SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Nominations Hearing: Federal Maritime Commission
February 28, 2024

DEMOCRATIC QUESTIONS FOR THE RECORD
Responses of Rebecca Dye

COVER PAGE

SENATOR AMY KLOBUCHAR (D-MN)

Ocean shipping companies charge customers when containers sit at port for too long or are not returned on time. Between 2020 and 2022, nine of the largest carriers serving U.S. liner trade charged $8.9 billion in these demurrage and detention fees. The *Ocean Shipping Reform Act* makes ocean carriers responsible for proving that any detention and demurrage fees they charge are fair.

1. **Last week, the Federal Maritime Commission published a final rule on detention and demurrage billing practices, which will take effect in May. How will these rules protect American shippers from unfair and unreasonable charges?**

The new demurrage and detention rule establishes billing procedures and invoicing information standards to protect industry participants from unfair and unreasonable charges. The rule clarifies who can be charged for demurrage and detention, mandates a reasonable timeframe for when they can be charged, describes the information that must be included in invoices, and ensures that a remedial avenue is available in the event of a billing dispute. The rule requires carriers and marine terminal operators to issue detention and demurrage invoices within 30 calendar days from when charges were last incurred. One of the rule's most important provisions limits carriers and MTOs from sending the same invoices to multiple parties for demurrage or detention charges. The rule states that invoices can only be sent to one billed party.

The rule promotes fairness and supply chain fluidity by better aligning charges for delays in picking up cargo or returning equipment in a timely manner with the appropriate incentivizing fee. It ensures that industry participants receive the information they need to understand demurrage or detention invoices in a timely fashion and follows the direction of Congress in OSRA that any failure by carriers or MTOs to include the required information in an invoice eliminates the obligation of the billed party to pay the charge.

During the COVID-19 pandemic, ocean carriers were unloading containers at American ports but refusing American exports and returning to Asia with empty containers. The *Ocean Shipping Reform Act* sought to crack down on this practice of carriers unreasonably refusing to ship American exports.

2. **The Federal Maritime Commission is currently reviewing comments on a supplemental rulemaking to define unreasonable conduct. How would the Federal Maritime Commission's proposed rules make it more difficult for carriers to refuse American exports?**

The draft rule currently under consideration by the Commission proposes to require carriers to file with the Commission a written report, called a "documented export policy," which details

the carrier's practices and procedures for U.S. outbound services. The Commission would have the authority to review this report to determine if carrier practices relating to exports violate statutory or regulatory provisions. If a carrier is alleged to have unreasonably refused available cargo space to exporters, the proposed rule states that the Commission may examine whether the carrier followed its documented export policy, whether it made a good faith effort to mitigate the impact of a refusal, and whether the refusal was based on legitimate transportation factors. The proposed rule provides examples of conduct that may be found unreasonable, such as "blank sailings" (cancelled sailings) or other schedule changes with no advance notice or with insufficient advance notice; vessel capacity limitations not justified by legitimate transportation factors; a failure to alert or notify shippers with confirmed bookings; scheduling insufficient time for vessel loading so that cargo is constructively refused; providing inaccurate or unreliable vessel information; or categorically or systematically excluding exports in providing cargo space accommodations. If a carrier is alleged to have unreasonably refused to deal with respect to vessel space accommodations, the proposed rule explains that the Commission may examine whether the carrier followed its documented export policy, whether the carrier engaged in good-faith negotiations, and whether the refusal was based on legitimate transportation factors. The proposed rule provides examples of the kinds of conduct that may be considered unreasonable, including quoting rates that are too far above current market rates to be considered a real offer or an attempt at engaging in good faith negotiations, and categorically or systematically excluding exports in providing vessel space accommodations.

