

Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports

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Executive Summary

Between September and early November 2014, the Federal Maritime Commission (FMC) held four forums at major gateway ports to foster dialogue between industry stakeholders, regulators, and the general public on the causes, impacts and possible solutions for the congestion experienced in seaports around the country.

At the forums, and since, the public has expressed concerns relating to the assessment of demurrage and detention charges by marine terminal operators (MTOs) and vessel-operating common carriers (VOCCs) where importers and exporters (and their truckers) have experienced terminal delays over which they have no control.

As a result of the strong concerns expressed by those subject to paying high demurrage and detention charges due to port congestion, this report collects and conveys the frustrations and concerns expressed by importers, exporters, and drayage providers, and makes observations about the steps the industry may take to address the concerns relating to demurrage and detention practices of VOCCs and MTOs. This report also provides a collection of possible tools the Federal Maritime Commission may have to address these concerns under certain circumstances.

Demurrage is a charge for the use of space; ***detention*** is a charge for the use of equipment. ***Free time*** is the grace period for which neither of these charges will be incurred. Both are meant to compensate for the use of space and equipment, and to encourage the efficient movement of cargo by importers, exporters, and drayage providers.

This report reviews the published rules tariffs of six vessel-operating common carriers at 32 terminals across the United States, and reveals that average total prices for both demurrage and detention may be higher for importers than

exporters, higher for demurrage than detention, and that both charges appear similar across all ports, except for New York/New Jersey, where they are much higher on average. It appears that VOCCs, rather than MTOs, generally control these prices and policies affecting importers and exporters directly. The demurrage and detention rates for the VOCCs whose tariffs were studied vary somewhat depending on port and terminal, but the terminology and application of charges with similar names are distinct across these VOCCs, making direct comparisons difficult.

INTRODUCTION

The first forum, hosted by FMC Chairman Cordero, was held in Los Angeles, California in September, 2014. In October, a forum co-hosted by Commissioners Lidinsky and Doyle, was held in Baltimore, Maryland and another, hosted by Commissioner Khouri, in Charleston, South Carolina. Commissioner Dye hosted the final forum in New Orleans, Louisiana in November, 2014.

Participants noted that many factors contribute to the current port congestion and related effects. At the forums, the Commission and staff heard concerns relating to the assessment of demurrage and detention charges by marine terminal operators and vessel-operating common carriers where importers and exporters (and their truckers) experienced terminal delays over which they had no control. Many shippers reported that they had been repeatedly told by the MTO that they could not pick up a container due to on-dock congestion and gate delays. Similarly, once the terminal allowed the importer or exporter to pick up the cargo, shippers reported that the VOCC or MTO would not release the container until demurrage charges had been paid.

Since the forums were held, many more such informal complaints have been received by the Chairman, the Commissioners, and a number of the Commission's

operating bureaus and offices, including the Office of Consumer Affairs and Dispute Resolution (CADRS), the Office of General Counsel (OGC), Bureau of Trade Analysis (BTA), and Bureau of Enforcement (BOE). As a report on the congestion forums, and in light of the increasing number of complaints, the Commission's staff was instructed to provide the Commission with a review of: demurrage and detention free-time, rates, and practices as they have been normally applied. The staff was also instructed to prepare summaries of situations in which shippers have complained they have been charged, although they had been prevented by the VOCC or MTO from picking up or delivering containers on a timely basis.

The report describes current demurrage and detention rates, rules and practices of several of transportation service providers. We have relied on information that must be published by vessel-operating common carriers in their tariff publications and by MTOs in their schedules (still frequently referred to as "tariffs") pursuant to 46 CFR Parts 520 and 525 and the Shipping Act. Appendix A. This report also collects and summarizes demurrage and detention levels across the six carriers at each of the studied terminals. Appendix B. This report,

however, does not attempt to reflect the total cumulative effect of the additional expense of congestion on the national economy.¹

BACKGROUND

In order to understand the charges related to delays in transportation, it is important to understand common transactions relating to the movement of containerized cargo for oceanborne import into and export from the United States.

Imports

Prior to the arrival of a vessel bearing containers for import, it is customary for the VOCC to send an “arrival notice” to the consignee and any “notify parties” (the parties that must be informed of the shipments imminent arrival) indicated on

¹ The National Retail Federation has estimated that complete shutdown of West Coast ports would amount to an impact on the economy of \$2B per day. The Agriculture Transportation Coalition recently estimated the reduction in port productivity has cost U.S. agriculture \$1.75B per month in lost export trade. There are many individual accounts of importers and exporters reporting additional costs significant enough to mention in their quarterly earnings reports. *See, e.g.,* Joseph Bonney, *Federal Reserve report notes US West Coast port delay impact*, Journal of Commerce (January 13, 2015), <http://www.joc.com/node/2906001> (“Athletic apparel retailer Lululemon Athletica has already told investors that congestion will [cost it \\$10 million in revenue](#), and New York & Co. said it has to pay \$2 million more to reroute freight through U.S East Coast ports and shift some cargo to air services.”) The Executive Director of the Port of Long Beach has estimated that the delays cost the industry \$1B per day; over the last six months he asserted the cost to the entire economy has been over \$1T. <http://www.bloomberg.com/news/articles/2015-02-11/port-deal-near-as-single-issue-remains-long-beach-chief-says>

the ocean bill of lading (also sometimes called “master bill of lading” or “steamship bill of lading”). This arrival notice may be sent via U.S. mail, fax, or electronically via e-mail, depending on the VOCC. If the shipment is consigned to an NVOCC (non-vessel-operating common carrier), the NVOCC in turn will send out an arrival notice to its client (who may be another NVOCC or a beneficial cargo owner (BCO)) and also to the parties shown on the NVOCC-issued “house bill of lading” (HBL). The consignee may engage a customs broker to make arrangements to pick up the container – usually by issuing a “delivery order” (either in hardcopy or electronically) to a trucking company.² The delivery order will tell the trucking company the container’s bill of lading number, container number and location. The trucking company (motor carrier) will then check the MTO’s website to verify that the container is available for pick up. Before a container can be released from the terminal to the trucker, the shipment must have: (1) “delivery authorization” from the U.S. Customs and Border Protection (CBP) (showing no holds by CBP or any other U.S. inspection agency); (2) a “steamship release” issued by the VOCC (or its agent), indicating the ocean freight and all fees

² Depending on the terms of carriage, the motor carrier may be hired by the VOCC or by the consignee, or hired by the VOCC but “nominated” by the consignee. *See, e.g.*, COSCO Tariff 201 Rule 002-064, Store Door Delivery/Pick Up Service (effective April 12, 2012).

(including demurrage) have been paid and the original ocean bill of lading (if any) has been surrendered; and, (3) an indication that delivery order instructions have been issued to the MTO releasing the cargo to the authorized trucker.

The available import container is picked up by the trucker and drayed to the BCO's desired location as instructed by the delivery order. The trucker either drops off the loaded imported container (on or off a chassis, as directed by the BCO) and may in the same trip pick up an empty or loaded container (or wait for the loaded container to be emptied) from the BCO for return to the terminal. For the return of their empty containers, VOCCs instruct the consignees and terminal operators who serve them when, where, and how this equipment can be returned.

Exports

An exporter, or his freight forwarder, books a shipment with a VOCC. This is usually done through an electronic system. When an export container is booked, the exporter or freight forwarder will receive from the VOCC's system a booking confirmation indicating the vessel's name, expected arrival date, the date by which the exporter must present the container for loading at the terminal ("cut-off date") and other details of the booking. The carrier's or terminal's rules may indicate how many days in advance of a vessel's scheduled sailing date a loaded container

may arrive at terminal without incurring storage charges. This is commonly called “export demurrage free time.” Once a slot is booked with the VOCC for the export container, an exporter usually must arrange for an empty container to be picked up from the VOCC’s terminal or depot, load it, and return the loaded container in a defined window of time to the designated terminal for loading onto the vessel. The full container is received by the MTO, then gets loaded on the vessel.

Free time, Demurrage and Detention Defined

The six VOCC tariffs examined for this report reveal that there is little standardization of practices among them. This report attempts to provide a comparison of like terms, but may not always be successful.³ The terms of carriage (“store door” or “carrier haulage” as opposed to “CY” or “merchant haulage”) affect the calculation for the termination and conclusion of the free time period, who is to be charged, and how much. Although the terms are sometimes used interchangeably, this report explores only detention assessed to the shipper for the use of the carrier’s container, for exports, after it leaves the terminal gate and is returned for loading on the vessel, and for imports, after it leaves the terminal gate for unloading and is returned to the terminal empty.⁴

³ It is common, for example, for those familiar with the industry to refer to charges such as “line demurrage” or “terminal demurrage.” Because those terms do not appear in published VOCC tariffs that were examined for this report, those terms are not used here. Similarly, for carrier haulage, even though the VOCC is responsible for the provision of the drayage trucking, the merchant may “nominate” the trucker. For simplicity’s sake, such considerations are not explored in this report.

⁴ This report does not explore the many variations of approaches to charges to the drayman for the use of the VOCC’s equipment, i.e., per diem (“the daily charge assessed to the drayman, or at the carrier’s option to the shipper or consignee, against the ocean carrier’s equipment, for the use of the equipment beyond allowed free time, as stipulated per tariff or contract, and moving under merchant arranged haulage on a Container Yard (CY) bill of lading.”) Maersk Line, Demurrage – World (Excluding OFAC Countries) to United States (effective November 22, 2014); per diem (export) is “charge for use of carrier’s equipment after delivery to the merchant (exporter) or

Free Time

In order to avoid demurrage and detention charges, import and export shipments must be handled by the shipper within a period of grace, i.e., “free time.” The term “free time” is generally used in the industry to mean the period of time during which no demurrage or detention charges will apply for the use of a container, in addition to basic freight costs.⁵ These rates and rules may be specified in a VOCC’s tariff, a terminal or port authority’s MTO schedule, or in a service contract between a shipper and VOCC. For charges assessed by MTOs, free time means the period of time during which cargo may occupy space assigned to it on terminal property, including off-dock facilities, free of demurrage or

agent.” *See also*, MSC Governing Rules Tariff FMC 12 (MESU-12), Demurrage/Storage – Detention – Per Diem – USA & Puerto Rico (106)(effective August 7, 2014); per diem (import) is “a charge assessed after the expiration of free time outside of the Terminal . . . for the usage of carrier’s equipment (full or empty) until it is returned to carrier’s custody.” MSC Far East EB (to USA) & WB (from USA) Freight Tariff & Rules (MESU-032)(effective November 15, 2014). Per diem rules are usually governed by an amendment to the Uniform Intermodal Interchange Agreement (UIIA) made with a motor carrier, which are themselves frequently published in the VOCC’s publicly available ocean tariff.

