



Comments of the Shippers Coalition
to the
Federal Maritime Commission
Docket No. FMC-2022-0066
Demurrage and Detention Billing Requirements;
Notice of Proposed Rulemaking
December 8, 2022

The Shippers Coalition respectfully submits these comments on the Notice of Proposed Rulemaking (NPRM) by the Federal Maritime Commission (“Commission” or “FMC”) regarding “Demurrage and Detention Billing Requirements.” 87 Federal Register 62341 (October 14, 2022).

The Shippers Coalition includes many of the nation’s prominent companies and trade associations engaged in manufacturing, agribusiness, and other business. Coalition members directly or indirectly sustain millions of American jobs. They move freight by all modes and do not favor any mode. The Shippers Coalition (“Coalition” or “we” or “our”) has emerged as a leading voice for a modern, safe, efficient and environmentally-friendly freight transportation system. The Shippers Coalition seeks to improve supply chain fluidity and freight transportation efficiency while – advancing transportation safety; reducing emissions, fuel consumption and congestion; and protecting infrastructure.

While we offer below recommendations to improve the proposed rule, we are supportive of it. Adoption of the proposal, along with the recommendations we make to improve it, should help reduce demurrage and detention by requiring clear, accurate, and promptly submitted bills for demurrage and detention. A more efficient and accurate billing system, with transparency and lack of duplicative billing of shippers, is a worthy goal in and of itself. But achieving it should bring additional benefits. It should reduce any incentives that may exist for carriers to collect demurrage and/or detention fees rather than promptly and fairly resolve billing issues and move cargo or, as applicable, release it so that it can be moved. The reforms proposed would further more efficient use of containers which, in turn, should promote supply chain fluidity, efficient freight transportation, and reduced congestion and emissions.

The Commission has advanced this proposed rule at a time when unprecedented port congestion is fresh in the nation’s mind. That recent, unfortunate commercial spectacle captured the attention of the Congress and lead to unusually prompt legislative action – passage of the Ocean Shipping Reform Act of 2022, Public Law No. 117-146 (June 16, 2022). That legislation includes (in section 7) particular provisions requiring prompt adoption of reforms to the billing of charges for demurrage and detention. Consistent with the strong message by the Congress in acting so promptly, the Commission should seize the opportunity to promptly adopt rules for clear, accurate, understandable and non-duplicative billing of charges for demurrage and detention. Reforms requiring increased and more precise information on demurrage and detention charges, rendered promptly, will help avert confusion and lack of transparency that can contribute to carriers holding cargo pending payment, delayed movement of containers, transportation and economic inefficiency, and increased congestion and emissions.

Against that background, we turn to specific comments.

The Proposal Commendably Includes Requirements Beyond the Minimum Called for by Statute

The Ocean Shipping Reform Act of 2022 (OSRA) set forth a number of requirements for and related to billing of charges for demurrage and detention. The Commission is authorized by statute to undertake rulemaking to modify them or add to them. We are pleased that the proposed rule includes all of them and a number of additional requirements.

As discussed below, the proposed rule would: adopt the statutory minimum information that common carriers must include in a demurrage or detention invoice; add to the statutory minimums additional information that must be included in or with a demurrage or detention invoice; further define prohibited practices by clarifying which parties may be appropriately billed for demurrage or detention charges; and establish billing practices that billing parties must follow when invoicing for demurrage or detention.

Contents of Invoices, Proposed 46 CFR 541.6

Statutory Information. Section 7 of OSRA amended 46 USC 41104 to require the following information to be “accurate” and included in invoices for demurrage or detention charges with respect to a container; all of these statutorily required items would be required by proposed 46 CFR 541.6 as set forth in the NPRM:

- (A) date that container is made available.
- (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.

These are straightforward items that are not burdensome for any carrier to have readily available for inclusion in an invoice. Their inclusion increases the prospect of prompt payment. Shippers have been dismayed by some invoices leaving out such basic information, resulting in delayed payment or billing disputes and, depending on specifics and the parties, potentially delaying the release of cargo and actual movement of containers. We would oppose any comments to this docket that would seek to weaken the requirements that this information be included in an invoice to a shipper for demurrage or detention.

