BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF THE COALITION FOR FAIR PORT PRACTICES FOR RULEMAKING; NOTICE OF FILING AND REQUEST FOR COMMENTS	)	**DOCKET NO. P4-16**

REPLY OF THE

UNITED STATES MARITIME ALLIANCE, LTD.

The United States Maritime Alliance, Ltd. ("USMX") submits its reply in response to the Federal Maritime Commission's ("FMC's") Notice of Filing and Request for Comments ("FMC Notice") to the above-referenced docket, 81 Fed. Reg. 95612 (December 28, 2016). The Petition presents a regressive approach to a complex commercial issue. It seeks to resurrect archaic rules promulgated under a statutory regime that has long been superseded by an amended statute enacted to respond to contemporary issues raised by containerization and the globalization of the supply chain that containerization has spawned. For the reasons set forth herein, USMX urges the Commission to deny the Petition.

I.

Interest of USMX

USMX is an association of ocean carriers, stevedores, terminal operators and port associations responsible for the movement of almost all of the containerized cargo on the Atlantic and Gulf Coasts of the United States. As such, USMX's members will be directly and substantially affected by some of the proposals introduced in the FMC Notice published by the Commission. USMX has its offices at 125 Chubb Avenue, Suite 350NC, Lyndhurst, NJ 07071.

The members of USMX negotiate and administer the terms of the current Master Contract with the International Longshoremen's Association, AFL-CIO ("ILA") which governs longshore operations on the Atlantic and Gulf Coasts of the United States. On behalf of its members, USMX has been actively involved in regulatory issues including matters before the Department of Homeland Security, Department of Transportation, and Department of Labor as well as federal and state legislative procedures involving issues relating to the transportation of cargo throughout this Nation's ports. The comments of USMX were heavily relied on by the FMC in rendering its opinion on the *Petition of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference at the New York/New Jersey Port District* (P3-02) (February 20, 2004). USMX played a pivotal role in the enactment of the Maritime Transportation Security Act of 2002, Public Law 107-295, 116 Stat. 2064 (Nov. 2, 2002) (MTSA) codified at U.S.C.A. § 70101-70121 (West 2007), as well as its ensuing regulations.

Currently, David Adam, USMX Chairman and Chief Executive Officer, is a member of the Port Performance Freight Statistics Working Group created by the Department of Transportation under the authority of Fixing America's Surface Transportation Act ("FAST Act"), P.L. 114-94 (Dec. 4, 2015), Section 6018, codified at 49 U.S.C.A. §6314 (West 2016). The purpose of this working group is to assist the Bureau of Transportation Statistics in developing a set of nationally consistent performance measures to assess port throughput and capacity. Previously, USMX was a founding member of the Department of Transportation's Marine Transportation System National Advisory Council ("MTSNAC") and held its chairmanship for 6 years. USMX was instrumental in the publication of numerous MTSNAC

white papers and presentations regarding the economic significance of the maritime transportation system to the U.S. economy, container security and the international supply chain.

USMX has also been proactive in seeking solutions to terminal velocity issues. In furtherance of its long-standing interest in promulgating reasonable legislation and Federal Motor Carrier Safety Administration regulations for the interchange of intermodal equipment, particularly intermodal chassis, USMX has sought to work with the International Longshoremen's Association, AFL-CIO ("ILA") in an effort to facilitate the establishment of gray chassis pools. Chassis pools have been identified as a mechanism to reduce the time involved with port drayage by simplifying the process whereby a motor carrier obtains and ultimately returns an intermodal chassis used to transport containers to a marine terminal

In addition, USMX along with the ILA have embarked on an effort to undertake early Master Contract negotiations for the purpose of resolving longshore labor issues well in advance of contract expiration to avoid uncertainty for cargo interests and to avoid potential port slowdowns. *See* Jennifer Smith, *Longshore Union, Employers Seek Early Pact at U.S. East Coast Ports*, Wall St. Jour., Feb. 16, 2017, available at https://www.wsj.com/articles/longshore-union-employers-seek-early-pact-at-u-s-east-coast-ports-1487275920.