⁵ “Free time is not a gratuity to be granted or denied at the whim of the provider of ocean transportation – ‘it is required as a necessary part of the carrier’s transportation obligation.’” Docket No. 68-9, *Free Time and Demurrage Practices on Export Cargo*, 13 F.M.C. 207, 213 (1970)(quoting *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 539 (1966) and citing *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C.Cir. 1962)). The concern in that proceeding was unlimited free time for exports that the Commission found was causing congestion at New York and Philadelphia.

terminal storage charges and usually immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel. For charges assessed by VOCCs, free time refers to the period of time the cargo interest can use the VOCC's equipment without incurring detention charges.

Historically, MTO schedules and VOCC tariffs allowed for five working⁶ days of free time for both import and export containers, and, for most ports in the U.S., this remains the standard allowance – the notable exceptions being the Ports of New York/New Jersey, Los Angeles and Long Beach, where four days is standard demurrage free time. As vessels grew in size over the decades and availability of terminal space became a premium, some MTOs and VOCCs reduced the amount of free time in selected ports to four working days, and at the same time increased the amount of demurrage charges.⁷ Because longer container dwell time (generally considered the amount of time the container remains at the

⁶ Generally, “working days” are used to calculate free time. The calculation of days for demurrage and detention charges, on the other hand, are generally done using calendar days. The exception to this is for the calculation of detention and per diem charges in California. *See, e.g.,* Maersk Line tariff, Detention – United States to/from World, Detention/Per Diem (effective November 30, 2014): “For merchant haulage at California locations, per diem charges shall apply per calendar day excluding weekend or holiday closures.” *See also,* COSCO Tariff 201, Addendum to the Uniform Intermodal Interchange and Facilities Agreement.

⁷ This report provides a snapshot of current tariff practices; it does not provide an analysis of historical changes in free time or demurrage/detention rates.

terminal, rail ramp, or inland container yard) reduces equipment inventory, it diminishes the VOCC's ability to carry cargo. The primary goal of reduced free time and increased demurrage was to encourage shorter dwell times at the terminal and thereby increase the overall velocity of the equipment, which reduces the VOCC's equipment inventory needs and its operational costs.

Demurrage

Demurrage is a charge assessed for cargo remaining in or on terminal facilities after the expiration of free time, unless arrangements have been made for storage.⁸ Demurrage practices, such as the exact time when free time begins to

⁸ The National Customs Brokers and Forwarders Association of America, Ocean Freight Forwarder Certification Program, Study Guide, version 1, Part II - Glossary (1996) defines demurrage as "an accessorial charge by a carrier or terminal operator for failure to pick-up . . . cargo within the free time following availability..." In its tariff, Maersk defines demurrage as the "daily charge assessed to the shipper/consignee, against the cargo, for use of the land and services provided at the carrier's load/discharge port, rail ramp or inland container yard (CY) facility, when the cargo remains in such facilities beyond the permitted freetime as stipulated per tariff or contract." MSC defines demurrage/storage (for import containers) as "a charge assessed for the occupation of land at marine terminal or rail ramp after the expiration of free time as set forth in the port operators marine terminal tariff, or rail operator's tariff. These charges will be invoiced only once to the cargo interest by either the [MTO], rail operator or the ocean carrier. In the event the [MTO] or rail carriers [sic] elects to invoice the carrier, then the carrier will invoice the consignee (merchant) at the following rates and conditions or at the terminal public tariff, whichever is higher..." According to COSCO's tariff, demurrage charges are those "costs which are incurred when a container with cargo, or cargo devanned from a container, is held at carrier's discharge port CY [container yard] or CFS [container freight station], or destination point CY or CFS, or at a carrier's Destination Interchange Terminal (DIT), beyond the permitted free

run, vary between ports⁹ and sometimes even between terminals at the same port. MTOs generally honor the VOCC's demurrage instructions.¹⁰ The demurrage rules can be found in the VOCC's published tariff rules or the MTO's published terminal schedule.¹¹

VOCCs' rules regarding free time for import demurrage vary, but generally state that demurrage will begin on the first day after the container (or shipment) is discharged from the vessel.¹² The time of day when free time will begin may also depend on the terminal at which the container has been discharged.¹³

demurrage time..." COSCO Far East – USA tariff (201), Free Time/Demurrage at Destination USA, Rule Number 023-B (effective November 22, 2014).

⁹ The Port of Los Angeles defines wharf demurrage as "the charge...assessed against merchandise which remains on a municipal wharf or wharf premises after the free time allowed." POLA Tariff No. 4 (effective December 11, 2006). APMT MTO Schedule Item No. 600: "Wharfage is the charge assessed against merchandise, calculated in accordance with the wharfage charges named in this Tariff for the passage of that merchandise onto, over, through or under wharves or wharf premises, or between vessels or overside vessels (to or from barge, lighter, or water) when berthed at wharves or wharf premises, or when moored in a slip adjacent to a wharf or wharf premise. Wharfage is solely the charge for use of wharves or wharf premises and does not include charges for any other service or facility."

¹⁰ See, e.g., New York Terminal Conference, Section IV, Item 2.B. (effective January 6, 2015).

¹¹ Fifty-eight percent (58%) of MTOs registered with the Commission currently publish an MTO schedule.

¹² Variations on this include when the entire vessel is discharged or when the shipment (not just the single container) is discharged. Because many terminals work to discharge vessels when the terminal gates are not open, most free time rules also specify at what time free time will begin.

Free time for imports is generally done on a “working day” basis; the days during which a terminal is not working, free time days will not be assessed. These are generally speaking Saturdays, Sundays, and Labor Holidays. Some VOCC tariffs define “working days” more precisely to include any day during which the terminal is working, even if only partially. Free time for imports does not generally cease when a container or shipment has been selected by a Federal government agency for inspection (CBP, USDA, CPSC, etc.).¹⁴ With the exception of ports in California, where state law does not allow for the accrual of demurrage charges on non-working days, demurrage charges generally accrue on a calendar day basis.

Demurrage on imports begins to accrue when a shipment is not collected from a terminal after unloading when it has come to a point of rest on the terminal

For example, the Port of Long Beach states, “free time shall commence for each container at 3:00 AM after that container is discharged from the vessel.” Port of Long Beach, Tariff No. 4 – Section 2; Rule 34-D, Section 4, Item 402, Free Time Commences (December 12, 2014).

¹³ For example, under its tariff, Maersk begins assessing free time at 0100 on the first business day following discharge of the container, except at APMT in Newark, Norfolk, Houston and Los Angeles, where Maersk free time begins at 0800 on first business day after discharge.

¹⁴ The notable exception to this is the Port of Long Beach, whose tariff provides an exception for imports on certain CBP holds. *See* Port of Long Beach, Tariff No. 4 – Section 2; Rule 34-D, Section 4, Item 402, Exception 2 (December 12, 2014).

within its free time. Demurrage commonly may accrue due to failure by the importer to obtain a steamship release prior to the expiration of free time. This can sometimes be caused by a delay in timely processing of documentation from the shippers' overseas office. Other causes for demurrage relate to an importer's warehouse or distribution center's inability to timely process containers. Additionally, when vessels bunch at the terminal, and free time for many shipments expires on the same day, there is incredible urgency for BCOs and their truckers to pick those containers up on the last free day (LFD) and as a result there may be congestion at the terminal gates or, for terminals that require appointments, an inadequate number of available appointments on the LFD.

Typically, MTOs collect demurrage charges from the cargo interest (consignee) according to the rates and free time as instructed by the VOCC. The VOCC's instructions may be based on its own tariff provisions, the terms of a confidential service contract between the BCO and the VOCC on file with the FMC,¹⁵ or the terms of a Uniform Intermodal Interchange Agreement (UIIA) with

¹⁵ Although all terms of service between a VOCC and shipper may be negotiated, it may be more likely for service contract parties to negotiate terms varying from the public tariff terms for detention, but not for demurrage rates and practices; per diem charges governed by the UIIA to drayage truckers may not be part of the shipper-carrier negotiated service contract, although those terms might appear in the VOCC's ocean tariff.

a motor carrier. The VOCC's tariff rates and practices may also directly pass through or refer to those of the relevant port authority's or MTO's schedule.

Demurrage on merchant haulage is invariably assessed "for the account of the cargo," although it may be paid by the importer's trucker or customs broker.¹⁶ In most ports, accrual of demurrage charges must be settled with the MTO prior to the release of the container(s). In ports where the MTO invoices the VOCC directly and not the trucker, the VOCC invoices demurrage separately. Some MTOs allow truckers to set up either credit card payment or may extend credit to them to be paid weekly or monthly. The MTO reports to the VOCC, usually on a monthly basis, what it has collected, less the agreed-upon collection fee, and remits the balance of demurrage it has collected to the VOCC.¹⁷

¹⁶ It appears that drayage truckers commonly may be required to pay "line demurrage" before an import container is released by the VOCC, even on carrier haulage.

