

Executive Summary of Fact Finding 29
Presented as part of the record submitted by Commissioner Dye to the Subcommittee on
Coast Guard & Maritime Transportation
June 15, 2021

In March 2020, the Commission voted to establish Fact Finding 29, designating me as the Fact Finding Officer and authorizing me to identify operational solutions to cargo delivery system challenges related to COVID-19.

To aid in my efforts as Fact Finding Officer, the Order also authorized the creation of Supply Chain Innovation Teams, which the Commission previously used to positive effect in past fact finding investigations to examine issues related to supply chain visibility, chassis availability and chassis pools in the Memphis rail heads, and demurrage and detention charges.

Even before COVID-19 reached the United States in early 2020, the global supply chain was disrupted by COVID-19 related impacts as the virus spread throughout China. Widespread closures and quarantines in China shuttered factories, which impacted freight flows, port operations, and ocean carrier service offerings.

In the earliest days of COVID-19 related impacts to the supply chain in the United States, import cargo volumes dropped precipitously and ocean carriers cut services. And those imports that were delivered contributed to congestion at U.S. ports, particularly on the West Coast, because the import loads that were not being picked up for final delivery due to business shutdowns. The congestion was exacerbated by empty containers waiting to be repositioned.

Making headway in addressing what was becoming an untenable situation was my first priority, and I worked with port directors around the country to find available cargo storage locations for U.S. companies whose businesses were shutdown. The Innovation Teams also worked to ensure that the delivery of personal protective equipment (PPE) and other essential goods were prioritized.

After identifying immediate steps that could be taken to address COVID-19 related port congestion in the San Pedro Bay, I then engaged nine Innovation Teams to determine what underlying behaviors or policies of carriers or marine terminals could be changed to improve efficiencies at U.S. seaport gateways for international ocean freight. The Innovation Teams reached consensus on four key measures to improve efficient cargo movement, especially as the challenges created by COVID-19 changed in light of import surges:

1. Truckers should be directed to return empty containers to the terminal where they were picked up, allowing them to make dual moves and reduce the number of chassis required.

2. Notice of terminal gate closures should be given no less than three days, and preferably seven days, before gate closing. At no time should a closure occur mid-shift.
3. Notice of blank sailings should be given not only to beneficial cargo owners, but also posted prominently on a carrier's website, at least seven days in advance. Notice of bypassed ports should be posted at least 72 hours in advance.
4. Carriers and terminals should immediately resolve the confusion for exporters regarding Export Cargo Receiving Timelines, also called Earliest Return Dates.

Shippers on the Innovation Teams also requested that the Commission waive certain service contract filing requirements to allow shippers to use service contract provisions immediately, due to impediments to contract filing created by COVID-19 restrictions. The Commission granted the waiver in April 2020 and later extended it into 2021. This relief was made permanent by the Commission on June 2, 2021.

In the months following the first phase of Fact Finding 29, we used the teams approach to examine conditions at the Ports of Los Angeles/Long Beach, the Port of New York and New Jersey, and the Port of New Orleans. This was in addition to countless individual interviews I conducted with other shippers, marine terminal operators, truckers, shipping intermediaries, and carrier CEOs to understand the challenges they faced to manage logistical operations as trade volumes surged.

I continue to encourage all U.S. international supply chain leaders to focus on the four port process goals identified in the first phase of Fact Finding 29 and to continue to work with the Commission to find workable solutions to these challenges. I am pleased that several carrier CEOs have made progress on solutions to identified operational challenges, and I will continue to work directly with them as this Fact Finding Investigation continues.

Based on information obtained in the initial phases of the fact finding, I became concerned that vessel-operating common carriers in alliances who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles may be employing practices and regulations that violate 46 U.S.C. § 41102(c). As such, in November, the Commission approved a Supplemental Order to Fact Finding 29 expanding my authority as the Fact Finding Officer beyond teams and commercial solutions.

The Supplemental Order allows me to investigate ocean carriers operating in alliances and calling on the Ports of Los Angeles/Long Beach, or the Port of New York and New Jersey to determine if the policies and practices of the lines related to detention and demurrage, container return, and container availability for U.S. export cargoes violate 46 U.S.C. § 41102(c).

This law enforcement aspect of Fact Finding 29 is aimed at potential unreasonable demurrage and detention charges and is currently underway, and it may result in civil penalty proceedings or other formal enforcement actions.

FACT FINDING 29 TO DATE

PHASE ONE: NATIONWIDE INNOVATION TEAMS

During the first quarter of 2020, as the COVID-19 pandemic escalated in the United States and internationally, the Federal Maritime Commission considered ways to respond to urgent cargo delivery dislocations in the U.S. international ocean freight delivery system. At that time, the most pressing problems included obstacles to delivery of critical personal protective equipment and the need for storage of cargo diverted due to business shutdowns.