Additional Information. Section 7 of OSRA also amended 46 USC 41104 to allow the Commission require “minimum information” on an invoice to a shipper for demurrage or detention. The Commission has proposed that minimum information on such invoices include more than the statutory minimum.

Specifically, proposed 46 CFR 541.6, set forth below in full, includes both statutorily required items and additional ones. The items in addition to those listed in the statute are underlined in the below:

- (a) Identifying information. The invoice must contain sufficient information to enable the billed party to identify the container(s) to which the charges apply, including:
 - (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 invoiced party is the proper party of interest and thus liable for the charge.
- (b) Timing information. The invoice must 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, including:
 - (1) The billing date;
 - (2) The billing 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. The invoice must contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated, including:
 - (1) The total amount due;
 - (2) The applicable detention or demurrage rule (i.e., the tariff name and rule number, 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. The invoice must 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, including:
 - (1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;
 - (2) The URL address of a publicly accessible portion of the billing party's 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. The invoice must 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.

The additional (underlined) items, not listed in OSRA, are also straightforward items that are not be burdensome for any carrier to have readily available for inclusion in an invoice. Their inclusion increases the prospect of prompt payment and release of cargo. As with the statutorily required information, shippers have been dismayed by some invoices leaving out such basic information, resulting in difficulty understanding invoices, delayed payment and, depending on specifics and the parties, potentially delaying the release of cargo and the actual movement of containers. The resulting back-up can add to congestion, emissions, and other negative transportation and economic impacts.

We would oppose any comments to this docket that would seek to weaken requirements that this information be included in an invoice to a shipper for demurrage or detention.

Among these additions, we particularly note our support for the Commission’s proposed clarification of the statutory reference to fee “mitigation” by adding that a shipper could also request a “refund” or “waiver.” This would ensure that, where the facts warrant, a shipper could request a full waiver or refund, not only a “mitigation.”

Direct Contractual Relationship Requirement for an Invoice to Be Valid, Proposed 46 CFR 541.2 and 541.4, is on the Right Track, But Should be Clarified, as Should a Related Definition

Proposed 46 CFR 541.2 and 541.4 both establish that an invoice for demurrage and/or detention charges can be sent to a shipper only by an ocean common carrier (or NVOCC) and only if the shipper “contracted with the billing party for the carriage or storage of goods.” Proposed 541.4.

We would clarify this by deleting the phrase “contracted with the billing party” and substituting “contracted **in writing directly** with the billing party” (emphasis supplied). This would help avert any claim of an implied contract as a basis for an invoice.

Shippers have sometimes been confused by receipt of invoices for demurrage or detention (or both) from parties with whom they have not contracted. An example would be where shipper contracts with a non-vessel operating common carrier (NVOCC) and finds itself receiving invoices for demurrage and detention from both the NVOCC and the underlying vessel operating common carrier, even though the vessel operating common carrier was selected by the NVOCC. The proposed section helpfully would protect a shipper from the confusion of such duplicate billing (and the risk that a duplicate bill might be paid).

We believe that the intent of the provision would be made even clearer if a new paragraph were added to proposed 541.4 to make explicit that a shipper has no obligation to pay an invoice that does not meet the requirements of proposed 541.4. This clear and warranted protection would be comparable to proposed 541.5, which concerns the minimum information required to be included in an invoice for demurrage or detention charges. Proposed 541.5 makes explicit that failure to include required information “eliminates any obligation of the billed party to pay the applicable invoice.” Proposed 541.7(a) is also similar, and would establish that a shipper is not required to pay charges for demurrage and detention unless the invoice is rendered within 30 days of when the charges last accrued. Accordingly, we recommend adding a new paragraph to section 541.4, which could read as follows:

A person does not have an obligation to pay an invoice for detention or demurrage that is not in conformance with this section.

On a related matter, we would make a technical amendment to the proposed definition of “billed party,” in proposed 541.3, so that it would read --

“*Billed party* means the person receiving the demurrage or detention invoice and who has contracted with the billing party for the ocean carriage or storage of goods.”

