

March 17, 2022

VIA ELECTRONIC SUBMISSION
(secretary@fmc.gov)

Mr. William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street N.W.
Washington, D.C. 20573

Re: **Comments on Demurrage and Detention Billing Requirements ANPRM
FMC Docket No. 22-04
Intermodal Association of North America**

Dear Mr. Cody:

The Intermodal Association of North America (“IANA”) submits the following comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM”) issued by the Federal Maritime Commission (“FMC”) at 87 Fed. Reg. 8506 (February 15, 2022) with respect to demurrage and detention billing requirements.

I. IANA’s Interest In The ANPRM

IANA is North America’s leading industry trade association representing the combined interests of the intermodal freight industry. IANA’s membership roster of over 1,000 corporate members includes intermodal and over-the-road motor carriers, railroads (Class I, short-line and regional), water carriers, port authorities, intermodal marketing and third-party logistics companies, and suppliers to the industry such as equipment manufacturers, intermodal leasing companies, and consulting firms. IANA’s associate (non-voting) members include shippers (defined as the beneficial owners of the freight to be shipped), academic institutions, government entities, and non-profit associations. IANA’s mission is to promote the growth of efficient intermodal freight transportation through innovation, education, and dialogue.

In furtherance of its mission, IANA administers the Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”). The UIIA is a uniform industry agreement that governs the interchange of intermodal equipment (*i.e.*, intermodal containers, chassis, trailers, etc.) among ocean carriers, rail carriers, equipment leasing companies and motor carriers and has been in existence since the mid-1970s. A copy of the current version of the UIIA is attached as Exhibit 1 and can be downloaded by the public without charge at <https://www.uiia.org/sites/default/files/documents/newuiia-Home.pdf>. The purpose of the UIIA is to promote intermodal productivity and operating efficiencies through uniform industry processes and procedures. The UIIA is used by almost all of the world’s ocean carriers who berth in the United States as well as by all Class I railroads. Therefore, motor carriers who wish to do business with ocean and rail carriers or equipment leasing companies typically become “participants” to the UIIA. Current participants to the UIIA include over 10,000 intermodal motor carriers and 60 equipment providers (ocean carriers, railroads, and leasing companies). UIIA participants manage over 95% of all North American equipment interchanges.

The Intermodal Interchange Executive Committee (“IIEC”) is one of IANA’s standing committees and is charged with administering, interpreting, and periodically modifying the UIIA. The IIEC consists of a minimum of two representatives from each mode (*i.e.*, ocean, rail, and motor carrier) and one representative from the equipment leasing sector. The IIEC is chaired by the President of IANA. IIEC members are drawn exclusively from companies who are signatories to the UIIA. The proceedings of the IIEC are confidential. Modifications to the UIIA require a super-majority consisting of a three-fourths (3/4) majority of those IIEC members present at a given meeting.

II. Responses to Questions Posed in the ANPRM

IANA hopes that its extensive experience with the UIIA over many decades will prove useful and instructive to the FMC in connection with several of the questions posed in the ANPRM.

Question A.4: What percentage of demurrage and detention bills contain inaccurate information, and which information is most often disputed?

While IANA does not have data to suggest what precise percentage of demurrage and detention bills contain inaccurate information, IANA does have perspective on the nature of the information that is most often disputed pursuant to the dispute resolution process (“DRP”) provided for in the UIIA.

The DRP, which was first incorporated into the UIIA in 2008, is a mechanism for arbitrating disputes that arise with respect to, among other things, invoices for detention, otherwise known as “Per Diem” under the UIIA. Section B.22 of the UIIA defines “Per Diem” as a:

. . . [c]harge to be paid when intermodal Equipment is not returned by the end of the allowable free time to its origin or to another location, as specified by the Provider, or at the discretion of Provider, is Interchanged to another Motor Carrier. A charge meeting the foregoing description constitutes Per Diem under this Agreement whether or not it is referred to as Per Diem, a detention charge, or otherwise.