On March 31, 2020, the FMC issued an Order authorizing me to conduct a fact finding investigation to identify and seek solutions to U.S. international ocean supply chain vulnerabilities surrounding the pandemic. That Order, Fact Finding No. 29, International Ocean Transportation Supply Chain Engagement, authorized me, as Investigating Officer, to form multi-industry Innovation Teams that included all actors of the ocean freight delivery system, including liner shipping companies (i.e., ocean carriers), railroads, public port authorities, marine terminal operators, beneficial cargo owners, ocean transportation intermediaries, drayage trucking companies, longshore labor representatives, and chassis providers.¹

Initial FF 29 Approach

Like previous FMC Innovation Teams, teams organized under Fact Finding 29 were composed of business leaders whose senior level corporate positions included responsibility and influence over their companies' operations and who were well positioned to implement recommendations developed by the innovation teams.

Fact Finding 29 was conducted during a period when travel and in-person group meetings were constrained by pandemic-related medical concerns, Fact Finding 29 teams met virtually to focus on the changing dynamics that various ocean carriers, exporters, importers, shipping intermediaries, truckers, seaports, longshore labor, and marine terminals were

¹ Order: International Ocean Transportation Supply Chain Engagement, 85 Fed. Reg. 19146 (April 6, 2020)

experiencing as the pandemic's impact changed over time. During this phase, I held nine meetings with fifty-one different participants.

When the first ten multi-industry teams began meeting in mid-April 2020, they were presented with three basic questions:²

1. What can the FMC do to help?
2. What can various supply chain actors do to help?
3. What “over the horizon” problems need addressing?

In terms of identifying expected problems, the various multi-industry teams listed one immediately pressing issue, another pending concern, and two potentially longer-term challenges.

- **Immediate:** *PPE shipments and other essential goods*
- **Pending:** *Port congestion and adequate off-dock storage*
- **Longer-Term:** *Future drayage trucking availability for recovery and vessel and equipment capacity (Supply/Demand Balance)*

Personal Protective Equipment, Essential Goods, and Off-Dock Storage

The first challenge the system faced was triaging cargo so that urgently needed goods, especially personal protective equipment (PPE) and other essential goods would be given delivery priority. An additional challenge was ensuring that non-essential goods that could be moved inland would flow quickly.

Marine terminals advised that they would be better able to manage cargo flows if they had specific, timely, and accurate information from shippers about which shipments contained PPE, which non-urgent containers shippers were prepared to be picked-up, and which containers shippers would not be able to pick-up, and so needed go into some form of off-dock storage.

Fortunately, the urgency of moving PPE shipments – and ensuring PPE availability for essential workers at terminals and warehouses – was rapidly and effectively addressed. So, too, at least initially, was the need to identify additional off-dock cargo storage options at destination or in-route for cargo that was delayed or abandoned.

² Members of the public who were not participating on a team were encouraged to provide advice by writing to FF29@FMC.GOV. Press Release: Fact Finding 29 Supply Chain Innovation Teams to Begin Work (April 6, 2020).

Drayage Trucking and Supply/Demand Balance

Another concern raised by the teams was the adequacy of future drayage services. Drayage truckers, many of whom had at first lost work as cargo volumes declined, would be needed when volumes returned. Drayage truckers fit all the team participants' definition of "essential workers."

All the innovation teams raised concerns about the future balance of vessel capacity and equipment (containers and chassis) against forecast demand. At this time, ocean carriers were reducing excess capacity to control costs and shippers wanted to ensure there would be adequate capacity as demand recovered.

Providing Timely Information

Underlying many of the teams' concerns, and a topic that resurfaced often in their discussions, was the fundamental importance to all supply chain actors of timely and accurate information. For the purposes of adequate operational planning, reliable supply and demand forecasting, and timely notification procedures, accurate and timely information exchange is crucial. Ultimately, carriers depend on shipper information, terminals depend on carrier information, and shippers and truckers rely on carrier and terminal information on gate closures, container returns, and appointments.

When supply chain actors are constantly re-evaluating and revising their operational plans, it creates chaos in the freight delivery system. Timely, reliable information exchange is especially crucial in periods of heightened uncertainty and rapid operational readjustment.