This proposed revision would delete the language in the proposed definition that a billed party is not only a person receiving the invoice but also a person –

“who is **responsible** for the payment of any incurred demurrage or detention charge.” (Emphasis added).

Whether a person (shipper) is “responsible for the payment” reads as a legal conclusion. Under the Commission’s proposal responsibility for payment depends not only on whether there was a contractual relationship but also on certain facts, such as whether the invoice was “properly issued” within the meaning of proposed 541.4 or contains all “required minimum information” (see proposed 541.5 and 541.6).

A revision such as we propose to this provision is in accord with the Commission’s own intent, as the preamble to the proposed rule states that the Commission’s concern was to limit the sending of an invoice for detention or demurrage only to the person that has **contracted** with the billing party for the carriage or storage of goods (emphasis added). Whether that person is legally “responsible” may also involve other factors, including factors in the proposed rule itself regarding billing requirements.

Specifically, the Commission explained its proposal as follows:

In sum, the proposed rule should simplify the current system and ensure that only the person with the most knowledge about the shipment and who is in the best position to understand and dispute the charge receives a demurrage or detention invoice. The Commission views the practice of sending an invoice to multiple parties involved in the shipping transaction rather than sending an invoice for demurrage or detention charges to only the person that has contracted with the billing party for the carriage or storage of goods as untenable. Therefore, the proposed rule would prohibit such a practice and require that only the person that has contracted with the billing party for the carriage or storage of goods receive an invoice for incurred demurrage or detention charges.

87 Federal Register at 62350 (emphasis supplied).

We Agree with the Commission that Imposing Limitations on Who May be Invoiced Does Not Preclude a Shipper from Utilizing an Agent to Pay an Invoice

The Commission properly notes in the NPRM that –

Practically, the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers. If adopted, the proposed rule would not prevent motor carriers from paying on behalf of the billed party. Although a motor carrier could pay on behalf of a billed party, the motor carrier would not be liable for these charges and could not be penalized for nonpayment of charges.

87 Federal Register at 62349.

In short, the Commission properly notes that while the proposed rule includes restrictions on who may be billed, it does not restrict who may pay on behalf of a billed party. Yet, the typical commercial entity or person may not consult the full Federal Register notice to learn that, but may well look at the rule

text. Thus, to further the Commission's effort to enhance clarity in the billing process for demurrage and detention, we would add the following new one sentence paragraph at the end of section 541.4 --

Nothing in this rule prevents a billed party from using an agent to pay an invoice.

We Oppose Allowing a Consignee to Be Invoiced for Detention or Demurrage Absent Written Agreement Beyond Mere Listing of an Entity as Consignee on a Bill of Lading

In the NPRM, the Commission specifically invited comments on whether the rule should also allow a carrier to "include the consignee named on the bill of lading as another person who may receive a demurrage or detention invoice." 87 Federal Register at 62349-50.

The Commission explained that --

Including the consignee named on the bill of lading as an appropriately billed party for demurrage or detention charges in the Commission's proposed rule would memorialize an existing industry practice and allow the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading.

87 Federal Register at 62350.

However, current practices have been confusing. That it is an existing practice does not commend it and it is not supported in the rule as proposed in this NPRM. Further, as worded, the choice would be the carrier's whether to bill consignee or the shipper (if different). What if the carrier sends an invoice for demurrage or detention to the consignee and the consignee says it never agreed to be responsible for such fees?

For such reasons we oppose the possible change to "allow the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading."

However, we are not against shippers and consignees having flexibility in their arrangements. Thus, we could support the ability of a carrier to invoice a consignee for demurrage or detention (or both), but only if there is advance written agreement between shipper, carrier and consignee to do so with such agreement precluding duplicate billing by also prohibiting the invoicing of the non-consignee shipper. Such provision could be added to the rule as a new paragraph in 541.4.

Only with some such advance written consent mechanism that precludes duplicate billing would allowing the invoicing of a consignee for demurrage or detention be at least somewhat consistent with the earlier quoted justification by the Commission for proposed section 541.4:

The Commission views the practice of sending an invoice to multiple parties involved in the shipping transaction rather than sending an invoice for demurrage or detention charges to only the person that has contracted with the billing party for the carriage or storage of goods as untenable. Therefore, the proposed rule would prohibit such a practice and require that only the person that has contracted with the billing party for the carriage or storage of goods receive an invoice for incurred demurrage or detention charges.