Absent a consensual settlement, UIIA participants may submit disputes involving Per Diem to a two-member arbitration panel consisting of IIEC members drawn from the two involved modes. These members must have at least five (5) years of operating experience involving gate interchanges, yard procedures, loading and unloading, the operation of container yards, and the like. In the event that the two members cannot reach an agreement as to the outcome of the dispute, then a final decision is rendered by a majority of a senior panel consisting of the longest tenured IIEC member or alternate member from each mode, as determined by the IIEC Chairperson. This ensures that those having the deepest and most extensive familiarity with the industry (and the UIIA and the DRP in particular) will resolve the dispute fairly. The proceedings and submissions of the DRP are confidential, but the decisions themselves are public (with the names of the participants redacted). Decisions can be reviewed at <https://www.uiia.org/uiia-binding-arbitration-process>, and the DRP is outlined in detail in Exhibit D to the UIIA.

From the point of the DRP’s inception in 2008 through February 2022, over 985 cases have been submitted for arbitration. Of the cases submitted, only 660 cases were appropriate for submission under the DRP. Of the 660 properly submitted cases, 272 have been disputes involving Per Diem. While many of these disputes have concerned a failure to invoice within the requisite time period, a failure to respond to a motor carrier’s dispute involving an invoice, or the absence of a valid return location, some of these disputes do arise out of allegedly inaccurate information on invoices. In IANA’s experience, disputes challenging the accuracy of information on a Per Diem invoice typically involve an allegation that the invoice amount was calculated incorrectly based on free

time allowed under a specific service contract that an equipment provider may have with a customer or under the equipment provider's UIIA Addendum (which outlines the equipment provider's free time, user charges, and other commercial terms not covered by the UIIA).

Question A.5. How much does the type of information included on or with demurrage and detention billings vary among common carriers, among marine terminal operators, and between VOCCs and NVOCCs?

While IANA does not have visibility to invoices issued by NVOCCs or marine terminal operators, IANA does have visibility to invoices provided by VOCCs in connection with DRP disputes involving Per Diem. In such disputes, the VOCC typically submits, among other things, the invoices in question. While the information contained on such invoices does not widely vary among VOCCs in IANA's experience, the form of the invoices and the format of the data naturally do vary. The most common data elements that IANA has observed on VOCC invoices include the following:

- Invoice Number
- Date of Invoice
- Company Name and Address of Invoiced Party
- Equipment Identification Number
- Type of Equipment
- Outgate/Ingate Date
- Locations of Outgate/Ingate
- Total Days
- Number of Free Days
- Total Days of Per Diem Due
- Rate per Day
- Total Amount Due
- Service Contract Number
- Bill of Lading Number
- Payment Remittance Instructions

That said, certain VOCCs do include other data elements on a less frequent basis. For instance, certain VOCCs include on their invoices an e-mail address or instructions for disputing invoices.

Question C.7: What information or timeframes should be required for VOCC and NVOCC demurrage and detention bills? Should the Commission require different types of information or timeframes?

IANA maintains that a sixty (60-day time period currently constitutes an industry standard in light of the fact that the UIIA has contained such a requirement upon UIIA participants for over twenty-five (25) years. Indeed, the FMC noted in the adoption of its final interpretive rule that the UIIA had been in effect "for decades." 85 Fed. Reg. 29638 (May 18, 2020).

Specifically, Section E.6 of the UIIA establishes uniform billing practices for Per Diem and Ocean

Demurrage.¹ Under the UIIA, equipment providers are obligated to invoice for Per Diem and Ocean Demurrage within sixty (60) days from the date on which equipment is returned to the equipment provider by the motor carrier. If the equipment provider fails to do so, the equipment provider forfeits its right to collect such charges. However, if the equipment provider does issue an invoice but inadvertently invoices the incorrect party, the equipment provider may invoice the proper party as long as: (a) it does so within thirty (30) days from the date that the incorrect party disputes the charges, and (b) the date of the correct invoice does not exceed ninety (90) days from the date that the equipment in question was returned. Of course, the equipment provider is also required to include documentation supporting its invoice.

The uniform process described above has provided transparency, efficiency, and predictability for the intermodal industry for decades. Consequently, in the event that the FMC adopts a requirement that demurrage and detention invoices be issued within a particular timeframe, IANA urges the FMC to adopt the time period that has been long reflected in the UIIA. Doing so will reinforce, rather than disrupt, long-standing industry practices.

Question C.12: Should the Commission require demurrage and detention invoices to be issued within 60 days of date when the detention/demurrage/per diem stops accruing?

Please see IANA's response to Question C.7.

Question C. 15: How would a regulation on demurrage and detention billing requirements impact, conflict with, or preempt any other applicable laws, regulations, or arrangements (such as the UIIA)?