¹⁷ See, e.g., APM Terminals Pacific, Ltd., Port of Los Angeles Pier 400 – Terminal Tariff Item No. 710: "If requested by carrier, APMT will manage, administer and collect carrier's inbound demurrage. APMT will reimburse to carrier 100 percent of collected carrier's inbound demurrage less terminal demurrage and an administration fee of 15 percent of the difference between the collected carrier's demurrage and terminal demurrage." Landlord port authorities (Los Angeles, Long Beach, Seattle, Tacoma and New York/New Jersey) lease their owned facilities to MTOs who operate them and the terms of those leases may include minimum throughput guarantees or incentives for additional throughput over a minimum amount. Tenant MTOs execute "berthing agreements" with VOCCs which include fees for services. At terminals operated by Port Authorities ("operating ports") (Virginia, South Carolina, Georgia, Houston), nominal demurrage rates are charged to the VOCC and the VOCC marks these up to the cargo

The measure for free time for import demurrage is typically the time between when the container is discharged from the vessel to the time the container leaves the terminal (is “out-gated”). Otherwise, the free time period ends at an appointed time on the LFD, and demurrage charges will begin to accrue.¹⁸

Many port authority schedules or ordinances include authority for the executive director to extend free time for demurrage in certain situations. Free time for demurrage may also be extended by the terminal operator¹⁹ or by the VOCC.

interest. These operating ports charge VOCCs for each container based on overall volume (“throughput”), as well as wharfage, dockage, demurrage and, in Virginia, chassis. These types of agreements (terminal leases and berthing agreements) are subject to the Commission’s jurisdiction, but have been exempted from filing. *See* 46 C.F.R. §§ 535.309, 535.310.

¹⁸ As with commencement of free time, expiration of free time varies by VOCC, terminal and port. For example, APM Terminals operating Pier 400 at the Port of Los Angeles requires that free time expires at 5:00pm on the last free day. APM Terminals Pacific, Ltd, Port of Los Angeles Pier 400, Marine Terminal Operator Rate Schedule, Section 7, Free Time, Wharf Demurrage and Wharf Storage, Item No. 710, “Free Time Allowed.”

¹⁹ *See, e.g.*, New York Terminal Conference, Section IV, paragraph 8, “In the event the consignee or owner of the cargo should make application for delivery of the cargo...during the free time and NYTC should be unable for any reason to make available to the consignee or owner of such cargo..., the free time shall be extended for a period equal to the duration of NYTC’s inability to make the cargo available.” If a terminal subject to the NYTC schedule is open fifty percent of the day, this day will be considered a full service day. *Id.*

A review of MTO schedules²⁰ reveals some common policies. MTO and port authority schedules indicate that demurrage charges may be invoiced to the VOCC (which, in turn, invoices the consignee), but are invariably “for the account of the cargo.” They are generally collected by the MTO on behalf of the VOCC and usually on the terms the VOCC instructs. This is true whether the movement is through carriage (*i.e.*, “carrier haulage” or “store door” delivery), in which the ocean carrier is responsible for the drayage from the terminal to the consignee, or “merchant haulage,” in which the shipper must make arrangements for the drayage of the cargo from the terminal. In either case, in an import move, the cargo interest will generally be responsible for any demurrage accrued while the container was at rest at the terminal.

There are exceptions to the application of demurrage fees known sometimes as “stop the clock” provisions. CMA CGM’s tariff, for example, includes this “Port/CY Tie up” provision: “If the consignee is prevented from removing the containers from the Port/CY by factors beyond his control, such as, but not limited to, labor strikes, trucking strikes, or weather conditions which affect the entire Port/CY area or a substantial portion thereof: free time and demurrage will be

²⁰ These include private marine terminal operators and public port authorities.

calculated and demurrage assessed as follows...” CMA CGM, CMDU-100 U.S. Unified Tariff, Rule 100 – Import Demurrage Rules. CMA CGM’s rules, as do others, also allow for additional free time for delays that are a result of the carrier’s inability to deliver the cargo within free time, but specifically does not pertain to “issues related to customer’s inability to receive cargo or the absence of a full release.” *Id.* Similarly, COSCO’s tariff rules account for the carrier’s inability to deliver: “When the carrier is for any reason unable to tender cargo for delivery during the free time, free time will be extended for a period equal to the duration of the carrier’s inability to tender the cargo. If such condition arises after the expiration of free time, no demurrage . . . will be charged for a period equal to the duration of the Carrier’s inability to tender the cargo.” COSCO tariff, Far East to U.S.A. Tariff No. 201, Free Time/Demurrage at Destination U.S.A., Number 023-B (effective November 22, 2014).

Detention

Detention is a charge assessed by the VOCC to the shipper for the use of its equipment (for the purposes of this report, limited to containers) after the

expiration of free time.²¹ Detention for imports generally begins when the importer picks up the container from the terminal (or the cargo is “delivered” depending on the VOCC terms) and ends when the container is returned empty to the place instructed by the VOCC. Detention for exports begins when the exporter picks up a container from the VOCC’s facility and ends when the exporter presents the loaded container for export at the terminal.

As a matter of policy historically, “[d]etention charges have a double purpose, one of which is for the use of a car, ship or vehicle. The other is to promote efficiency in the operation.” *Am. Exp.-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm’n*, 444 F.2d 824, 829 (D.C. Cir. 1970) (citing *Turner, Dennis & Lowry Lumber Co. v. C., M. & St. P. Ry.*, 271 U.S. 259, 262 (1926)); *see also*, Docket No. 68-9, *Free Time and Demurrage Practices on Export Cargo*, 13 F.M.C. 207, 211 (1970).

DISCUSSION

²¹ *See*, National Customs Brokers and Forwarders Association of America’s Ocean Freight Forwarder Certification Program, Study Guide ver. 1, Part II – Glossary, page II-69 (1996).

The MTO congestion the Commission had noted in 2014 at certain ports has recently become even more acute. Operationally, it appears that congestion begets further congestion, which in turn may result in higher costs for everyone in the supply chain. When MTOs are forced to stack equipment higher and tighter to address terminal space issues, containers may be buried in hard-to-access stacks when a truck driver is attempting to pick up a specific container. Landside productivity consequently declines when a crane operator has to move multiple containers in order to remove the desired one. Further, truckers complain that certain areas at terminals have been restricted or placed off limits; this makes some containers unavailable for pick up. VOCCs and MTOs have limited the days and shifts during which they will accept the returns of empty containers. Last-minute notice from VOCCs and MTOs to truckers, importers and exporters about vessel-loading delays, cancelled vessel calls, terminal opening hours, shifts and closed areas, have left cargo interests scrambling to pick up their cargo, load their exports and return their empties. Rail service providers, for example, report delays have reduced the number of trains running from the West Coast to the mid-West by half.²²

²² Testimony of Katie Farmer, Vice President for Consumer Products, BNSF, before the Senate

Methodology and Sources

For this report we examined the tariff publications of six VOCCs, selected chiefly for the size of their market share, Maersk Line, Mediterranean Shipping Company, CMA CGM, Evergreen, COSCO,²³ and OOCL²⁴ and the public rules of the port authorities of Los Angeles, Long Beach, Oakland, New York/New Jersey, Tacoma, Seattle, Houston, Georgia, South Carolina and Virginia. Where the VOCC tariff refers to the MTO's terms, we also examined the free time and demurrage rules of all the MTOs within those ports (a total of 32),²⁵ to the extent

Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security, "Keeping Goods Moving" (February 10, 2015).

²³ COSCO's tariff did not include demurrage and detention rules for service to Houston; this analysis therefore does not include that port for COSCO; references to rates applicable to two terminals in Tacoma were also not available, and thus are not included in this analysis.

²⁴ OOCL was also selected based on its membership in the G6 Alliance, an operational alliance of the ocean common carriers American President Lines, Hapag Lloyd, NYK, OOCL, Hyundai and Mitsui OSK. FMC Agreement No. 232-012194.

²⁵ They are: Port of New York/New Jersey – APM Terminals, Port Newark Container Terminal, Maher, Global Container Terminal (Bayonne), Global Container Terminal (New York), Red Hook Container Terminal; Port of Los Angeles – West Basin Container Terminal (Berth 100), West Basin Container Terminal Berth 121), TRAPAC, Yusen Terminal, Inc., Eagle Container Terminal, APL Terminals, APM Terminals, California United Terminals, Total Terminals, Inc., International Stevedoring Services; Port of Long Beach – Long Beach Container Terminal, PCT, SSA(A), SSA (C); Port of Seattle - SSA18, SSA30, TTI; Port of Tacoma – Olympic Container Terminal, Husky Container Terminal, APM, Washington United Terminal, PCT; Port of Oakland – SSA, Ports America Outer Harbor Terminal, TRAPAC, STS, Matson; Houston Port

they were available.²⁶ The MTO schedule of one terminal conference, containing the terms of five terminals serving New York/New Jersey (the New York Terminal Conference), was also examined. Appendix B organizes and compares the data.

Price comparison: Imports and Exports

Using data collected for this report, we can make some initial, general observations about the demurrage and detention prices for imports and those for exports. Average daily prices for these fees combined are higher for imports than they are for exports. For importers, terminal congestion results in additional delays between the time a container is available for pickup (released) and when the drayman can pick up the container. Demurrage charges for the account of the cargo now appear largely to be collected by MTOs, but according to VOCCs

Authority – Barbour’s Cut, Bayport; Virginia International Terminals; South Carolina State Port Authority; Georgia Port Authority.

²⁶ The Commission amended its regulations for MTO schedules in 1999 following the adoption of the Ocean Shipping Reform Act (OSRA), 46 CFR Part 535. FMC Docket No. 98-27, Marine Terminal Operator Schedules (63 Fed. Reg. 69604-69606 (proposed rule)(Dec. 17, 1998) and 64 Fed. Reg. 9281 (Final Rule)(Feb. 25, 1999). OSRA relieved MTOs from the requirements to file and adhere to tariffs but made provisions for the Commission’s continued regulation of MTO schedules, when MTOs choose to publish them. The Commission’s rules at 46 CFR section 525.3(f) require MTOs to report to the FMC through the filing of an FMC-1. The Commission in turn publishes the location of such MTO schedules on the FMC webpage at <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=mt0>.

terms.²⁷ It appears that there is no generally used formula to determine when the normal allowance for free time might be increased or reduced. Even with the current congestion, while perhaps temporary, staff has not observed increases in free time in VOCCs' tariff terms or MTO schedules. Many shippers have reported, however, that VOCCs have waived or reduced fees or increased free time when there are delays clearly attributable to terminal congestion that are not the fault of the cargo interest.

