COVID-19: UPDATES ON THE FMC'S DETENTION AND DEMURRAGE FINAL RULE

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The Federal Maritime Commission (FMC or Commission) recently announced its adoption of a final interpretive rule to provide the maritime community guidance on the "reasonableness" of detention and demurrage charges. The rule addresses shipper complaints of excessive and unwarranted charges by providing that charges may well be found unreasonable unless they further the prompt movement of cargo ("freight fluidity"), thus shifting the burden of delays that are beyond the control either party towards the carrier and away from the shipper. The importance of the guidance to all participants in the shipping supply chain is heightened as COVID-19 affects normal maritime movements.

THE FMC'S YEARS-LONG CONSIDERATION OF DEMURRAGE COMPLAINTS

Shippers, forwarders, and others have long sought Commission regulation of detention and demurrage charges imposed by carriers and marine terminal operators (MTOs), alleging that they are often imposed in violation of the broad Shipping Act prohibition on failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). In public hearings on the issue in 2018, shippers asserted that cargo was not often available for tender within the demurrage period due to lack of terminal appointments, congestion, or labor issues. They also asserted that even well-established shippers lacked the bargaining power to address such issues contractually. Carriers generally argued that the existing scheme was sufficiently protective of shippers and that imposition of one-size-fits-all rules by the Commission would transform carriers and MTOs into insurance providers for any disruptive events. MTOs argued that they should not be deprived of compensation for the use of their assets when factors such as weather, labor issues, government inspections, the bankruptcy of steamship lines, and the burdens of increasingly large vessels tie up their terminals.

In response to the hearing, Commissioner Dye led a fact-finding investigation into the detention and demurrage issue and released a final report in December 2018. Finding that there were widespread issues, the report focused its recommendations on ways to make demurrage and detention practices more transparent, including the use of standardized language as to what the charges are for and how they are applied. The report also noted that focusing demurrage practices on notice of when cargo is actually available would help streamline the supply chain.

Following that final report and the development of "Innovations Teams" to address some of the issues brought up in the investigation, the FMC published a Notice of Proposed Rulemaking last fall that the final interpretive rule largely adopts.

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KEY PROVISIONS OF THE FINAL INTERPRETIVE RULE

An interpretive rule does not bind the Commission but does provide guidance on how the Commission is likely to assess the "reasonableness" of a given detention and demurrage charge. While there have been very few detention and demurrage cases brought under the FMC's 41102(c) authority in the past, shippers could utilize this guidance to bring more cases before the Commission or in their negotiations with carriers over assessed charges.

The guidance provides a nonexhaustive list of factors the Commission may consider when assessing the reasonableness of demurrage and detention charges for containerized cargo, thus leaving the Commission free to consider additional factors outside those specifically listed. Throughout the guidance, the Commission emphasizes that the key consideration will be whether the detention and demurrage charges improve "freight fluidity."

The guidance applies to common carriers, MTOs, and ocean transportation intermediaries. However, it may also apply to other entities like railroads or rail facilities if the "practice" at issue relates to rail but is otherwise an ocean carrier practice (such as terms included in tariffs or service contracts). The Commission lists a number of situations that would weigh in favor of an unreasonableness determination, such as detention for government inspection or actual unavailability of cargo, but emphasizes that the overall question would be whether the charges enhance freight fluidity. The Commission may also consider the content or clarity of detention and demurrage policies for carriers and MTOs.

COVID-19 IMPACTS

The focus on freight fluidity could incentivize more scrutiny of detention and demurrage charges during the COVID-19 crisis. In late March, the FMC issued Fact Finding No. 29 Order, which authorizes Commissioner Dye to identify operational solutions to cargo delivery system challenges related to COVID-19. This order enables new Supply Chain Innovation Teams of maritime industry leaders to come together and develop commercial solutions to port congestion and other supply chain challenges. While ports around the country have maintained throughput, some in the shipper community have complained that reduced hours in ports have led to difficulties in picking up cargo. There are also concerns that shippers and cargo owners cannot pick up delivered containers if distribution centers are closed. At the same time, carriers are dealing with an unprecedented number of blank sailings and the resulting difficulties in getting their equipment where it is needed. So far, the significant drop in consumer demand has averted large scale congestion and equipment dislocation. The new Innovations Teams began their investigatory work in April and have not yet released any recommendations. Any congestion-related issues stemming from COVID-19 will raise questions under the Commission's new interpretive guidance, potentially resulting in increased litigation.

K&L Gates' maritime practice continues to monitor regulatory and policy issues in light of the COVID-19 pandemic and otherwise. If you have questions about how this may affect your company or otherwise, please see the contacts below.

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