May 7, 2015

The Honorable Mario Cordero  
Chairman  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Washington, D.C. 20573

Dear Chairman Cordero:


Some comments submitted to the Commission make a sweeping claim that the practice of adhering to established free time limits and assessing detention and demurrage during times of serious port congestion is “unfair and unproductive”, and that the Commission should consider taking some unspecified generalized action using some unspecified authority under the Shipping Act against detention and demurrage charges.

We recognize that justifiable frustration over port congestion exists within the shipper community. That frustration also exists within the ocean carrier community. It is also important to stress that carriers, ports, marine terminal operators and others are actively working to reduce congestion pressures.

Port congestion in U.S. ports can arise from multiple causes, and those causes may vary by port or by marine terminal. Some causes of congestion can be from factors beyond any party’s control, such as weather. Some can be the result of shortages of various types of equipment. Some can be the result of labor issues, as has been vividly demonstrated recently on the West Coast. Some can be the result of surges in cargo volumes as occurred recently in New York/New Jersey when carriers and shippers diverted cargo from West Coast ports dealing with labor difficulties to East Coast ports. Some can be the result of marine terminal productivity, or inefficiency of the transportation infrastructure connecting a marine terminal to rail and roadways. The same vessel, being used by the same vessel sharing agreement, may be served with more efficient terminal productivity in Asian ports than in U.S. ports. Some
congestion can be caused by a terminal’s transition from a wheeled to a grounded operation. Some can be caused by hours of terminal operation or by when shippers or truckers want to pick up their shipments. Some terminal efficiency issues can be affected by whether there are efficient alternatives to storing empty containers within the port terminal facility, or by the efficiency of vessel operators’ cargo stowage planning, or by vessel operators’ schedule reliability and a terminal’s ability to avoid berth congestion. One carrier’s efficiency in port can be affected by the actions of another ocean carrier using the same marine terminal. Congestion at a marine terminal gate may have nothing to do with whether an ocean carrier has a container prepared for shipper pick-up. Some port congestion problems can be a result of a combination of factors, and most probably are.

The above is hardly an exhaustive list of reasons for port congestion, but it illustrates that the problem is not caused by a single or simple set of factors. It cannot be accurately blamed on the size of ships or vessel sharing alliances. Resolution of the problems will require a concerted set of actions involving all parties. Those solutions will need to be tailored to the specific problems in specific locations.

Exporters, importers, ocean carriers, marine terminal operators, truckers, and railroads all experience additional costs when cargo and equipment does not move efficiently through the terminals and when there is congestion. Each party does what it can to recover those costs. Ocean carriers, U.S. marine terminal operators, and port authorities are all well aware of the port congestion problems that have confronted the industry recently and are working to address their causes. The Commission is aware of both the problems and the steps being taken to solve those problems, and the Commission has been appropriately supportive of the recent agreements that have been filed that may facilitate more effective collective action to address these port congestion issues. Progress is being made, as recent reports demonstrate, and more will be needed.

The question of whether a charge for detention or demurrage may be in violation of the Shipping Act is by its very nature a fact-specific inquiry to be addressed on a case-by-case basis. To the extent that a complainant chooses the adjudicatory process over available alternative dispute resolution mechanisms, the complainant seeking such relief is responsible for presenting evidence to support its allegation of Shipping Act violations. There may be situations that would justify such actions. Just as WSC does not know all the circumstances behind every complaint, the Commission also has noted that it requires facts to make judgments about the legality of particular charges in particular situations. What is clear is that the facts and the appropriateness of any regulatory remedy will be very specific to a particular case.

Trying to assign responsibility for who caused what level of port congestion would be a difficult, complex, and unsatisfying undertaking. Making a generalized judgment about what mechanism by what party would be appropriate to recover congestion costs or help manage port terminal efficiency would be an inescapable quagmire. For example, is the Commission going to be asked to decide that a terminal operator or an ocean carrier must assume
congestion costs when the longshore labor force refuses to work at full strength and efficiency? Is the Commission going to be asked to decide to make a generalized judgment about when it would be appropriate for a shipper to not pay detention charges when it has failed to return a container to a port facility after its free time has expired and that container is needed by another shipper?

If shippers wait until the last free day to pick up or return a container and that results in "bunching" and terminal congestion, is the Commission going to be asked to require the terminal operator or ocean carrier to absorb the costs? A marine terminal operator has to recover its operating costs; is the Commission going to be asked to decide when it can charge its ocean carrier customers for container storage on its premises and when it cannot? An ocean carrier has to recover its operating costs; is the Commission going to be asked to decide that a carrier cannot recover costs through demurrage charges that it has been charged by a marine terminal operator? How would port congestion conditions be improved if the FMC were asked to issue an edict exonerating shippers from having to pay demurrage costs for their containers sitting in already congested port facilities? Under what legal authority could the Commission even consider such a request?

Ocean carriers' rules on detention and demurrage create valid economic incentives, as the Commission has long recognized. These charges have been in effect for decades; carriers did not establish them recently to "take advantage" of recent congestion problems. At the same time, some tariffs contain provisions allowing for extended free time when the carrier is unable to tender cargo for delivery or allow return of equipment during the specified free time. As the Commission has noted in its report, ocean carriers have been using that discretion on a case-by-case to address many of the problems and complaints that have recently arisen due to port congestion.

The frustration with the consequences of port congestion that may be experienced by shippers and truckers is in many cases real and understandable. Ocean carriers are frustrated by it too. Port congestion is costly and frustrating for all participants in the affected supply chains. All relevant commercial parties recognize that they need to address the various causes of port congestion. They are all working on it. The worst of the recent West Coast congestion was clearly the result of labor issues that cannot be productively addressed by the FMC.

The FMC's four forums on the issue last fall were an appropriate and helpful way to focus attention on the issue and to encourage the parties to find solutions. The efforts by the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) to address specific complaints are appropriate and constructive.

There are no simple, generic answers or appropriate scapegoats. There are no good guys and bad guys. There is no regulatory action that will address the combination of causes of port congestion or that can equitably resolve or simplify the various complex market forces trying to deal with the unavoidable issue of cost recovery.
The Commission has been constructive with its efforts to encourage attention to the port congestion issue with its forums and with its report, its support of the various agreements that will try to collectively devise improvements, and the CADRS efforts. The agency should continue these efforts and continue to monitor the situation.

The challenges are many and some are not simple, but with the good faith attention and effort of all, there is no reason to believe that significant, continued progress cannot to be achieved.

Sincerely yours,

[Signature]

Christopher Koch

cc: Commissioner William Doyle
    Commissioner Rebecca Dye
    Commissioner Michael Khouri
    Commissioner Richard Lidinsky