With respect to detention, importers are negatively affected when their ability to return empty containers and other equipment to carriers is impaired and the equipment free time is not correspondingly increased. The National Industrial Transportation League (NITL) requested that MTOs and VOCCs put a moratorium on all demurrage and detention charges until the terminal congestion ceased at West Coast Ports. Importers invariably feel this is unfair and frequently express a sense of powerlessness, as they have no direct commercial relationship with the

²⁷ See, e.g., APM Terminals – Los Angeles Pier 500 – Terminal Tariff, Item No. 710: "...If requested by carrier, APM Terminals will manage, administer and collect carrier's inbound demurrage." MTOs themselves do not waive free time for demurrage. See also *id.*, Item No. 715: "When Carrier or consignee is prevented from removing cargo from the terminal beyond APM Terminals' control, such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions . . . containers which remain at the terminal beyond the designated free time shall remain subject to the demurrage charges in accordance with this rule."

MTOs to negotiate free time and observe that VOCC free time terms reflect MTO free time terms. Importers who move their cargo under service contract appear to have the ability to negotiate terms with the VOCCs that would address declines in terminal handling velocity with corresponding increases in demurrage and detention free time but, to date have not negotiated these charges. This may be because truckers have been willing to absorb²⁸ any temporary additional costs rather than passing them through to their importer customers. It also could be because no standard measures of terminal velocity exist or because MTOs and drayage truckers have different opinions on how to measure terminal gate productivity. From the VOCC's perspective, the free time negotiated with MTOs may sometimes be based on throughput. Of course, delays at the terminals result in additional dwell time for VOCCs' equipment. Importers frequently argue that VOCCs are in a better position to demand greater velocity from MTOs than are

²⁸ It is unclear whether the recent severe decline in the price of fuel facilitated drayage operators' willingness to absorb these charges. More recently there have been anecdotal reports of truckers charging their own "congestion fees" when their drivers are forced to wait long hours in queues outside the marine terminal gates.

importers, although, they claim, it is the importer who will bear the costs of delays at the terminal.²⁹

Importers and their agents have complained that there is confusion about who should be responsible for delays at the terminal or delays returning equipment to the terminal. This especially has been the case with the current extraordinary congestion on the West Coast and on the East Coast, where exceptional weather-related closings and delays due to winter storms have been experienced. Cargo interests and truckers on the West Coast argue that the VOCCs and the MTOs are responsible for ordering adequate labor for ensuring cargo moves according to their established free time. They argue that, if VOCCs and MTOs do not secure adequate labor to move containers, VOCCs and MTOs should increase free time to reflect the delays they have caused. VOCCs and MTOs may argue that they are not the cause of the slow downs, and, at least for VOCCs, their own vessel operating costs have increased due to the delays. As a result of a slowdown in processing truckers within the terminal, truckers or BCOs may incur significant demurrage costs when they are unable to make sufficient turns (i.e., pick ups and

²⁹ There have been recent reports of importers attempting to recoup detention (and per diem) charges by billing the VOCC for storage of the VOCC's empty containers at the importers' warehouse.

drop offs) on a daily basis. This results in corresponding detention charges as congested terminals sometimes limit or restrict the return of empty containers. With respect to detention, opportunity costs to the VOCC of its equipment that remains in importers' control past the free days does not change because of delays. Anecdotally, too, VOCCs have waived or reduced detention charges when importers have shown their inability to return the equipment was caused by the VOCC's own direction to an MTO for reduction in hours during which the equipment could be returned.

For exporters, failure by MTOs and VOCCs to increase demurrage and detention free time when there are delays at terminals that result in vessel loading delays or vessel call cancellations and rolled bookings cause demurrage and detention expenses.³⁰ Additional demurrage costs for exporters may arise in "rolled booking" fees, and detention when they hold a container longer than the applicable free time. Carrier's tariff rules may allow for rolled booking storage, but the terms controlling how far in advance the carrier must inform the shipper of the rolled booking may not meet the time constraints of certain exporters

³⁰ *But see*, COSCO Tariff 203, Cargo Free Time/Demurrage at Origin Ports, Rule No. 023-A, "Cargo shut out" (effective May 11, 2014), extending free time for rolled cargo due to overbooking.

delivering cargo assembled or loaded far away from the marine terminal, as is the case with many agricultural exporters in the Western United States.

Both exporters and importers experience additional external costs when cargo and equipment does not move efficiently through the terminals or when vessel calls are cancelled or delayed. Most commonly, these expenses are related to additional trucking, labor, and storage. For truckers, additional expenses relating to delays arise from labor and fuel costs. Shippers invariably feel these additional costs are more than enough to bear without also having to bear additional costs of demurrage and detention for slowdowns outside their control, but arguably within the control of those entities charging them for delays.

Price comparison: Demurrage and Detention

Recently, importers complain that they cannot timely return empty containers to the terminal as instructed by the carrier because there are reduced service hours at the ports for the return of empty containers and free time for detention has not been extended to reflect those reduced service hours. Detention is usually calculated on a calendar day (or fraction) basis; free time is generally extended for the time equivalent to a terminal shutdown only while containers are still in free time. A comparison of the combined import/export average prices for demurrage with those for detention, however, reveals that the average daily costs for demurrage is higher.

Shippers on the East Coast complain that the one-for-one extension of free time days after a terminal is closed for weather, for example, is inadequate because it may take longer to return the terminal to normal productivity after a closure than the closure itself. It appears that, because of the generally higher daily charge, a decrease in demurrage fees, or increase in demurrage free time, would have greater overall impact than changes in detention prices and practices.

Price comparison: Ports

Comparing combined demurrage and detention prices across all the ports examined in this report, it appears shippers moving cargo through terminals in New York/New Jersey pay the highest average price. For terminals other than those at New York/New Jersey, prices are, on average, similar. These prices were derived from VOCC's tariffs, which in turn may reflect the prices in the terminals' schedules.

Price comparison: VOCCs

Comparing VOCCs across all the ports they serve indicates carriers' individual prices for detention charges are generally the same regardless of port of loading or discharge, and generally the same for imports or exports. Comparing VOCCs demurrage charges at ports vary widely. For purposes of illustration, we compared the charges that would be incurred on a hypothetical import container delayed for six days across the six VOCC tariffs. Similarly, the fees that would be incurred by a hypothetical container kept by the importer for 12 days was also examined. Attachment B.

POSSIBLE ACTION

The following section discusses different options for addressing demurrage and detention by VOCCs, MTOs, port authorities, BCOs and their truckers, as well as the Commission.

Possible actions by VOCCs

Carriers may “stop the clock,” waive, reduce or compromise fees relating to congestion if they have the flexibility to do so under their tariff or service contract.³¹ Some carriers’ tariffs provide for extensions of free time for delays in cargo availability due to carrier’s error or carrier’s inability to tender the cargo.³²

It seems carriers vary widely by customer and by situation as to whether they will waive or reduce demurrage and detention charges where they are able to tender the cargo, but have experienced delays due to terminal unproductivity. It

³¹ Maersk Line, Demurrage – World (Excluding OFAC Countries) to United States, Note 6 (effective November 22, 2014) states, “Demurrage will not be assessed on shipments if incurred due to carrier’s error.” Maersk will “stop the clock” on detention and per diem for store door and drop and pick when consignees notify Maersk in writing. Maersk Line, Detention – United States to/from World – Detention/Per Diem – United States to/from World (effective November 30, 2014). *See also*, CMA CGM’s “port/cy tie up” and “carrier inability” provisions for import demurrage. CMA CGM’s tariff also has special provisions extending free time for detention at Oakland and Long Beach for ship loading delays. COSCO’s tariff provides for “carrier inability to tender cargo.” *See* COSCO Tariff 201 – Free Time/Demurrage at Destination USA Rule No. 023-B (effective November 22, 2014).

³² The Shipping Act requires common carriers to abide by their published tariff rules or filed service contract terms. 46 U.S.C § 41104.

may be that VOCCs once willing to interpret these free time extensions liberally are no longer willing to do so. Wide variation in carriers' willingness to waive, or even consider reducing, these fees has been observed. VOCCs have indicated that proper documentation is needed for a waiver to be considered.

With respect to the charges to which cargo interests are accountable, and the subject of this report, VOCCs are unlikely to take action to reduce their collections of these fees unilaterally. Carriers undoubtedly have costs relating to the delays in their vessel operations. One carrier skipping calls at Oakland reportedly has absorbed the additional rail costs to move the shipments that were to be delivered there. Other carriers skipping calls at Oakland may declare force majeure in order to avoid those costs; importers will bear additional unanticipated costs of recovering their shipments at a termination point they did not expect. The additional detention costs on these containers are unlikely to be reduced by the carrier. Shippers have made assertions that detention charges, rather than representing recovery of costs associated with the use of equipment, have become revenue centers for the carriers. We have no information that would either confirm or disprove this assertion.

Whether they waive these fees or not, however, it may be reasonable to expect that VOCCs will act to minimize their own costs resulting from terminal

delays. For example, alliances of VOCCs may consolidate terminal operations and reduce the number of terminals serving their vessels in southern California. In the short term, this may cause additional congestion at the remaining terminals serving the vessels of those operators. Some observers assert better blockage and stowage on vessels bringing imports from Asia should be done so that receiving terminals can more efficiently organize those containers for collection by drayage providers. It has been observed, although not by the VOCCs themselves, that better pre-planning, blockage and stowage on the vessel, as well as vessel scheduling and regular vessel traffic information and forecasts may improve the MTOs ability to expedite the import shipments as they are unloaded. This type of operational improvement may be achieved as alliances integrate their shared vessel strings. The operators participating in those alliances are in the best position to make decisions on how their operations can be better integrated for efficiency and where that cannot be done for other operational and non-operational reasons.

Possible actions by MTOs

Those MTOs who are members of an FMC-filed-and-effective agreement can make increasing use of their ability to address congestion collectively and thus

reduce costs. In addition, they can individually improve technology for gate operations, through systems such as NAVIS, eModal³³ and FRATIS systems,³⁴ for example, as well as improve communications with drayage providers and importers. All this, of course, may require additional capital contributions as well as the agreement of shore-side labor. MTOs could extend their own free time for demurrage; this may drive VOCCs to reflect the additional free time in their tariffs, but it may not necessarily be the case.

