September 15, 2023

Commissioner Rebecca Dye
Federal Maritime Commission
800 North Capitol St., NW
Washington, DC 20573

*Submitted Electronically to John Moran, FMC jmoran@fmc.gov*

Dear Commissioner Dye;

The Harbor Trucking Association (HTA) appreciates the opportunity to provide additional comments on your recent proposals to address Supply Chain Bottlenecks.

For many years, the HTA and our motor carrier member companies have consistently maintained active engagement with policy makers on the critical issues that impact the efficient movement of goods on the US West Coast (USWC).

Over those years, your leadership has been indispensable in identifying many of the unreasonable, unjust, and inefficient equipment provider (EP) and marine terminal operator (MTO) practices that have plagued the system for decades.

The successes of your efforts have highlighted the benefits of identifying and proposing potential solutions through collaborative discussions; with consensus comes a willingness to comply.

However, as evidenced by recent EP and MTO actions (or inaction), it may take a regulatory approach in order to "hedge" fair, just and equitable behavior in this market sector.

Nevertheless, the recent proposals you have put forth are undoubtedly a reasonable starting point for further action in addressing the inherent inefficiencies and unreasonable practices that have become commonplace across the goods movement chain.

HTA truly values the partnerships we have established with our fellow supply chain actors, unfortunately, there seems to be little willingness by many MTOs and EPs to shift away from current practices that inhibit efficiency, increase costs and penalize motor carriers.

MTO or EP imposed empty container return restrictions, chassis restrictions, forced storage and dislocation, appointment restrictions, gate closures, and unreasonable detention and demurrage charges are amongst a multitude of things motor carriers are exposed to when trying to move containers for their shipper partners. The issues described above each have a unique mitigation cost that is borne by motor carriers or in some instances their shipper partners.

Although these costs are the direct result of MTO or EP action, since the EPs and MTOs refuse to reimburse at a fair rate, if they entertain reimbursement at all, the motor carrier is expected to absorb the costs or pass them onto the beneficial cargo owner (BCO). These increased costs are eventually borne by the American consumer as they are passed down the chain.

Continued discussions on these issues are welcome, and we hope that your recent efforts will result in a greater willingness to find common ground amongst all actors involved. However, in line with recommendations contained in Fact Finding 29 (FF29), we are committed to our belief that further regulation is needed to enshrine practices that enhance supply chain fluidity and protect motor carriers from the continued unfair and reasonable business practices EP and MTO partners are still engaging in today.

Nevertheless, as collaboration is the cornerstone of lasting programmatic change, HTA looks forward to contributing further perspective in order to help build a practical pathway for addressing the issues these proposals are meant to resolve.

Below, you will find commentary on the proposals, including some additions that are meant to enhance the discussion and help identify solutions that will contribute to cargo fluidity, cost savings and efficiency gains.

## *I. **CONTAINER RETURN PROPOSAL***

***Containers must be returned to the terminal of original pickup, facilitating the pickup of a new load.***

Motor carriers need the flexibility to determine the most efficient truck move, therefore, while the container should always be able to be returned to the terminal of origin, truckers should be given the choice to utilize other MTOs that are open to receiving the empty in order to facilitate dual transactions and maximize efficiency.

***Truckers must have an option to return empty containers to another location to facilitate double moves.***

See above response. Having the ability to return to other terminals is an important component for maximizing efficiency, nevertheless, it is important that truckers always have the terminal of origin for first choice as a return location to help avoid unnecessary and costly repositioning.

Nevertheless, if a trucker is forcefully redirected by the EP or MTO, the EP or the MTO should be liable for any expense incurred for the movement to the alternative location, furthermore, the EP or MTO must compensate motor carrier for storage of a container if there are no return locations available.

***In rare cases, where it is not possible for a trucker to return a container to the terminal of original pickup, notice to truckers of the new container receiving terminal must occur no later than 12PM the previous day.***

The standard should apply to all empty container returns not just when there is diversion to a different terminal. All MTOs should publish at 12 noon the previous day for all EP empty receiving. To ensure efficient container movement, once empty return receiving is published at noon, any appointments secured for return should be honored by the MTO.