II.

Preliminary Statement

USMX has read the replies prepared by the National Association of Waterfront Employers ("NAWE") and the World Shipping Council ("WSC") and adopt them as its own as if fully restated herein. Accordingly, these comments will be brief to reinforce the arguments contained in those comments that so clearly and decisively expose the legal fallacy of the Petition and the harm and havoc that would be created if the agency were to pursue the course

suggested by the Petition. USMX opposes the Petition that purports to shift to MTOs and ocean carriers the legal, operational and financial risk for port congestion or delay. Such risks are otherwise best addressed through commercial arrangements.

III.

Summary of the Comments

The Petition should be denied for the following reasons:

- The FMC lacks the legal authority to grant the relief sought by the Petition;
- The Petition does not demonstrate an adequate factual basis for the requested relief;
- The present regulatory framework provides adequate remedies; and
- The proposed rule will not remedy the situation it seeks to address but will create confusion, undue agency action, and exacerbate congestion.

A. The FMC lacks the legal authority to grant the relief sought by the Petition

The legal basis for the Petition relies on the Commission's adoption of truck detention rules for the Port of New York in the 1960s and 1970s. This presents an insurmountable legal hurdle to the Petition inasmuch as the law as well as the commercial circumstances under which those rules were promulgated has changed dramatically. Those rules were based on authorities granted to the Commission under the Shipping Act, 1916 (46 U.S.C. §816), which was amended by the Shipping Act of 1984. Curiously, the Petition does not address or otherwise explain this reliance on subsequently-amended regulations that pre-date containerization. The purpose of the Shipping Act of 1984 was to legislatively articulate a necessary response to the embrace of containerization as the primary means of international cargo transportation. In doing so, it was necessary to establish a non-discriminatory regulatory process with minimum government intervention and regulatory costs to ensure that domestic law conformed to international

standards. *See* 46 U.S.C.A. §40101(1) (West 2007). Most significantly to this inquiry, the Shipping Act of 1984 eliminated the language of both Sections 17 and 18 of the 1916 Act that granted the Commission the authority to prescribe commercial rules and practices and regulate the level of rates and charges respectively. *See* 46 U.S.C. App. §1709(d)(1) now codified at 46 U.S.C.A. §41102(c) (West 2007). Ironically, Petitioner is asking the Commission to magically turn back time to a pre-containerization world to exercise precisely the same authorities that Congress removed from the 1916 Act by encouraging the agency to now prescribe "a just and reasonable regulation or practice" and "to regulate the level of rates and charges." *See id.*

The Petition would require MTOs to adopt rules under which they could not assess demurrage if the failure to pick up the cargo within free time was due to a "disability." Disability is broadly-defined therein as including but not limited to port congestion, port disruption, weather-related events, and delays as a result of governmental action or requirements, unless such delays could have been prevented by the shipper or receiver. *See* Petition, Exhibit A, paragraph (b). Such events would be considered disabilities under the proposed regulation, even if the cause was not the fault of, or was beyond the control of, the MTO or ocean carrier. It would also require MTOs to limit their charges for demurrage for periods between the expiration of free time and the commencement of a disability. *See id.* at paragraph (c). In addition, charges for demurrage would be limited to a "compensatory rate," which is not to exceed the marine terminal's "storage costs." *See id.* at paragraph (d). Certainly such a rule cannot pass muster under current law because the Commission lacks the statutory authority to dictate the level of rates and charges assessed. Accordingly, it does not have the authority to adopt a rule that in essence dictates the level of rates and charges assessed. Thus, the Petition should be denied because the Commission lacks the legal authority to grant the relief sought.