Possible actions by port authorities

Port authorities, both landlord and operating ports, continue to publish terminal schedules. It appears they may consider, either individually or collectively through agreements filed with the Federal Maritime Commission (such as the California Association of Port Authorities), adding requirements for terminal productivity, incentives or measurements of terminal productivity that include container velocity from dock to gate (i.e., dwell time). Some public port

³³ NAVIS and EModal are software solutions for terminal gate appointment and other terminal management needs. *See, e.g.*, <http://www.emodal.com/anondefault.aspx?ReturnUrl=%2f>

³⁴ FRATIS is the Department of Transportation, Federal Highways Administration's Freight Advanced Traveler Information System. *See*, http://www.camsys.com/kb_cases_FRATIS.htm

authorities may determine they lack adequate current authority to unilaterally extend demurrage free time. Doing so would have reduced the demurrage charges collected by MTOs on behalf of VOCCs; it would not have appeared to have any impact on detention fees.

Some port authorities are taking steps to do what they can to relieve congestion: offering lots for the storage of empties; purchasing chassis and creating pools; adding required infrastructure improvements; and exploring how information technology can help stakeholders share shipment and location information to improve velocity in terminals. They also fund and advocate for infrastructure improvements that can improve terminal operations and the flow of cargo on and off the terminal. Port authorities have been reaching out to their stakeholders for input.

Possible actions by BCOs and truckers

BCOs and truckers that are unhappy with the rates, rules, and practices of VOCCs and MTOs can seek to change them through: requests for assistance of CADRS in informal mediation; litigation before the FMC; petitioning the Commission for declaratory orders or rulemakings; or litigation in state or federal court, possibly asserting contractual claims such as excusable non-performance under the contract due to force majeure, impossibility, or frustration. Many shippers, ocean transportation intermediaries and truckers are contacting CADRS to request assistance mediating disputes relating to demurrage and detention charges. It appears that motor carriers whose relationships with VOCCs and others as “equipment providers” are subject to the terms of a UIIA amendment, must challenge these rates, rules, and practices through the arbitration process governed by the UIIA.

After the adoption of the Ocean Shipping Reform Act and Congressional instruction that the Commission rely more on complaints to address violations of the Shipping Act, the FMC has addressed matters, such as whether the particular application of a charge violates a provision of the Shipping Act in adjudicatory proceedings. These individual complainants seeking reparations are responsible for presenting evidence to support their allegations of Shipping Act violations.

Possible action by the Federal Maritime Commission

The Commission has tools that may be available to it to acquire additional information and to examine and address additional concerns relating to free time, detention, and demurrage practices of VOCCs, MTOs and port authorities. It may initiate these either in response to a public petition or on its own initiative after reviewing public information and information compiled by staff and gathered from information already in its possession (or, in response to Commission-issued orders directing VOCCs, their agents and employees to submit certain information or special reports).

Federal Advisory Committee

The Commission could explore whether it should establish an Advisory Committee, subject to the requirements of the Federal Advisory Committee Act, to provide it with non-binding recommendations on how the agency should address the reported problems with demurrage and detention. We note that the Department of Commerce's Supply Chain Competitiveness Advisory Committee has discussed port congestion at its last semi-annual meeting held in January, 2015 and it is likely to be studying the issue as well. Its mission is to advise the International Trade Administration (ITA) on actions that agency should take. It is also possible that

the Department of Transportation's (DOT) Freight Advisory Committee may make recommendations to that agency on the matter. It appears these advisory committees will address intermodal transportation congestion generally. They appear unlikely, however, to recommend DOT or ITA action relating specifically to MTO and VOCC demurrage and detention rates, rules, and practices. Should the Commission determine to establish a Federal Advisory Committee, the Commission could direct it to offer suggestions for the Commission's regulation of MTO and VOCC demurrage and detention rates, rules, and practices.

Special Reporting Requirements

Under the appropriate circumstances, the Commission could seek special reporting from certain filed agreements. 46 C.F.R. § 535.702 (d). The Commission could direct the staff to draft special reporting requirements for its consideration pursuant to its regulatory authority on filed agreements of VOCCs and MTOs directing them to submit additional data and information related to demurrage, detention, and free time issues involved in the agreement. This may be one manner, for example, to determine whether there may be any factual support for the allegation that these charges have become unreasonable revenue sources for VOCCs.

Section 15 Orders

Section 15 of the Shipping Act provides the Commission the authority to order common carriers and their employees and agents to report on a matter germane to the Commission's regulation. 46 U.S.C. § 40104. The authority of the Commission to use such orders to gather information is broad and has been used in the past to gather information on a variety of policies. The Act gives the Commission the authority to keep responses to these orders confidential.

Order of Investigation and Hearing – Adjudicatory Proceeding

The Commission may initiate an adjudicatory proceeding through the issuance of an Order of Investigation and Hearing under 46 U.S.C. § 41302. The presiding officer would adjudicate the alleged Shipping Act violations related to free time, demurrage, and detention practices of one or more VOCCs or MTOs. The Commission's Bureau of Enforcement would be a party to the proceeding. 46 C.F.R. § 502.63. For example, an Order of Investigation and Hearing might

address whether the free time and demurrage practices of a particular MTO or VOCC violate the Shipping Act.³⁵

To initiate such a proceeding, the Commission should have evidence or credible allegations of a violation of a provision of the Shipping Act and harm that has occurred because of that violation. *See* 46 C.F.R. § 502.63(b) (identifying the required contents of orders of investigation). These investigations provide for discovery, including interrogatories, production of documents, depositions, and issuance of subpoenas by the presiding officer.

Petitions to the Commission

Rule 76 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.76) provides that the public may file petitions with the Commission seeking relief or affirmative action by the Commission. Strictly speaking, these are not

³⁵ The Commission could examine a particular MTO tariff term such as: "When Carrier or consignee is prevented from removing cargo from the terminal by factors beyond the terminal's control, such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions which affect the entire port area or a substantial portion thereof, Containers which remain at the terminal beyond the designated free time shall remain subject to the demurrage charges in accordance with this rule." It should also be pointed out, however, that because MTOs for the most part defer to the VOCCs with respect to charging demurrage, finding this provision to be unreasonable may have no direct effect on preventing the continued collection of demurrage.

Commission-initiated proceedings, but the Commission would be the ultimate arbiter on whether to entertain the petition or grant relief. For example, in 2002, Bi-State Motor Carriers filed a petition alleging the New York Terminal Conference's rules violated section 10(d)(1) of the Act as amended by the Ocean Shipping Reform Act because they avoided fair calculation of truck detention penalties that compensate truckers for excessive waiting time at the terminal. Docket No. P3-02, *Petition of the Association 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*, 30 S.R.R. 104 (February 20, 2004). The Commission denied Bi-State's petition, finding the petitioner relied only on past assertions of congestion and did not present any probative evidence on why *current* truck detention practices should be considered unreasonable. The FMC also found Bi-State had failed to demonstrate how the rules were useful in addressing port congestion, why the FMC was better suited than local authorities to address and resolve delays, and how the Port continued to suffer from unique circumstances which would distinguish it from other large ports. *Id.*

Order of Investigation – Non-Adjudicatory Fact Finding

The Commission has turned to non-adjudicatory investigations (fact-finding) proceedings, invoking the regulations at 46 C.F.R. Part 502 Subpart R, to investigate policies and practices of regulated entities (such as agreements among common carriers, household goods intermediaries, vessel operators and equipment providers) on a wide range of alleged violations (e.g., discrimination, unreasonable practices, anti-competitive practices). The Commission can direct the appointed fact-finding officer to present findings and recommendations for Commission action (rulemaking or adjudication) on a discrete issue.³⁶

Rulemaking

If the Commission were to initiate an adjudicatory proceeding or a non-adjudicatory fact-finding, or require special reporting requirements, the final result of these approaches may be the Commission's issuance of an adjudicatory order or the initiation of a notice and comment or negotiated rulemaking. They may also result in no Commission action.

³⁶ See, e.g., Docket No. 68-9, *Free Time and Demurrage Charges on Export Cargo*, 13 F.M.C. 207 (1970) (discussing Fact-Finding Investigation No. 4 (1963) (effect of free storage on export cargo at the Port of New York)).

The Commission may initiate a rulemaking proceeding to explore whether it should issue generally-applicable rules to address widespread practices that it has determined violate the Shipping Act. This may be initiated as a result of findings made in a non-adjudicatory fact-finding or the issuance of a Notice of Inquiry, requesting the public to submit comments, suggestions, and evidence.

Alternatively, the Commission can issue a notice of proposed rulemaking, or initiate a negotiated rulemaking, which would include an identification of the issue the Commission seeks to address, articulating its authority to do so, and providing a burden/cost estimate of the proposal.

The last time the Commission was petitioned to address MTO practices at one terminal complex it declined to do so, finding that the evidence presented was not persuasive that the congestion or delays that existed in New York were unique to that port complex or that they could be remedied by Commission action. *See*, Docket No. P3-02, *Petition of the Association 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*, 30 S.R.R. 104 (February 20, 2004) (FMC order denying petition).

Ombudsman

The Commission could direct the Director of CADRS, who also serves as the agency's Ombudsman,³⁷ to facilitate targeted meetings and listening sessions with the industry and to develop findings and recommendations for the Commission and industry as a whole. Unlike a fact-finding officer, however, the Ombudsman has no authority to compel participation.

CONCLUSION

U.S. importers and exporters have expressed their belief that the demurrage and detention practices of MTOs and VOCCs are unfair. One shipper has told Commission staff that it has paid over \$100,000 in demurrage charges in the last year, as compared to paying approximately \$10,000 for the previous year. This disparity highlights shippers' perceptions that demurrage charges are not serving to speed the movement of cargo, the purpose for which those charges had originally been intended. Shippers feel they are in a "catch-22" when they are not permitted to pick up their container because of MTO congestion, and yet are charged demurrage. Similarly, normal free-time periods may become insufficient when the MTO is unable or unwilling to provide shippers access to their cargo.

³⁷ 46 C.F.R. § 501.5(k).

The Commission has made no determinations with respect to the application of demurrage and detention, or about the courses of action that it may take. The Commission has a variety of actions that could be used to address issues provided there is a sufficient factual basis to support the action. As indicated above, those actions include:

- the establishment of an Advisory Committee under the Federal Advisory Committee Act;
- the imposition of special reporting requirements on filed agreements;
- the requirement for filing special reports by common carriers pursuant to Section 15 of the Shipping Act;
- the initiation of a docketed proceeding for adjudication through an order of investigation;
- the grant of review of a petition with the Commission for specific action, if such a petition were appropriately presented by a party;
- the initiation of a non-adjudicatory fact-finding;
- the initiation of a rulemaking proceeding;
- or direction to the agency's Ombudsman to undertake focused facilitative meetings with industry.