Therefore, absent some written agreement by the carrier, shipper and consignee to ensure that there is advance consent by a consignee to receive an invoice for demurrage or detention, combined with

preclusion of the ability of the carrier to invoice the shipper, we would oppose the possible change to “allow the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading.” Simply, the Commission should not retreat from its commendable proposal to improve industry practice, not to rely on it, by ensuring that only one party can be billed and that party has agreed in writing, separate and apart from its being referenced on a bill of lading, regardless of any fine print on a bill of lading.

Support for Proposed 46 CFR 541.5, Confirming the Statutory Provision on the Consequences of an Invoice for Demurrage or Detention not Including Required Information

Section 7(a)(2) of OSRA amended 46 USC 41104 by adding, among other things, new subsection 41104(f), “Elimination of Charge Obligation.” The provision states --

Failure 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.

We support proposed 46 CFR 541.5, as it incorporates the substance of this statutory mandate into the proposed rule.

Support for Prompt Issuance of Invoices for Demurrage or Detention Charges and for Adverse Consequences for not Issuing Invoices Within Regulatory Deadlines, Proposed 46 CFR 541.7

We support proposed section 541.7, under which a carrier must issue a demurrage or detention invoice within thirty (30) days from the date on which the charge was last incurred, or the billed party “is not required to pay the charge.”

In the NPRM the Commission explained that “without such a provision, there would be no consequence for not meeting the 30-day timeframe.” The Commission also noted that this provision is “consistent with the UIIA [Uniform Intermodal Interchange Agreement].”

87 Federal Register at 62354.

In addition, we have no objection to a small exception to this 30-day requirement set forth in proposed section 541.7(b), but consider that the wording of the exception should be clarified.

The exception concerns what happens if the carrier invoices the incorrect party. The subsection then makes two statements that seem potentially hard to reconcile.

First, the proposed subsection states that the “correct” billed party must receive an invoice within thirty (30) days from the date the incorrect party disputes the charges with the billing party.

Then the subsection states that “an invoice to the correct billed party must be issued within sixty (60) days after the charges were last incurred.”

Consider the possibility that the carrier invoice is submitted to an incorrect party 30 days after the last of the demurrage or detention charges were incurred, and that the incorrect party does not dispute the charges until the 30th day after receipt (permitted under proposed section 541.8).

At that point the earliest the carrier could submit the invoice to the correct party would be the 61st day. As a result, in such case, the carrier could not submit the invoice to the correct party within sixty (60) days after the charges were last incurred – even though the carrier could get the invoice to the correct party within the terms of the first of the two phrases of exception -- within 30 days of being notified that an incorrect party disputed the charges. We note that, at that point the correct party would be receiving the invoice up to 90 days after the charges were last incurred, a significant delay.

The final rule should clarify how the different phrases of the subsection are supposed to work together, and do so in a way that does not under any fact pattern allow a carrier as many as 90 days to invoice the correct party for demurrage or detention.

Modify Proposed 46 CFR 541.8 Regarding Resolution of Fee Mitigation, Refund, or Waiver Requests

Under section 541.8 a billed party has 30 days from receipt of an invoice for demurrage or detention to submit a request to the billing party for mitigation, refund, or waiver of fees. The billing party has 30 days from receipt to “resolve” the request or the billed party is not required to pay the charge at issue.

We have two distinct recommendations for modification of this section.

First, the preamble to the proposed rule indicates that, to the Commission, “resolve” apparently means that the carrier must take a position and communicate it to the shipper within 30 days. It does not, apparently, mean that a final resolution must be achieved as between carrier and shipper.

In explaining the provision, the Commission wrote --

The proposed rule would require a billing party, after receiving a request to mitigate, refund, or waive a charge on a demurrage or detention invoice, to determine whether to grant or deny the request within 30 days of receiving the request. Resolution of a request also includes billing parties to mitigate, refund, or waive a charge, if appropriate, within the 30-day timeframe. If the billing party does not resolve the fee mitigation, refund, or waiver request within 30 days, then the charge at issue must be mitigated, refunded, or waived. The proposed deadline would provide billed parties with certainty that it will receive a response to its fee mitigation, refund, or waiver request within a specific timeframe.