Direct FMC Action

With respect to actions the Commission could itself take, some shippers on the teams noted that conditions associated with doing business in a global pandemic might lead to inadvertent non-compliance with FMC contract filing requirements. At that time, Commission regulations required carriers to file original service contracts (as opposed to amendments) with the Commission "before any cargo moves pursuant to that service contract."³

As Fact Finding Investigative Officer, I recommended to the Commission that we issue a waiver to allow carriers to file their service contracts up to 30 days after contract terms had

³ Final Rule: Service Contracts, 86 Fed. Reg. 21651, 21658 (Apr. 23, 2021).

been agreed to. The Commission voted to accept that recommendation in April 2020.⁴ The relief granted was originally scheduled to expire on December 31, 2020, but in order to provide continued stability and certainty to ocean carriers and shippers, the Commission extended regulatory relief for contract filing until June 2021.⁵ In April 2021, the Commission issued a final rule, effective June 2, 2021, making this relief permanent for all service contracts while ensuring that shippers were not harmed by carrier filing errors.⁶

PHASE TWO: REGIONAL INNOVATION TEAMS

Another point raised during the initial fact finding discussions was the need for a regional approach to the Fact Finding 29 investigation. As the volumes and cargo mixes handled at ports differ, so do terminal operations and local conditions, the innovation teams recommended that the investigation create teams to discuss challenges by specific port range or major port. That recommendation was adopted, and I held regional team meetings specific to challenges in Southern California, New York/New Jersey, and New Orleans.

Southern California Region

Due to the massive cargo volumes that the Ports of Los Angeles and Long Beach handle, and the relatively large number of terminals serving those two ports, the regional review began with the neighboring San Pedro Bay ports.

The team discussions and interviews identified four areas of concern:

1. Empty Container Returns (dual moves and chassis availability)
2. Terminal Gate Closure Notifications
3. Blanked Sailings and Bypassed Port Notifications
4. Export Cargo Receiving Timelines (Earliest Return Dates and Loading)

These four areas were the ones where team participants felt commercial improvements could generate the most “bang for the buck.” They likely would not require major new expenses or significant operational changes. Improving drayage efficiency and chassis

⁴ The Order granting the exemption can be found on the Commission’s website at https://www2.fmc.gov/readingroom/docs/20-26_ord_grnt_exempt.pdf/.

⁵ The Order extending the exception can be found on the Commission’s website at https://www2.fmc.gov/readingroom/docs/20-06/Extension_Temporary_Extension_FINAL.pdf/.

⁶ 86 Fed. Reg. at 21651.

availability were areas that ports, terminals, carriers, and shippers all agreed would be critical as trade volumes recovered.

Having pinpointed the main supply chain challenges at Los Angeles and Long Beach, our teams also proposed ways to address them. First, carriers in alliances needed to work closely with their terminals to: (1) operate in ways that better facilitate dual drayage moves, and (2) more closely coordinate and more broadly disseminate various notifications.

With respect to the ways in which alliance members could work closely with their terminals, specific recommendations offered by the team participants included:

- Truckers ideally should be able to return empty containers to the terminal where they were picked up. That would allow them to make dual moves, reduce costs, reduce the number of chassis required, and enhance efficient appointments. At a minimum, carriers should provide sufficient notice – *three days* for example – to allow truckers to plan moves and secure appointments.
- Notice of terminal gate closures should be given *no less than three days, and preferably seven days*, before gate closings. At no time should a closure occur mid-shift.
- Advance notice of blank sailings should be given not only to beneficial cargo owners, but also posted prominently on a carrier’s website, *at least seven days in advance*. Notice of bypassed ports should be posted *at least three days in advance*.
- And, finally, carriers and terminals should collaborate more closely regarding Export Cargo Receiving Timelines with the goal of eliminating conflicting or confusing information.

Second, shippers should promptly cancel any unused multiple bookings and/or terminal appointments to reduce “no show” rates and related inefficiencies. It was noted that blank sailings, port bypasses, and cancelled service strings increase shipper uncertainty about space availability. That can lead shippers to make multiple bookings and related terminal appointments that compound existing inefficiencies. Unused bookings and appointments thwart planning and result in under-utilization of scarce assets. It was specifically recommended that:

- As soon as a shipper is aware that its extra bookings and extra terminal appointments will not be used, they should immediately notify their lines and terminals so that other shippers can take advantage of those opportunities.

As Fact Finding Officer, I continue to stay in touch with supply chain parties in Los Angeles and Long Beach to monitor and encourage more dual moves and better communications. Given their cargo volumes, Los Angeles and Long Beach are where the challenge is greatest, and change is most needed.⁷

North Atlantic Region

The next region that Fact Finding 29 focused on was the North Atlantic's major port, the Port Authority of New York and New Jersey.