B. The Petition Does Not Demonstrate An Adequate Factual Basis For The Requested Relief

As noted by the FMC in its *See Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* (April 3, 2015) (hereinafter referred to as the "*FMC Report*"), ports across the Nation have different ownership and operational structures that generate the need for different commercial arrangements. Yet, the Petition without regard to regional differences and unique operational challenges seeks to impose its overly-broad and statutorily unsupportable rules on all marine terminals and carriers at ports throughout the Nation. Notwithstanding the obvious legal flaw in ascribing all financial risk for port congestion or delay, no matter what the cause, on MTOs and ocean carriers, as previously noted, the proposed regulation seeks to limit what costs an MTO or ocean carrier may potentially recover for the failure of a shipper or receiver of cargo in retrieving cargo in a timely manner. *See* Petition, Exhibit A at paragraph (d).

However, there must be a "good reason" for granting relief on a national scale and that the relief sought must be reasonable. *Petition of National Customs Brokers and Forwarders Association of America, Inc. for Rulemaking*, 30 S.R.R. 76, 78 (FMC 2004); *see also Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, 31 S.R.R. 718, 724 (FMC 2009) (petition rejected as unsupported by an adequate factual basis to justify a rulemaking or the adoption of broad regulatory relief on a national scale). The Petition, inclusive of its supporting declarations, fails to establish that there is a "good reason" for granting the relief sought on a regional let alone "on a national scale."

A petition for a rulemaking must be supported by facts and data "so as to convince the Commission of the need for broad regulatory relief." *See Petition of Olympus Growth Fund III*, 31 S.R.R. at 724, citing *Marine Terminal Tariff Provisions Regarding Liability of Vessel Agents,*

27 S.R.R. 611, 614 (FMC 1996). A petition will be denied that lacks the necessary support to grant "relief on a nationwide scale" and when a petitioner has not provided "evidence of pervasive conditions requiring a broad rule of applicability." *Id.* That is the situation with the Petition at issue.

While the Petition attempts to tar marine terminal operators throughout the Nation with the same brush based on trade press accounts of regional delays and port congestion occurring in 2014 and 2015, it fails to provide the requisite quantifiable factual showing to warrant the requested relief on a national scale. *See Petition of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference at the New York/New Jersey Port District* (P3-02) (February 20, 2004) (rejecting petition based on pre-containerization regulations supported by newspaper articles regarding port congestion). The verified statements that accompany the Petition fail to rehabilitate this fatal flaw. The comments submitted by NAWE and the WSC provide a detailed analysis of the deficiencies in the supporting declarations. The verified statements allegedly supporting the Petition simply do not present a cohesive argument that certain past regional port congestion episodes present a national disease that requires the draconian measures recommended in the Petition.

Remarkably absent from the Petition is recognition that cargo interests have a great deal of control over the supply chain. Cargo interests can pick and choose the ports, ocean carriers, marine terminals and inland carriers they utilize for the arrival and departure of their cargo. If cargo interests fail to exercise their choice in selecting carriers who offer more favorable demurrage or detention terms or service levels, that is a commercial choice and not a reason for government intervention into commercial relationships. As previously noted by the FMC, shippers have the leverage to negotiate for more free days and lower demurrage and detention

rates through confidential service contracts or through pressuring carriers to change their tariffs. *See FMC Report* at 25.

The Petition and the verified statements attempt to link limited and unique regional circumstances such as the labor situation on the West Coast and severe weather in the Northeast in late 2014 and early 2015 as factors supporting the Petition. However, as articulated by NAWE, "[u]nique episodic conditions do not justify a blanket, broad-brush policy on demurrage charges…congestion is almost always the result of unique circumstances (labor dispute, unusually bad weather) and is almost always limited in duration and geographic scope." *See Reply of the National Association of Waterfront Employers* at 10. The Petition does not mention congestion at other regional ports or congestion-causing events outside the limited 2014-2015 time period. USMX is not aware of substantial, on-going congestion or systematic problems having occurred at any U.S. ports during 2016.