In the absence of documented facts that provide a basis for the Commission to take action, issues regarding application of demurrage and detention charges will continue to be reviewed as part of the broader examination of port congestion.

Appendix A

I. Vessel-operating Common Carrier Tariff Publications

Maersk Line

Maersk Line – Demurrage – World (Excluding OFAC Countries to United States)

Demurrage – World (Excluding Sudan, Syria and Cuba) to United States

Effective from 22 November, 2014

Maersk tariff Detention - United States to/from World; Detention/Per Diem -
United States to/from World

Effective November 30, 2014

Maersk tariff - Demurrage - USA To World; Demurrage: United States to World

Effective Date: October 18, 2014

Maersk tariff Detention - United States to/from World; Detention/Per Diem -
United States to/from World

Mediterranean Shipping Company S.A.

Tariff: MSC Governing Rules Tariff FMC 12 (MESU-012)

MSC Governing Rules Tariff FMC 12 (MESU-012) tariff Demurrage/Storage –
Detention – Per Diem – USA & Puerto Rico (106)(effective 8/7/2014); MSC Far
East EB (to USA) & WB (from USA) Freight Tariff & Rules (MESU-
032)(Descartes) - Demurrage/Storage – Detention – Per Diem – USA & Puerto
Rico (105)

Rule: Demurrage on Intermodal Shipments (100)

Effective 09 Oct 2011

Rule: Demurrage/Storage – Detention – Per Diem – USA & Puerto Rico (106)

Assessorial: Demurrage/Storage – Detention – Per Diem

Effective 07 August 2014

Tariff: MSC Far East EB (to USA) Freight Tariff & Rules (MESU -032)

Rule: Demurrage/Storage – Detention – Per Diem – USA & Puerto Rico (105)

Assessorial: Demurrage/Storage – Detention – Per Diem

Effective 15 November 2014

CMA CGM

CMDU-100 U.S. Unified Tariff; Rule 100 – Import Demurrage Rules

Effective 23 April 2014

Ratebase.net (tariff publisher)

CMDU-100 U.S. Unified Tariff

Rule 300 – Addendum to the Uniform Intermodal Interchange and Facilities
Access Agreement (U.S. Detention)

Effective 23 April 2014

Ratebase.net (tariff publisher)

CMDU-100 U.S. Unified Tariff

Rule 200 – Export Demurrage Rules

Effective 23 April 2014

Ratebase.net (tariff publisher)

CMDU-100 U.S. Unified Tariff

Rule 300 – Addendum to the Uniform Intermodal Interchange and Facilities
Access Agreement (U.S. Detention)

Effective 23 April 2014

Ratebase.net (tariff publisher)

COSCO

Tariff: 201 (Far East to USA)

Rule: Free Time/Demurrage at Destination USA

Rule Number: 023-B

Effective: 22 November 2014

(www.coscon.com)

Tariff: 201 (Far East to USA)

Rule: Free Time/Detention under Drop and Pull Service

Rule Number: 021-A

Effective: 01 January 2015

Rule: Addendum to the Uniform Intermodal Interchange and Facilities
[Agreement]

Rule Number: 021-003

Effective: 01 November 2013

Tariff: 203 (USA to Far East)

Rule: Cargo Free Time/Demurrage at Origin Ports
Number 023-A

Effective: 11 May 2014

Tariff: 203 (USA to Far East)

Rule: Equipment Free Time/Detention at Origin (Drop N Pull)
Number 021-A
Effective: 01 July 2013

Evergreen Line Joint Service Agreement

Tariff: 601/Equipment Interchange and Demurrage Tariff
Rule: 036-E01 / Demurrage & Detention for POL from USA & Puerto Rico
Effective: 15 October 2014
Shipmentlink (tariff publisher)
Tariff: 601 / General Rules Tariffs for All Trades (Rules + B/L + Equipment)
Rule: 021-005 / Evergreen Shipping Agency (America) Corporation Addendum (UIIA)
Effective: 01 May 2014
Rule: 036-I01 / Demurrage & Detention for POD in USA & Puerto Rico
Effective: 15 October 2014

Orient Overseas Container Line Limited

Overseas Orient Container Line Limited, Eastbound Freight Tariff FMC-0003,
OOLL - 001 Rule No. 109 Free Time and Demurrage
Overseas Orient Container Line Limited - OOLL - EIA Tariff No. 053 (OOLL-053) Appendix A Schedule of Charges (21-05)
Effective: 02 July 2014
Overseas Orient Container Line Limited - OOLL - Westbound Tariff No. OOLL-002 - Rule 23 E
Overseas Orient Container Line Limited - OOLL - EIA Tariff No. 053 (OOLL-053) Appendix A Schedule of Charges (21-05)
Tariff: FMC-002 Westbound Trans-Pacific
Number: OOLL-002
Effective: 26 September 2005
Rates.etransport.com [URL – self published?]
Rule: 21 A Equipment Freetime/Detention – USA
Effective 02 November 2012
Rule: 21 B – Equipment Freetime/Detention – Destination (General)
Effective 21 May 2008
Rule: 23 E – Cargo Free Time and Demurrage at Origin
Effective: 15 January 2014
Rule 24 – Freetime and Demurrage – Destination
Effective: 23 January 2013

Rule 35 – Combined Demurrage and Detention

Effective 01 February 2015

Tariff FMC – 001 Eastbound Trans-Pacific OOLL-001

Rule 2 29 Store Door Delivery

Effective: 22 January 2015

II. Port Authority Schedules

Port of Los Angeles

Tariff No. 4, Section Seven: Free Time, Wharf Demurrage and Wharf Storage
Effective August 18, 2007

Port of Long Beach

Tariff No. 004

Rule 34-D: Section 4 – Wharf Demurrage, Wharf Storage and Free Time
Effective 12 December 2014

Port of Oakland

The Board of Port Commissioners, Port of Oakland Tariff No. 2-A
Section VIII-A: Wharf Demurrage - Rules and Rates
Section VIII – B: Wharf Storage – Rules and Rates
Effective 1 July, 2007 (and various)

Port of Seattle

Terminals Tariff No. 5

Section Five, Part 1 – Free Time and Wharf Demurrage
Effective 01 January 2015

Port of Tacoma

Terminals Tariff No. 300

Item 657.000 - Storage

Effective: 1 October, 2014

Port of Houston Authority

Tariff No. 14 – Additional Rates, Rules and Regulations Governing the Fentress
Bracewell Barbours Cut Container Terminal

Subrule No. 093 – Free Time; Demurrage; Booking Roll/Storage Charges

Subrule No. 094 – Loaded Throughput and Empty Handling Charges

Effective: 1 January 2014

Tariff No. 15 – Additional Rates, Rules and Regulations Governing the Bayport
Container Terminal

Subrule No. 093 – Free Time; Demurrage; Booking Roll/Storage Charges

Subrule No. 094 – Loaded Throughput and Empty Handling Charges

Effective: 1 January 2014

Virginia International Terminals, LLC

Schedule of Rates No. 1 Governing Charges, Rule and Regulations at Marine Terminals operated by Virginia International Terminals, LLC located at the Port of Hampton Roads, Virginia, U.S.A.

(C) 456 Free Time – Container

Effective 1 May 2014

(I/C) 461 Terminal Demurrage Charge – Loaded Container

Effective 1 October 2014

Georgia Ports Authority

Gaports.com

Subject: Equipment and Services

Subject: Container Charges for CY Services

South Carolina State Ports Authority

Terminal Tariff No. 8

Rule 34-220 – Free Time, Terminal Demurrage

Effective 23 April 2011

Port Authority of New York and New Jersey

PAMT FMC No. PA-10

Published September 2014

III. Marine Terminal Operator Schedules (or websites)

Maher Terminals LLC (PONYNJ-M)

Maher Terminal Schedule No. 010599 – Naming Rules, Regulations and
Commodity Rates on Cargo Moving in Containers/Breakbulk

Maher Container Terminal, Port Elizabeth

www.maherterminals.com

Section III – Export Demurrage

Section IV – Import Demurrage

Effective: 1 October 2014

New York Terminal Conference (participating terminal operators: Red Hook
Container Terminal, LLC; GCT Bayonne LP; GCT New York LP; Port Newark
Container Terminal; APM Terminals Elizabeth, LLC)(PONYNJ-GCTB;
PONYNJ-RH; PONYNJ – APM; PONYNJ – GCTN; PONYNJ-PCT)

Marine Terminal Schedule No. 011408 – Naming Rules, Regulations and
Commodity Rates on Cargo Moving in Containers/Breakbulk

Section III – Export Demurrage

Section IV – Import Demurrage

Effective: 19 February, 2015

APM Terminals Pacific Ltd. (Port of Los Angeles Pier 400)(Tacoma) (POLA-
APM; POT-APM)

Marine Terminal Operator Rate Schedule

www.apmterminals-na.com

Section 7 – Free Time, Wharf Demurrage, Wharf Storage

Effective: [access date 2 February 2015]

SSA Marine (A Carrix Enterprise)(Long Beach, Seattle, Oakland)(POLB-SSAT;
POLB-PCT; POLB-SSAC; POS-SSA18; POS-SSA30; POO-SSA)

Marine Terminal Operator Schedule of Rates, Regulations and Practices

<http://www.ssamarine.com>

Effective: 19 June 2014

Yusen Terminals Inc., Los Angeles (POLA-YTI)

www.yti.com

Long Beach Container Terminal (POLB-LBCT)

<http://www.lbct.com/>

STS-LAX Evergreen Terminal (POLA-ECT)

www.vtsocal.com

TraPac (Los Angeles, Oakland) (POLA-TRAPAC)(POO-TRAPAC)

www.trapac.com

West Basin Container Terminal Berth 100 (Los Angeles)(POLA-WBCT100)

www.wbct.us/terminal-services/customer-services

West Basin Container Terminal Berth 121 (Los Angeles)(POLA-WBCT121)

www.wbct.us/terminal-services/customer-services

Husky Terminals (Tacoma)

www.huskyterminal.com

Pierce County Terminal/Evergreen (Tacoma) (POT-PCT)

www.vtnlocal.com

California United Terminal (POLA-CUT)

www.shipcut.com

Ports America Outer Harbor Terminal (Oakland)(POO-PAOHT)

www.portsamerica.com

TTI(Long Beach; Tacoma; Seattle)(POLB-TTI; POT-TTI; POS-TTI)