Furthermore, as described above, if there is any forced diversion away from terminal of origin or if there is a delay in a receiving location that results in storage or further repositioning, trucking companies should have a pathway for billing back the MTO or EP for charges associated with handling the equipment.

***Any requirement for an appointment at a new receiving terminal must be waived.***

While we appreciate the need for MTOs to leverage appointments in an attempt to manage gate fluidity, when truckers are redirected to alternate locations, truck capacity is strained and overall efficiency is impacted as assets are redirected and deployed to a new location in response to the restriction.

Waiving an appointment for a redirected box will enhance the ability of motor carriers to respond and dispatch to a new location as assets can be deployed based upon their availability and or operational capability instead of when the terminal can accommodate.

Nevertheless, if there is an unwillingness to completely remove the requirement for empty container appointments, at a minimum, if a trucker is redirected, they should be given an exemption that can be used to return the empty container at any time across the available shifts as long as coupled with reasonable receiving windows. Any detention clock should be frozen as soon as restriction and redirect is applied.

## *II. EARLY RETURN DATE PROPOSAL*

***The ERD date applicable for the shipment will be the one in effect at the time the empty container has been picked up from the terminal.***

This proposal is also a reasonable approach in addressing shifting ERDs that result in per diem or detention charges if a motor carrier is required to hold the container while waiting for a new return window. If an ERD is set and a trucker pulls a container under the assumption that the ERD is date specific, then that ERD date should remain in effect for billing purposes.

In a perfect system, MTOs would accept the container starting on that date regardless of vessel availability. However, if an MTO cannot accept the container, any charges assessed for detention should use the original ERD as the clock stopping event for any charges.

Once an ERD shifts, all detention or per diem charges should freeze. This should be automatic. Shippers and motor carriers should not have to scramble to find screen shots or emails to dispute charges that are issued once an ERD was moved.

Understanding there are many factors that impact vessel arrival and availability, it is not unreasonable to assume that motor carriers and shippers should not be charged a daily usage fee for a container they are unable to return for reasons out of their control.

While the need for an "auto-freeze" should be a focus of the Innovation Teams, MTOs and EPs should also simultaneously be expected to disclose clear and accurate information on shifting ERDs and other operational changes or restrictions in an archived and searchable format in order to provide a tool for shippers and motor carriers to utilize should they need to file disputes.

A single repository of information may help offset the consistent lack of communication between MTOs and EPs on row closures, appointment issues and other events that impact ability to pick up or drop off containers. A single source where accurate information is accessible will facilitate effective communication in billing disputes amongst all parties.

There is of course some level of communication between MTOs and EPs on operational issues, but not enough to stop billing departments from issuing charges to motor carriers or shippers despite closures or other events that prevent drop off or pick up.

Full transparency by MTOs and EPs on not only ERD changes but empty return restrictions, gate schedules, appointment availability and volume, chassis counts, row closures, lane closures, terminal closures etc. will prevent EPs and MTOs from misdirecting responsibility for events that result in inappropriately applied charges to shippers and motor carriers.

Problems with a shifting ERD are not limited to per diem charges. Our agricultural partners with perishable commodities suffer greater costs due to potential losses if an ERD shifts significantly. Unfortunately, there is no recourse available to shippers or motor carriers for reimbursement of costs related to container storage or cargo losses because of a shifting ERD.

Due to this issue and others described in the previous and following section, in order to foster fairness and encourage efficiency and fluidity, the Innovation Teams should investigate a billing pathway for motor carriers to submit invoices back to EPs or MTOs for repositioning, storage, chassis charges and other miscellaneous charges that accrue when storing EP equipment because of a shifting ERD or other issues that prevent container return.