Curiously, while the Petition is laden with references to the West Coast labor situation of 2014 and 2015, there are no references to the considerable efforts of both longshore labor and management on both the West and East and Gulf Coasts to begin labor negotiations well in advance of contract expirations to avoid uncertainty for cargo interests. *See* Jennifer Smith, *Longshore Union, Employers Seek Early Pact at U.S. East Coast Ports*, Wall St. Jour., Feb. 16, 2017, available at https://www.wsj.com/articles/longshore-union-employers-seek-early-pact-at-u-s-east-coast-ports-1487275920; *see also* Bill Mongelluzzo, *ILWU, PMA to Soon Consider Contract Extension*, Jour. of Comm., Sept. 27, 2016, available at http://www.joc.com/port-news/longshoreman-labor/international-longshore-and-warehouse-union/ilwu-pma-soon-consider-contract-extension_20160927.html.

In light of this, a rulemaking applicable nationwide is an unnecessary overreaction to the extraordinary factual circumstances identified in the Petition and verified statements.

C. The Present Regulatory Framework Provides Adequate Remedies

The Petition seeks adoption of a nationwide regulation to deal with issues arising from regional port congestion. USMX asserts and the FMC recognizes that there are several options available to address demurrage and detention issues without additional regulation. *See FMC Report* at 31-36. In view of the many avenues presently available and being pursued that are narrowly-tailored to specific circumstances, the overly-broad regulation sought by the Petition is unnecessary.

Even though the Petition acknowledges that many MTO schedules and carrier tariffs provide for the extension of free time and the waiver or refunds of demurrage or detention charges, Petitioner is still seeking its proposed rule. *See* Petition at 7-8. As admitted by the Petitioner, the proposed rule is simply not necessary to abrogate commercial arrangements that are successfully being accomplished by a substantial portion of the industry. The Petition also imprudently seeks to disrupt the well-established means of dispute resolution for complaints already available. The Commission's Office of Consumer Affairs and Dispute Resolution Services assist in resolving such disputes and aggrieved parties may file complaints with the Commission for conduct that violates the Shipping Act.

Given the many forms of recourse and resolution already available including FMC dispute resolution mechanisms and commercial solutions, a rulemaking on this issue is not necessary. If the Commission determines that some action is required with respect to this issue, it should be accomplished through cooperation among stakeholders such as recommended best practices from the Commission's Supply Chain Innovation Teams, the Department of

Transportation's FAST Act Port Performance Freight Statistics Working Group and similar regional groups such as the Port of New York and New Jersey Council on Port Performance, rather than through rulemaking.

D. The Proposed Rule Will Not Remedy The Situation It Seeks To Address But Will Create Confusion, Undue Agency Action, And Exacerbate Congestion

Contrary to the stated purposes of the Shipping Act, the proposed rule would discriminate against MTOs and ocean carriers by arbitrarily, and without factual analysis or support, allocating all risk for delays on the MTO or ocean carrier. This is in contrast to permitting some of that risk to be assigned through commercial agreement to the shipper, receiver, or motor carrier. Such a regulation cannot be considered non-discriminatory. If a shipper is unable to pick up cargo because of a problem beyond its control at a distribution center or warehouse, or a problem with an agent of the shipper, or a highway closure, the MTO or carrier should not be required to absorb the demurrage.

Thus, the proposed rule would increase, rather than minimize, government intervention and regulatory costs by raising the number of disputes that would result in litigation over demurrage and detention issues. This would dramatically increase the case-load burden of the administrative law judges at the FMC and exponentially increase government intervention and regulatory costs.

The Petition is contrary to well-established current law and will create confusion. For example, the proposed rule would preclude marine terminals and carriers from assessing demurrage for *any* reason beyond the control of the shipper, including Customs inspections. *See* Petition at 31-32; 39. Yet the Commission has held that it is reasonable to apply charges to cargo that exceeds free time as a result of a Customs inspection. *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 96 (1948).