<http://www.ttisea.com/main/index.do>

Olympic Container Terminal (Tacoma)(POT-OCT)

http://www.vtnocal.com/default.asp?SiteID=OCT_TAC

Husky (Tacoma)(POT-HUSKY)

<http://www.huskyterminal.com/>

Washington United Terminals (Tacoma)(POT-WUT)

<http://www.uswut.com/>

Matson (Oakland)(POO-MATSON)

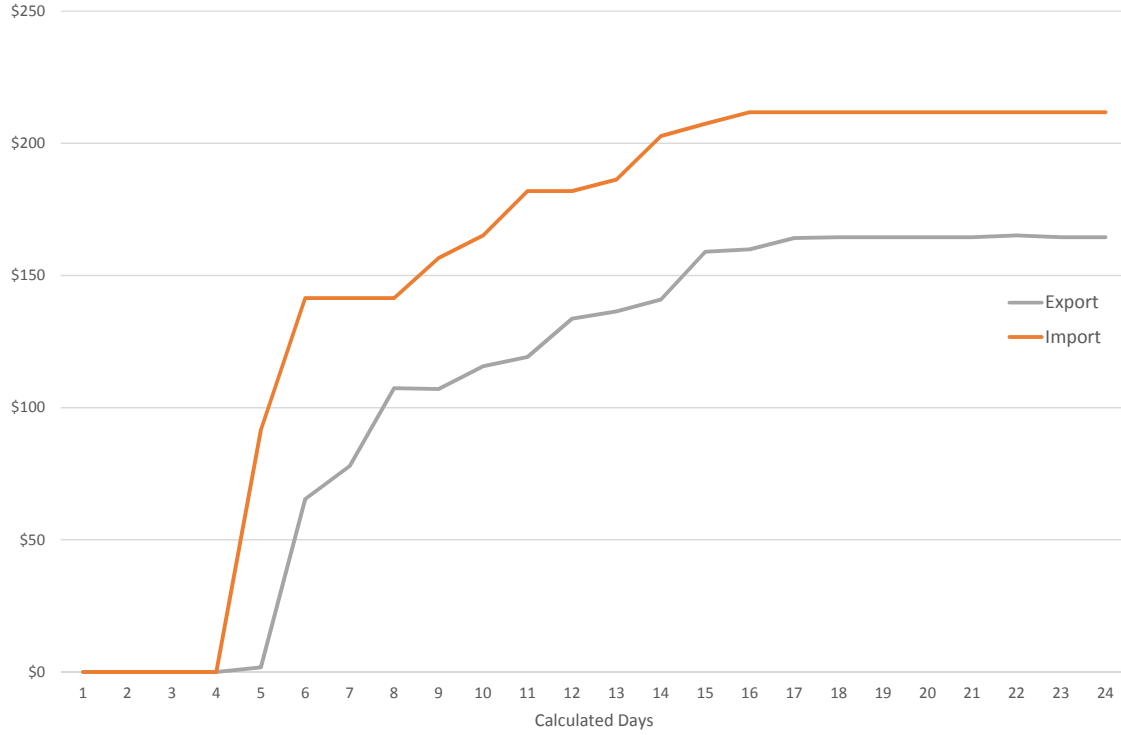
https://matson.ratebase.net/rateBASE/servlet/loginServlet?user_id=matspass&password=mats01

International Transportation Service (Long Beach)(POLB-ITS)
<https://www.itslb.com/Main/Default.aspx>

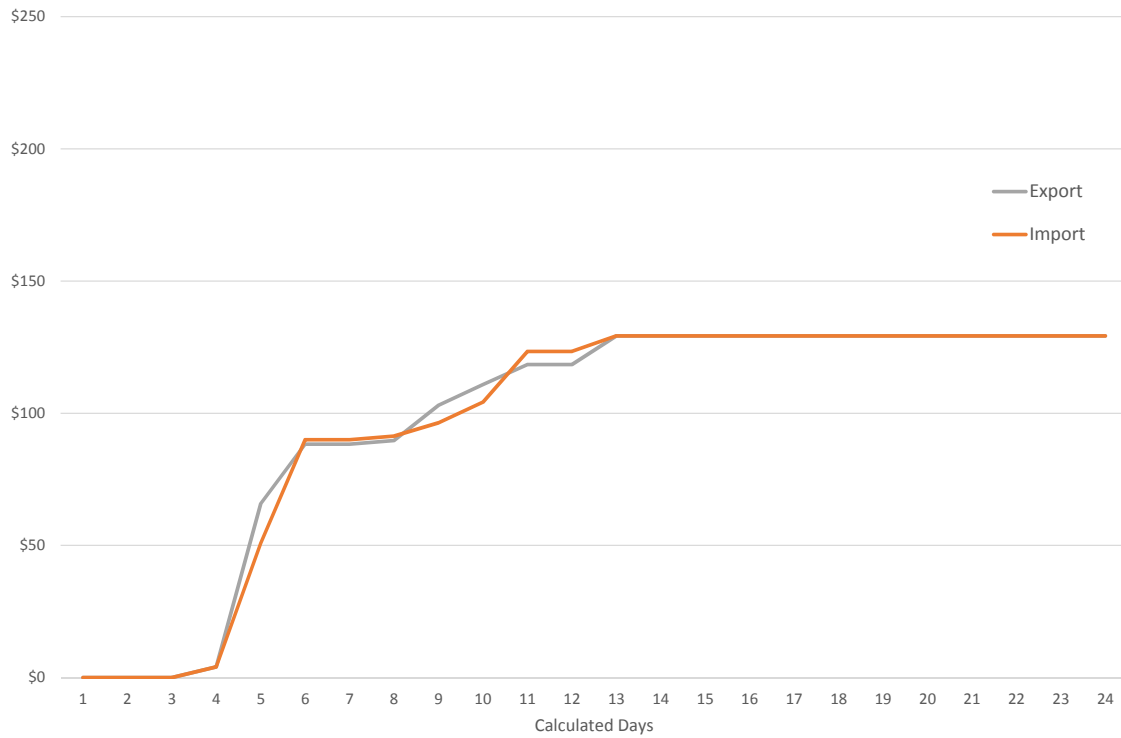
Seaside Transportation Services (Oakland) (POO-STS)
http://www.vtnocal.com/default.asp?SiteID=MTC_OAK

Appendix B

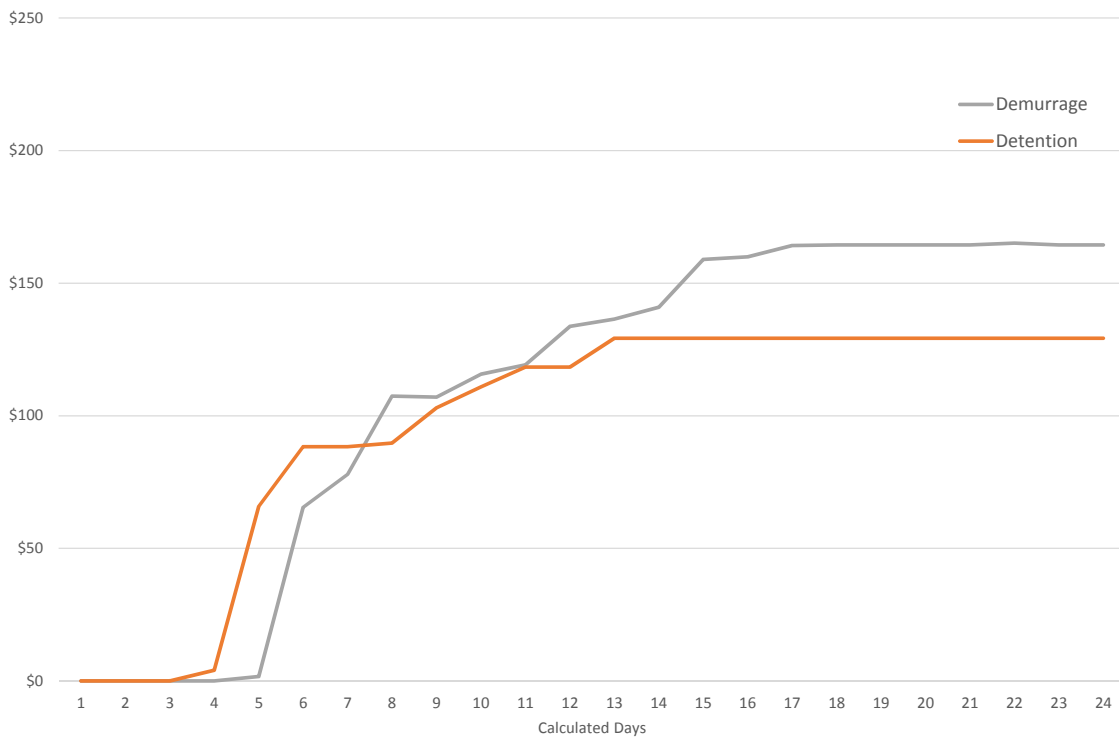
Comparison of Demurrage Charges by Calculated Day for Import and Export 20' Dry Containers



