5.

The “Consignee” Dilemma

- In rail demurrage, the consignee on the bill of lading was generally liable for demurrage. However, this approach became problematic if the owner of the freight used a third-party intermediary to receive the railcars and the intermediary was listed as the consignee instead of as a “care of” party. Varying approaches led to a circuit split and eventually the Surface Transportation Board’s (“STB”) promulgation of demurrage regulations. *Compare Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) (finding that a third-party intermediary is not liable for demurrage unless it expressly agreed to be named as a consignee or is given advance notice of its designation and provided with an opportunity to object), *with CSX Transp. Co. v. Novolog*, 502 F.3d 247 (3rd Cir. 2007) (finding that third-party intermediary is liable for demurrage charges as long as it is named as the consignee on the bill of lading and accepts the freight); 79 FR 21407;



- The STB's regulations sought to move away from consignee status and bill of lading designations. Instead, demurrage would be the responsibility of the entity receiving the rail cars, subject to certain requirements. 49 C.F.R. §§ 1333.1 *et seq.* The FMC's position appears to pull from the STB's experience.
- When the FMC issued its final rule, it made changes so that consignees can be billed "as an alternative to the shipper when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier." See FMC Final Rule, Docket No. FMC–2022–0066.
- The FMC's regulations define consignee as "[T]he ultimate recipient of the cargo; the person to whom final delivery of the cargo is to be made." 46 C.F.R. § 541.3.
- Like the STB, it avoided reliance on the bill of lading stating that bill of lading designations are neither dispositive nor required for a consignee to be billed for detention and demurrage charges. In some circumstances, an entity can be listed as the consignee on the bill of lading and not be responsible for demurrage, and in others, the consignee can be absent from the bill of lading and be responsible.
- Based on the FMC's final rule, it appears it will be a question of contractual privity and a meeting of the minds as to whether the consignee can be billed for detention and demurrage.

Deadline for Billing Party to Issue Its Invoice

"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.*" (46 CFR § 541.7(a).)

A billing party can reissue the invoice if it sent it to the wrong party, but it must do so within thirty days of the date of the last charge. *If it fails to do so, the billed party does not have to pay.* 46 CFR § 541.7(b).

NVOCCs and Pass Through Charges

- An NVOCC can be both a "billed party" and a "billing party." This can modify the deadlines to issue and dispute an invoice.
- NVOCCs may receive a demurrage/detention invoice and then rebill or passthrough the charges to its customer. It must do so within thirty days of the date the invoice it received was issued.



- Example: On January 3rd, an NVOCC receives a demurrage invoice that a billing party **issued** on January 1st. The NVOCC has 30 days from January 1st to issue its invoice. If it fails to do so, *the billed party does not have to pay the charge*.
- If the NVOCC's customer disputes the invoice, the NVOCC can inform its billing party of the dispute, and it must receive an additional thirty days to dispute the charge itself.

46 C.F.R. § 541.7(b)-(c)

Dispute Requirements

Invoices must contain specific dispute information per 46 C.F.R. § 541.6(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.

Minimum Time Requirements for Disputes

Section 541.8 provides:

- (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.



Planning for the Future

- Companies should develop standard operating procedures for dealing with demurrage and detention invoices.
- This includes implementing procedures to ensure the company is actively reviewing invoices that come in to assess whether the invoices comply with the regulatory requirements and whether the invoices are accurate.
- How is the billed party monitor containers and container charges? What support does it have to contest the charges?
- Strategies for handling detention and demurrage charges caused by third party misconduct:
 - Double-brokering and/or subcontracting without notice;
 - Motor carriers holding shipping containers to leverage payment of unpaid invoices;
 - Theft of containers;
 - Misrouted/mislabeled containers;
 - Inadequate staffing;
 - Cargo damage disputes.

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RELEVANT FMC REGULATIONS

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 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.

§ 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.