Based on team meetings and discussions with various supply chain parties, the two central observations of the Fact Finding 29 teams were that: (1) operations and cargo flow at the Port of New York and New Jersey have been minimally impacted by COVID-19, and (2) the leadership at the bi-state organization has prioritized improving the container return process to further increase efficiencies and better serve shippers and truckers.

Interviews with port users revealed that, despite being situated in an early COVID-19 hotspot, Port Authority leadership had responded effectively to the initial challenges that arose. Port users reported that as a result of this effort, facilities in the two states are working well. Especially helpful was the early and active intervention of port leadership with the local and state governments. Also cited was the effectiveness at the time of stakeholder cooperation under the Council on Port Performance (CPP).

The teams began their New York/New Jersey efforts by assessing which, if any, of the four operational challenges identified during the examination of the San Pedro Bay ports might be applicable to the situation in New York and New Jersey. Ultimately, the only common challenge identified was the need to make progress in returning containers in a manner that facilitates a "double move." Senior port executives advised that achieving that goal was a high priority and the CPP was working to improve the process.

The Fact Finding 29 team members recommended greater ocean carrier participation in port performance discussions as a step toward achieving better drayage outcomes, and in trying to achieve progress in returning containers.⁸

⁷ On June 17, 2020, the Commission issued a press release summarizing the findings of the San Pedro Bay discussions. The press release can be found on the Commission's website at <https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/>.

⁸ In May 2021, however, two of the largest trucking organizations in the Northeast suspended their participation in the Council on Port Performance, citing lack of carrier action taken on CPP

As with the stakeholders in Los Angeles and Long Beach, I continue to stay in touch with supply chain parties in the New York/New Jersey area to monitor and encourage improved efficiency and better communications.⁹

Gulf Coast

The third region incorporated into Fact Finding 29 was the U.S. Gulf Coast – and, in particular, the Port of New Orleans.

Aside from challenges arising from the frequent visitations last summer by hurricanes, users of the Gulf Coast ports expressed concerns with port channels, barge traffic, blanked sailings, and bypassed port calls. Stakeholders at Gulf Coast ports also raised issues with demurrage and detention.

As rising cargo volumes have increasingly put pressure on port and terminal performance, demurrage and detention charges have tended to increase. Shippers and trucking companies have asserted that those increases often have little or nothing to do with creating effective incentives. They view such non-incentive charges as, in effect, little more than a forced subsidy for continued inefficiency.

Again, as with the previous two regions, I remain in contact with stakeholders in the Gulf Coast region to monitor and encourage progress.

PHASE THREE: INFORMATION AND EVIDENTIARY DEMANDS

During the first two phases of Fact Finding 29, I held over twenty team meetings with eighty different participants representing shippers, carriers, ports, terminal operators, ocean transportation intermediaries, drayage providers, and trade associations. Throughout the process, I routinely followed-up with team participants and stakeholders in the areas reviewed above.

Following those meetings, it became apparent that some of the problems facing supply chains at the beginning of the pandemic diminished. In particular, on the West Coast, stakeholders gradually experienced fewer issues with blank sailings.

recommendations on empty container returns. Michael Angell, “NY-NJ truck groups quit port task force over empty container woes,” The Journal of Commerce Online, May 12, 2021.

⁹ On July 17, 2020, the Commission issued a press release summarizing the findings from phase two. It can be found at <https://www.fmc.gov/dye-covid-19-supply-chain-investigation-shifts-focus-to-ny-nj-in-phase-two/>.

Other issues, however, remained outstanding and, in some cases, deteriorated. Stakeholders using the Port of New York and New Jersey and the Ports of Los Angeles and Long Beach have expressed growing concern with carrier practices regarding the return of empty containers. Stakeholders expressed frustration regarding poor notice of where and when empty containers can be returned. Others have mentioned instances of terminals refusing to receive empty containers, requiring dual transactions or not having appointments for the return of empty containers. Issues regarding the return of empty containers have been discussed in the trade press.¹⁰

Many have charged that empty container return practices, and other carrier practices, have not only resulted in increased operating costs, but in many cases result in demurrage and detention charges due to terminals unwilling to accept empty containers. Some stakeholders have also complained that increasingly demurrage and detention charges are not administered in a manner that incentivizes freight fluidity. Similar concerns have been expressed in the trade press.¹¹ The demurrage and detention issues were of particular concern given that the Commission issued guidance on the reasonableness of demurrage and detention practices in May 2020 based on my recommendation as Fact Finding Officer in Fact Finding 28.¹²

Three issues emerged in the fall of 2020 that I believed warranted additional scrutiny, especially given the rapid increase of trade volumes:

1. *Container return practices* – in particular, practices that impact the efficient drayage of empty containers to marine terminals for carrier pickup.
2. *Demurrage and detention practices* – in particular whether carriers’ policies, practices and procedures align with the principle, central to the Commission’s interpretive rule on demurrage and detention, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.
3. *Practices related to container availability for U.S. exports*: in particular, reports that carriers were declining to ship U.S. agricultural commodity exports.