In addition, the proposed rule would prohibit assessing charges when the disability which prevents cargo interests from picking up cargo or delivery equipment starts after free time ends. *See* Petition at 37. This is also contrary to well-established law holding that the assessment of charges is lawful under such circumstances. *Boston Shipping Ass'n, v. Port of Boston Marine Terminal Ass'n,* 10 F.M.C. 409, 417-18 (1967) ("Once free time has expired, the vessel's transportation obligation has ended."). Rather than being a "clarification" of a statutory provision, the Petition seeks an impermissible expansion and substantive change of existing law.

The Petition is based on the unsubstantiated assertion that the proposed rule would incentivize terminals and carriers to reduce future delays and congestion. This is not true as the proposed rule is merely a cost avoidance mechanism and MTOs and carriers are already highly motivated to reduce delays and congestion. As noted, the proposed rule seeks to shift financial risk to MTOs and carriers for delay even when the delay is not the responsibility of or within the control of the MTO or carrier. *See* Petition, Exhibit A, paragraph (d). Since there is nothing these entities could do to prevent such events, there is no attendant impact on delays or congestion. Hence the purported incentive to reduce port congestion supporting the Petition is illusionary.

It is instructive to consider examples provided by NAWE of events beyond the control of a shipper or a MTO or carrier, which could prevent the shipper from picking up cargo when the MTO is ready, willing and able to make it available that demonstrates the faulty logic of the proposed regulation. For example:

- the customer of the receiver has gone bankrupt and the receiver must find an alternate buyer of the goods being imported;
- the warehouse used by the receiver to store the goods is unable to accept the goods;

- the container is discovered to be overweight and the receiver needs to make arrangements for an alternate means of transport or for a special overweight permit;
- the goods in question cannot clear Customs because they are subject to a quota which has been filled, and arrangements must be made for storage in a duly authorized facility; and
- the receiver is unable to pick up the goods because a protest (*e.g.*, "Occupy Oakland") is blocking access to the port.

See Reply of the National Association of Waterfront Employers at 19. The Petition does not address such or similar scenarios or explain why the MTO or ocean carrier should absorb the financial risk for the failure of a shipper or receiver to timely retrieve cargo. The proposed rule would exacerbate congestion because it would eliminate the incentive to retrieve cargo during free time causing cargo interests to treat marine terminals as storage facilities.

At best, the Petition is short-sighted and does not project beyond seeking exoneration from all risk for the failure to timely retrieve cargo. At worst, the proposed rule would create confusion regarding the definition of the term "disability" and what other non-enumerated events would constitute a disability. Notwithstanding this deficiency, the proposed rule also relies on the phrase "including but not limited to" as a catchall, which suggests that there are other events not enumerated in the proposed rule, which cargo interests could assert would constitute a disability. There is nothing in the rule that provides any guidance on how a marine terminal would know that a failure to retrieve cargo was due to a disability requiring relief or applicable burdens of proof in adjudicating inevitable disputes. Most significantly, the proposed rule does not explain how the "costs" identified in paragraph (d) would be defined.

It is clear that serious consequences would result if such a rule was adopted. The administrative burden and expense of addressing these new issues would be overwhelmingly and unduly burdensome for MTOs, carriers, their customers, as well as the Commission.

V.

Closing Statement

The Petition is not offering solutions to the challenges of port congestion and delays; it is just a cost-shifting measure that will in fact exacerbate the problem. Such a proposed rule will remove any incentives on the part of cargo interests and port draymen to retrieve cargo and return equipment in a timely manner. The Petition does not realistically address the nuanced problems that the Commission is tackling as it simply seeks to insulate the Petitioners from financial risks and responsibility for their role in the supply chain.

For the reasons cited herein, the Commission should deny the Petition and continue its efforts in addressing port congestion and delays by fostering commercial solutions.

Respectfully submitted,

/S/Carol N. Lambos

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