SENATOR RAPHAEL WARNOCK (D-GA)

Federal Maritime Commission's Detention and Demurrage Rule

Georgia's deepwater ports are critical to its economy. Storage fees are one way that Georgia's marine terminal operators incentivize shippers and importers to promptly remove their cargo and keep our ports efficient.[1] The Federal Maritime Commission's new rule on Demurrage and Detention Billing Requirements institutes changes to this practice, and these changes may lead to confusion across the maritime industry, delays, and increased costs.[2]

1. **Are you concerned that the Federal Maritime Commission's new detention and demurrage rule – specifically its invoice and fee mitigation provision, and refund, or waiver requests provisions – may lead to delays in fee collection and ultimately congestion at America's ports?**

Fact Finding 28, for which I served as the Commission Fact Finding Officer, stemmed from a petition filed at the Commission by the Coalition for Fair Port Practices, a broad coalition of exporters, importers, and others concerned with detention and demurrage fees charged by ocean carriers, seaports, and marine terminal operators. In Fact Finding 28, I recommended, and the Commission unanimously approved, an approach to address detention and demurrage practices based upon a principle - the "incentive principle." If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. This "incentive principle" was embodied in a Commission rule.

The billing practices of ocean carriers, ports and marine terminals for detention and demurrage have been particularly problematic for shippers and truckers, leading Congress to specifically address this issue in OSRA 2022. The recent billing rule is the Commission's effort to implement this statutory directive. The purpose of the rule is to bring clarity, predictability, and fairness to a complex operational process. The Commission conducted an extensive and extended rulemaking process, receiving many comments from interested stakeholders. If experience with the rule dictates the necessity, the Commission will certainly revisit the matter.

Port Congestion Mitigation

Georgia's deepwater ports are an economic engine for the entire state.

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[1] *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports,* Federal Maritime Commission (April 3, 2015), https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf at 12 ("The primary goal of reduced free time and increased demurrage was to encourage shorter dwell times at the terminal and thereby increase the overall velocity of the equipment, which reduces the VOCC's equipment inventory needs and its operational costs").

[2] 46 C.F.R. § 541.

1. **As a Commissioner with the Federal Maritime Commission, what actions have you taken or supported to protect against future supply chain bottlenecks at our nation's ports?**

During the past five years, I have served as Commission Fact Finding Officer for two investigations that addressed international ocean supply chain bottlenecks.

In Commission Fact Finding 28, I recommended, and the Commission unanimously approved, an approach to address detention and demurrage practices of ocean carriers, ports and marine terminal operators based upon a principle - the "incentive principle." If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. This "incentive principle" was embodied in a Commission rule. Though characterized as an interpretive rule, it is enforceable, and the Commission has moved forward with investigations and cases to enforce it. I am pleased to say that this effort is bearing fruit and changing behavior in the marketplace.

The second investigation, Commission Fact Finding 29, was ordered to address problems in the U.S. international ocean supply chain caused by the COVID-19 pandemic. As a result of my investigation, I recommended statutory amendments to the Shipping Act that were enacted into law. The Commission has acted on several of my recommendations and continues to move forward with the final Fact Finding 29 recommendations to address supply chain problems that occurred during the pandemic.

2. **What more would you like to see the Commission do to ease congestion and promote supply chain resiliency and efficiency at our nation's ports?**

I am gratified that OSRA 2022 recognized and ratified the interpretive rule the Commission adopted based on my recommendations in Fact Finding 28 and gives the Commission the opportunity to further clarify specific practices that would be unreasonable under the general incentive principle. If confirmed, I look forward to the Commission implementing a rulemaking to achieve this end, continuing to make the Interpretive Rule more effective.

If confirmed, I also look forward to focusing my efforts on improvements to operational processes that are critical to the systemic success of the U.S. international ocean supply chain: specifically, container return, earliest return date, and a "notice of availability." The goal is to improve these seaport and marine terminal operational processes by making them clear and predictable, so port users can plan their businesses accordingly.

I have been working with terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey on programs to address container return, earliest return date, and "notice of availability." I plan to convene and lead FMC Supply Chain Innovation Teams and operational pilots to consider how these three operational processes may be improved. I will share this experience with other ports and marine terminals so that they may

benefit from the lessons learned in these efforts. (https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/).