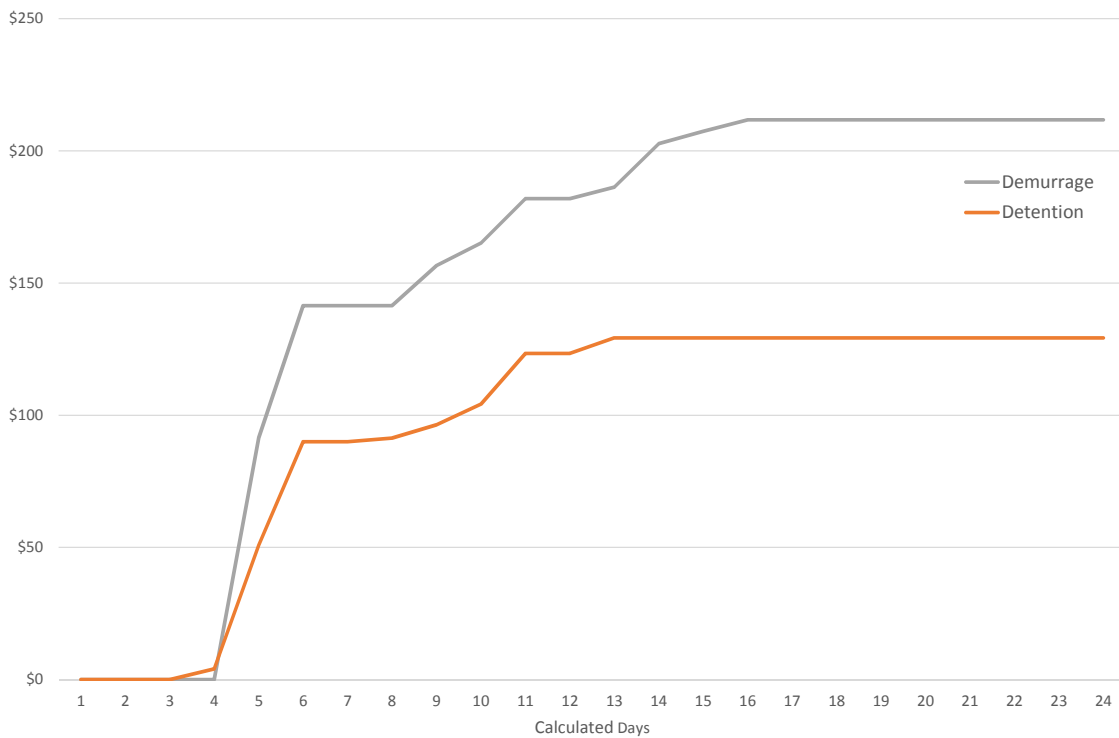
Comparison of Detention Charges by Calculated Day for Import and Export 20' Dry Containers



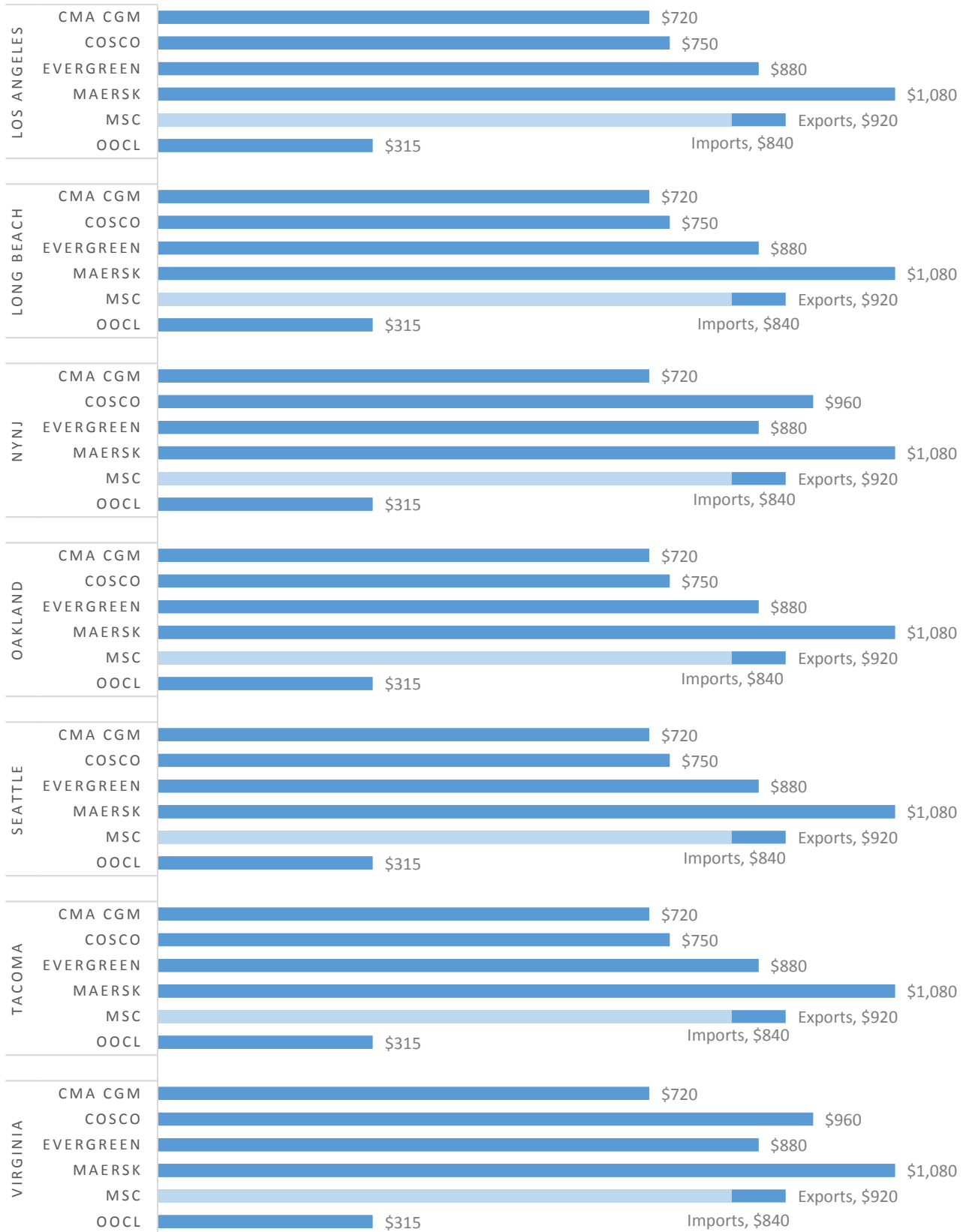
Comparison of Demurrage and Detention Charges for Export 20' Dry Container



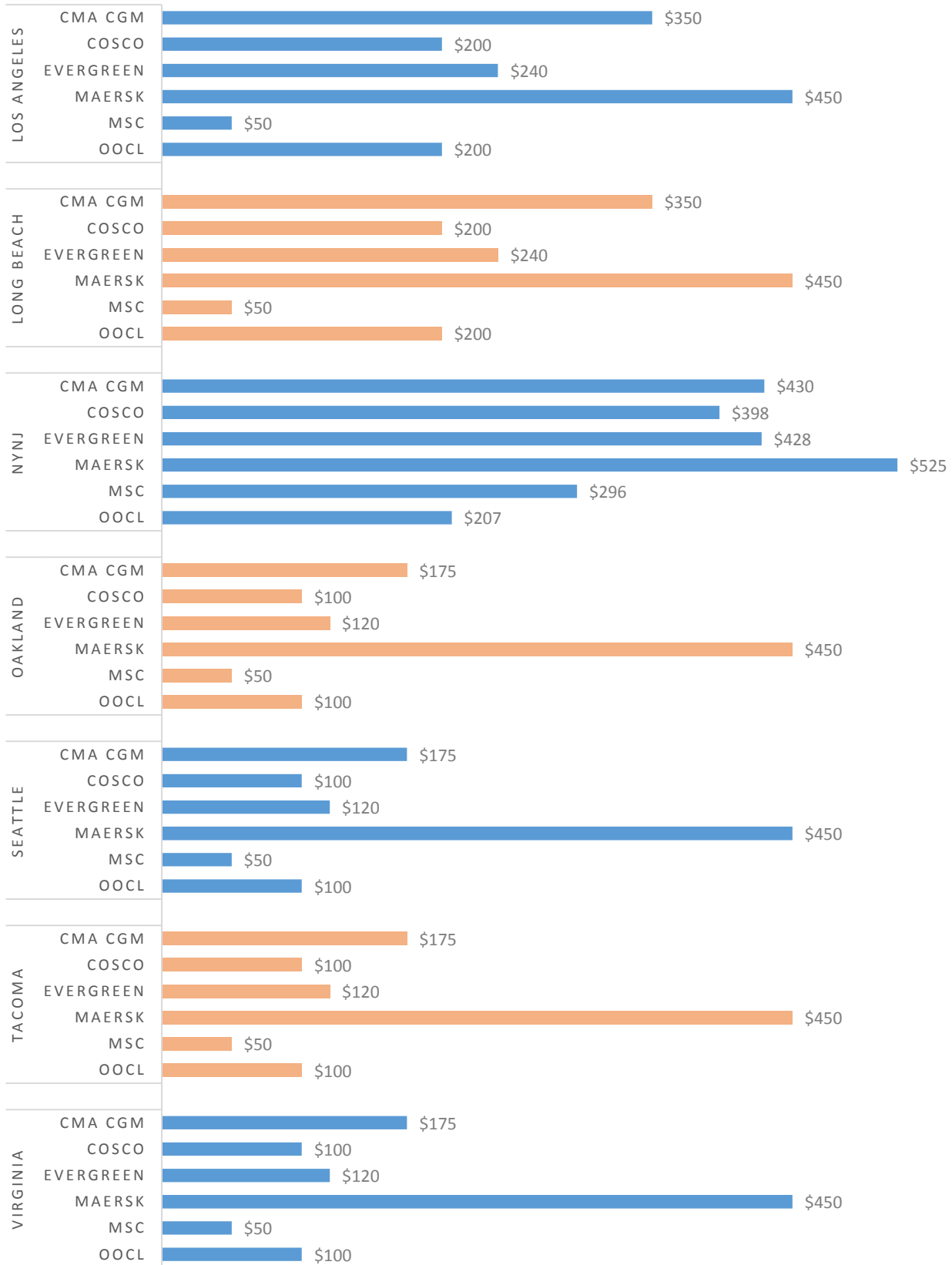
Comparison of Demurrage and Detention Charges for Import 20' Dry Container



COMPARISON OF DETENTION CHARGES AT DAY 12 PER 20' DRY CONTAINER



COMPARISON OF IMPORT DEMURRAGE CHARGES AT DAY 6 PER 20' DRY CONTAINER



COMPARISON OF EXPORT DEMURRAGE CHARGES AT DAY 6 PER 20' DRY CONTAINER