***FMC Supply Chain Innovation Team engagement surrounding this proposal will also involve related detention and demurrage charges.***

As referred to above, shifting ERDs have not prevented EPs from continually assessing detention and per diem charges on motor carrier and shippers. It is a constant battle to dispute charges that are incurred when a container could not be returned due to a shifting ERD.

The involvement of the Innovation Teams in this important issue is welcome. Ideally, a consensus can be reached in how to set policy for disclosure and fee applicability along with a billing pathway for motor carrier storage and repositioning.

However, due to the critical nature of these issues, a potential regulatory pathway should be considered if consensus cannot be reached.

## *III. NOTICE OF CONTAINER AVAILABILITY FOR PICKUP PROPOSAL*

***Ocean carriers and marine terminals (MTOs) must coordinate information to provide shippers with an electronic notice that a container is available for pickup.***

Accurate information sharing is critical to efficient movement of goods. Timely and accurate data on shipment status and availability of cargo helps shippers and truckers plan for capacity deployment. Nevertheless, the term “available” requires closer examination.

To any rational person, “available” means it is ready to be picked up. However, at terminals that require appointments, the term “available” doesn’t mean that the container is accessible by the motor carrier.

Electronic notifications on container status is helpful, but any data shared on when a container is available for pick up must reflect all operational constraints (such as appointment availability, return restrictions or closures) on actual retrieval. Accurate information is critical in this regard, as the “free time” (FT) clock initiates when the MTO has deemed the container to be “available”. Under current conditions, the clock begins regardless of ability to actually pick up the container.

At many MTO facilities in the ports of Los Angeles and Long Beach, the demurrage “clock” will begin at 0800 the following shift from when the container becomes “available” meaning it has been fully cleared of all holds and is located in an open section of the terminal.

While the container may be now “available” as of 0800, if a motor carrier cannot secure an appointment for that same day, the clock continues to tick and will continue until the container is picked up. It may take several days to secure an appointment depending on the particular terminal.

The unfortunate issue here is despite the fact that no appointments are available, the demurrage clock continues to tick. It is not reasonable to begin counting against free time on the very first day the clock starts if there is no way to actually pick the container up. This applies to both free time calculations for demurrage and terminal specific dwell fees.

A thorough reexamination of what constitutes "available" should be a priority for the Innovation Teams. We are pleased to see the concept specifically referenced here in your proposals, especially since there may be an opportunity for tangible change as MTOs are able to establish polices on free time commencement through their individual tariffs. So ideally, if MTOs reach consensus, a systematic transformation may occur without commanding adherence through regulatory decree.

***Free time and clocks stop if a container becomes non accessible and unavailable for pickup.***

The proposal above is a very reasonable approach to establishing fairness and equity in the detention and demurrage (DnD) process. Too often, MTOs are forced to close entire rows due to unforeseen events and individual row or section closures can potentially spread to full gate closures across multiple shifts.

While the reasons and magnitude of closures range in severity, the result is the same; appointments are cancelled, and truckers are forced to reschedule once notified the container is again "available" (which could be as early as a following 2nd shift).

Related to what was described in the previous section, if truck capacity has already been deployed to pick up a container prior to a closure being notified, the motor carrier has no reimbursement pathway for costs associated with the "dry-run" or for storage of the container and use of the chassis now that that box has been restricted from return.

When an appointment is cancelled through no fault of the trucker, MTOs or EPs should be responsible for reimbursement of any motor carrier costs related to the cancellation. This is also outlined in the previous sections discussing a potential billing pathway for motor carriers to seek reimbursement for costs related to empty restrictions and ERD shifts.

While a billing mechanism for motor carriers will help cover costs related to dislocation and storage, the assignment of detention or demurrage needs separate attention.

Once the appointment is cancelled, in theory, the terminal or EP should proactively extend free time for all containers impacted by the closure. While some MTOs will accommodate and extend days to match the closure, the problem arises when the motor carrier cannot secure an appointment until after the extension has expired, regardless of where the container is in free time. Many times an appointment is only available after free time has expired despite potential extensions for closures, this situation is commonplace and can only be addressed through contacting the terminal directly for an additional extension.