To indicate a shift in focus of the Fact Finding 29 investigation, at my request, the Commission issued a supplemental order: (1) emphasizing the Commission’s concern with the above-identified issues, especially as they pertain to the Port of Los Angeles, Port of Long

¹⁰ For example, “Import surge clogs Southern California warehouses,” Bill Mongelluzzo, *Journal of Commerce*, August 5, 2020.

¹¹ For example, “LA-LB truckers urge suspension of detention and demurrage,” Bill Mongelluzzo, *Journal of Commerce*, November 6, 2020.

¹² Final Rule: Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020).

Beach, and Port of New York and New Jersey, and (2) endorsing the use of compulsory information demands.¹³

Since that time, I have not only continued to speak with stakeholders, but the Fact Finding has also solicited information and evidence from shippers, truckers, intermediaries, and their trade associations and required carriers and marine terminal operators to provide information and evidence on demurrage and detention, empty container return, and export container availability.¹⁴ This phase of the investigation is ongoing, but there is reason to believe that not all regulated entities may have acted reasonably as required by 46 U.S.C. § 41102(c), including with respect to demurrage and detention in light of the May 2020 guidance.

Preliminary Findings from FF29

Staff is reviewing the information and documents provided by stakeholders and in response to information demand letters. Some initial findings to date include:

1. The Commission solicited information and evidence from shippers, drayage providers, and intermediaries via a dedicated email inbox. The subject matter of the “complaints” are as follows, listed in order of most-frequent to least-frequent:
 - a. Appointments
 - b. Empty Container Returns
 - c. Customs
 - d. Chassis
 - e. Earliest Return Dates (ERDs)
 - f. Congestion/Long Lines
 - g. Availability of Containers for Export
 - h. Dispute Resolution
 - i. Terminal Closure
 - j. New Fees
 - k. Shut Out/Locked Out
2. Demurrage and detention amounts collected have generally increased from 2019 to 2020.
3. Demurrage and detention refunds and waivers have generally decreased from 2019 to 2020, but this does not necessarily account for free-time extensions.

¹³ The Order can be found on the Commission’s website at [https://www2.fmc.gov/readingroom/docs/FFno29/FF29_41102\(c\)_%20Supplemental_Order.pdf](https://www2.fmc.gov/readingroom/docs/FFno29/FF29_41102(c)_%20Supplemental_Order.pdf).

¹⁴ The Commission issued a press release regarding these information demand letters in February 2021, which is available at <https://www.fmc.gov/information-demand-on-detention-demurrage-practices-to-be-issued/>.

4. Few carriers have made significant changes to demurrage or detention tariffs, practices, or policies since the effective date of the Commission's interpretive rule on demurrage and detention, and many indicated that their past practices were compliant with the Commission's guidance.
5. Some carriers have, however:
 - a. Made information about their demurrage and detention practices more easily accessible and understandable.
 - b. Clarified that demurrage will not accrue while a container is at an off-terminal customs examination site.
 - c. Preemptively cancelled demurrage or detention charges incurred because there is a change in ERD caused by vessel delays or blank sailings after an empty container has left a terminal for loading.
 - d. Invoice demurrage and detention charges to their customers directly rather than to truckers, for customers using merchant haulage.
6. Several carriers assert that they provide notice of return location by at least 1:00 pm the day before, but this deadline does not appear to be firm.
7. Most carriers, but not all, require shippers or truckers to request a free time extension and provide documentation if there are problems with empty container return.
8. In some instances, carriers have provided off-dock or off-terminal space to facilitate empty container returns.
9. Agricultural exports have generally increased in 2020 compared to 2019.
10. Carriers ship empty containers back to Asia for a number of reasons, including to balance heavy agriculture commodity shipments with lighter empty containers for vessel safety and to enable carriers to fulfill contractual obligations to U.S. importers. Liner services are designed to meet the demand of high volume headhaul trade.
11. Whereas in "normal" years peak season for imports and exports do not coincide, the unusually long import peak in 2020 and early 2021 resulted in an overlap that resulted in competing demands for the same containers.
12. Proposals to alleviate challenges to export container availability include container depots, collapsible containers, digitized two-way committed contract practices or products, and increasing container supply.