87 Federal Register at 62355 (emphasis added).

We are concerned that this explanation could provide an incentive to carriers to just say “no” to shipper requests within 30 days in order to meet the time deadline and not lose the dispute by default. A shipper who is on the receiving end of such a “no” response needs an option to contest the charges and not let the carrier be the decider.

In that regard we note that the Commission explained that proposed 541.8 –

does not apply to “charge complaints” authorized by section 10 of OSRA 2022 (codified in 46 U.S.C. 41310).

87 Federal Register at 62354 at n. 176.

Under 46 U.S.C. 41310, a shipper may submit complaints about charges assessed by a common carrier along with information. The Commission is to investigate, allowing the carrier to respond and submit additional information.

Importantly, under section 41310(b)(2) the common carrier “shall bear the burden of establishing the reasonableness of any demurrage or detention charges.”

Accordingly, our first suggested modification to this section is that the prompt resolution process intended by the Commission would be more likely to come to a conclusion if proposed section 541.8(b) were amended to include an additional sentence such as:

In considering a request for mitigation, refund, or waiver of fees, a common carrier shall consider that under 46 USC 41310(b) a common carrier shall bear the burden of establishing the reasonableness of any demurrage or detention charges.

This is consistent with the ability of a carrier to reject baseless requests for fee mitigation, refunds or waivers, but consistent with a clearly worded statutory provision.

Second, we see some benefit and fairness in tweaking the time frames for issuing and responding to the invoices as described below as well as in adding a related format requirement or incentive.

Given the short but fair timeframes set forth in this section for issuing invoices and for any shipper response, the Commission should require that invoices be in a form that is not only readable by people, but computer readable. The advantages, in terms of timeliness and accuracy are obvious.

We realize, however, that the Commission could be reluctant to impose a requirement not referenced in the NPRM, as logically related as this recommendation is to a system calling for ever prompter processing of specific billing information. So, in the event that the Commission would not impose a computer readability requirement for invoices in this docket, it could incentivize it. For example, for providing a computer readable invoice, a carrier could be allowed 35 rather than 30 days to issue an invoice.

In addition, we would allow shippers 60 days, rather than 30, to notify the carrier that it disputes an invoice. For a carrier, ocean carriage (and ancillary matters such as detention and demurrage) is its principal business. For a shipper, transportation is not the principal business, even if it is a very important, and increasingly important function in support of the business (whether manufacturing, retail, agribusiness, or other). Allowing a few additional days for the shipper to interpret the carrier’s bill before responding would not be an unfair advantage for the shipper, but a modest adjustment reflecting the carrier’s greater expertise as to the carrier’s own billing. The shipper would not have to use the extra days – and we are confident that many of our members would want to hurry and provide any response within 30 days or less – but it would be a fair and minor adjustment to the proposed rule.

Summary and Conclusion

The Shippers Coalition supports reforms to improve billing and invoicing for demurrage and detention. The rules as proposed, with the improvements we recommend, should result in clear, transparent, accurate, non-duplicative, and promptly submitted bills for demurrage and detention. The process will reduce shipper confusion, or at least uncertainty, about invoices for demurrage and detention. This should reduce disputes and enable both shippers and carriers to better focus on making substantive

improvements to their shared goal of effective ocean transportation of freight.

As noted earlier, a more efficient and accurate system of billing for demurrage and detention, with needed information, transparency and lack of duplicative billing of shippers, is a worthy goal in and of itself. But achieving it should bring additional benefits. It should reduce any incentives that may exist for carriers to collect demurrage and/or detention fees rather than promptly and fairly resolve billing issues and move cargo or, as applicable, release it so that it can be moved. The reforms proposed would further more efficient use of containers which, in turn, should promote supply chain fluidity, efficient freight transportation, and reduced congestion and emissions.

The Shippers Coalition thanks the Commission for its consideration, and recommends that the Commission promptly adopt rules in accord with the positions and recommendations set forth in these comments.

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