Dealing with EPs on extensions for DnD charges due to closures or other "clock-stopping" events becomes even more challenging as the modus operandi of EPs is to shirk responsibility to the MTO thereby justifying their unwillingness to entertain an extension of free time or credits against assessed fees.

Establishing a minimum standard for what constitutes a clock stoppage is necessary to ensure fair and accurate detention and demurrage billing.

Once FMC finalizes the Rulemaking on Detention and Demurrage Billing Practices, the industry will have a better understanding of which parties are going to receive the invoices for DnD. However, regardless of who is receiving the bill, consistency is needed to establish standards that prevent unfair and unreasonable charges in the first place.

In 2022, HTA was successful in pushing local reform on DnD billing practices though efforts with our partner organization the California Trucking Association (CTA) in passage of AB2406 in California.

The bill was signed into law in 2022 (CA B&P Code §22928) and went into effect on January 1, 2023. AB 2406 is the only legal vehicle that is available so far that governs the behavior of MTO and EPs when it comes to the applicability of detention and demurrage billing.

Specifically, the bill amended code section §22928 of the B&P code. This code section was originally created in 2005 through another piece of California legislation, SB45 (another CTA sponsored bill).

The code had always prohibited MTOs and EPs from charging DnD fees or consuming free time when gates are closed due to planed or unplanned events.

AB2406 went one step further to include (amongst other things) appointment availability and container restrictions as events that would trigger clock stoppage. The bill explicitly explains that if one of the several events outlined in the legislation occurs, both free time and the charges that occur after free time expires will not apply.

The basic premise of the AB2406 and its subsequent code section is that DnD charges cannot be continued, nor can free time be consumed if the container cannot be returned or retrieved for any reason under the purview of the MTO or EP and outside the control of the motor carrier.

Unfortunately, the laws of California are not always adhered to, and it is left up to the billable party to determine validity of charges and appropriate dispute channels.

Currently, the provisions of §22928 are being used to challenge improperly issued invoices for detention and demurrage billing by EPs. Nothing so far seems to compel MTOs or EPs to comply with the law, nor does anything exist that forces them to share accurate and timely information between each other.

What has become clear throughout the dispute process is that information sharing between EPs and MTOs is inconsistent, which results in bills being issued when the terminal is closed (amongst other things) which precludes container pick up or drop off.

Motor carriers and shippers in California are constantly filing disputes with EPs after expending copius resources to determine if a DnD charge was valid using provisions contained in CCR B&P §22928, OSRA21 and/or requirements under the Uniform Intermodal Interchange Agreement (UIIA).

While many (not all) disputes are recognized resulting in charges being eliminated, there is no compensation back to the motor carrier for the time and resources that were necessary to prove that a charge was improperly (or illegally) applied in the first place.

If discussions by Innovation Teams can result in the establishment of clear policy for MTOs and EPs in how to comply with existing California law on DnD billing, it would help move the industry towards consistent standards across all gateways.

Using the provisions in CCR B&P §22928 as a pathway to set minimum standards for how free time is applied when cargo is inaccessible may help avoid additional federal regulatory measures that would govern this behavior.

Conversely, the code section could also act as vehicle for other states and jurisdictions to simply mirror for their own standards.

***Availability includes the physical availability of the container to be picked up within a reasonable time period by the shipper or trucker.***

It is reasonable to believe, especially from HTA motor carrier member experience, that a more detailed definition is needed for what constitutes availability related to free time commencement. What is important to remember here in these discussions that just because a container is physically available for pick up, does not mean it is actually physically capable of being picked up.

As described above, in terminals that require appointments, a lack of available appointments will prevent container pick up. The container may physically be "available", but it cannot be accessed because an appointment cannot be secured. Unfortunately, the lack of an appointment does not currently constitute a clock stoppage or free time extension for DnD billing.

A reasonable time period would take into account when the container was actually accessible, meaning that an appointment is available. A reasonable amount of time to pick up the container before the clock starts against demurrage or dwell fees would take into account appointment availability and the ability of the motor carrier to secure the appointment.

Free time should commence when the container becomes "accessible" which means it has an actual window that it can be picked up in. In MTOs that require appointments, containers cannot be picked up unless a valid appointment has been secured. No appointment, no container.

One way to provide reasonable time for a trucker to pick up a container is by having MTOs couple the initiation of free time to the first day side appointment that is accessible for a motor carrier to book at least 24 hours after the container has been made "available" and fully cleared of all holds staged in an open area.

To ensure consistency, the clock should start on the same day that the first available day side appointment is offered to the motor carrier once the 24 hour period has concluded, regardless of whether a motor carrier takes the appointment or not.

A change to when the clock starts may be enough to alleviate the unreasonable charges that accrue while a motor carrier attempts to secure an appointment once a box is made available.

Regardless, a reevaluation of the concept of "availability" is needed.

Establishing a standard that recognizes appointment availability for purposes of free time commencement will formally encourage fairness and reasonableness in detention, demurrage and terminal dwell billing. This is a good place to start.

In conclusion, we would like to directly thank you, Commissioner Dye for putting forth these proposals. Your commitment to understanding and addressing supply chain issues is unparalleled.

HTA is very encouraged by your efforts to address these issues. There is a real possibility that a paradigm shift may result from this work. While the Innovation Teams will have a tremendous number of issues to address, the proposals will inevitably prompt productive discussion amongst the participants which ideally will lead to solutions.

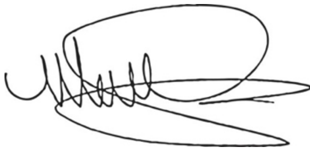
Nevertheless, while discussions will no doubt be productive, it is important for all of us to recognize that a regulatory pathway, although not preferred, may be necessary to institutionalize appropriate behavior in this system. History has demonstrated that not all actors in the goods movement supply chain are willing to follow the standards unless the rules they are following are part of a legal framework that they must adhere to. The pursuit of consensus is appropriate, but in many instances, it is not enough.

Still, we are fully confident that under your leadership we will emerge with a better understanding of the underlying issues brought forth here and what potential solutions may be the best way to address them.

We look forward to continued engagement with your office on development of the Innovation Teams and are eager to begin work on these proposals with our fellow supply chain actors.

Thank you.

Sincerely,



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**HTA Comment Summary**
**FMC - Addressing Supply Chain Bottlenecks**
**Matt Schrap, CEO, Harbor Trucking Association**
**9/15/2023**

Empty containers should have the terminal of origin as a return location option, however, truckers should be able to decide on return location if other facilities are open for receiving.

All empty return locations must be noticed by 12pm the previous day. Any appointment made once return locations are posted should be honored.

Appointments for redirected containers should be waived. If appointment is absolutely necessary, exemptions should be issued for use by trucker across any following shift. Detention clock should be frozen once empty is diverted from terminal of origin.

If an ERD shifts, the original published ERD should be used as the final day for per diem or detention billing. All billing should freeze once ERD shift is announced.

MTOs and EPs should be required to consistently publish pertinent and accurate information on ERD changes, empty return restrictions, gate schedules, appointment volume and availability, chassis counts, row closures, lane closures, terminal closures along with any and all other information related to handling of property in containerized transport.

MTOs and EPs should comply with existing California law on applicability of detention and demurrage billing under §22928 of the California B&P Code, these standards should be consistent across all gateways.

Free time commencement regarding “availability” should be coupled to the first day-side appointment that is available to a trucker at least 24 hours after the container has been fully cleared of all holds and is an open and accessible area.

Any motor carrier costs related to repositioning, return or storage of containers due to appointment cancellations, empty return restrictions, ERD shifts or anything else that prevents container pick up or return should be billable back to the MTO or EP.