Consistent with the foregoing comments, IANA advocates that any regulation adopted by the FMC relative to detention and demurrage be consistent with, rather than conflict with, the UIIA. Doing so will minimize disruption with current operational and business practices that most stakeholders in the intermodal industry have had in place for decades. For instance, the billing and collection departments at both equipment providers and motor carriers are already familiar with and have processes in place to maximize compliance with the billing practices outlined in the UIIA. Changing these practices would require stakeholders who are also UIIA participants to engage in retraining of staff, alter existing procedures and systems (which may include reprogramming of information technology systems), and otherwise modify their existing business practices. Moreover, even those parties who may not currently be participants to the UIIA are generally familiar with the existing industry practices reflected in the UIIA. Of course, if the FMC does adopt a regulation that mandates demurrage or detention billing practices that conflict with the UIIA, such a regulation may (depending on how it is ultimately drafted) abrogate the UIIA's conflicting language by operation of law. This would, in turn, necessitate revisions to the UIIA in order to ensure that the text conforms with the law. During that process, however, commercial confusion may exist since the text of the UIIA will not technically reflect the state of the law. So, again, any divergence from the existing UIIA practices will likely create unnecessary business disruption that impedes rather than promotes the growth of efficient intermodal freight transportation.

Question C.16: Please provide any other views or data you believe would help inform the Commission's decision whether to pursue a proposed regulation on demurrage and detention billing information and practices.

The industry standard reflected in the UIIA and described herein has proven helpful and fair throughout turbulent times. That same standard can serve an identical purpose here.

¹ Section B.26 of the UIIA defines "Storage/Ocean Demurrage" as a "charge to be paid when Intermodal Equipment is stored on property." The UIIA requires parties to follow the same invoicing practices for Ocean Demurrage as for Per Diem. However, Ocean Demurrage is not subject to the DRP as described elsewhere in the UIIA.

For instance, one consequence of the labor disruptions on the West Coast in late 2014 and early 2015 was that motor carriers were unable to return containers and chassis to the designated return locations at the ports in a timely fashion. Notwithstanding that inability to return equipment to the ports in a timely fashion, ocean carriers imposed Per Diem charges on motor carriers for failing to return the equipment before expiration of the “free days” awarded under the UIIA and the ocean carrier’s addendum. These Per Diem disputes, in turn, led to the commencement of DRP cases. Ultimately, a total of 137 cases were submitted to IANA involving Per Diem disputes relating in some fashion to congestion on the West Coast. Seventeen (17) of the 137 cases were rejected outright as either being untimely (nine (9) were outside the established 30-day timeframe for a motor carrier to dispute Per Diem charges initially, and eight (8) were outside the 15-day timeframe for motor carriers to submit claims to the DRP). Thirty-seven (37) of the 137 claims were resolved by the parties prior to a decision issuing from the arbitrators. This resulted in eighty-three (83) decisions on the merits. Forty-three (43) of those decisions were rendered in favor of the equipment provider for the original invoiced amounts, twenty-six (26) were rendered in favor of the equipment provider for a modified amount, and fourteen (14) were rendered in favor of the motor carrier. Accordingly, the UIIA’s DRP process provided a clear, fair, and accessible dispute resolution process for industry stakeholders.

IANA’s real-world experience, accumulated over decades, addressing the value of uniformity with respect to detention should be highly instructive for the FMC. IANA would be pleased to serve as a resource to the FMC as it considers the items described above.

III. Conclusion

Fortunately, the UIIA has played a key role in the development and expansion of the intermodal market. Among other things, the UIIA permits parties to manage detention and demurrage in a predictable way and to respond effectively to significant industry-wide events (e.g., labor controversies, ocean carrier bankruptcies, etc.) that can have a domino-like effect upon equipment utilization and upon parties’ relative exposure to detention and demurrage. The UIIA has manifestly stood the test of time and brings a valuable degree of uniformity to an otherwise fragmented industry. Accordingly, IANA urges the FMC to take these significant benefits into account when evaluating whether to engage in proposed rulemaking in connection with demurrage and detention billing requirements.

IANA appreciates the FMC’s efforts and, again, is pleased to answer any questions that the FMC may have.

Sincerely,



Joanne F. Casey
President and CEO
Intermodal Association of North America

Enclosure

cc: Marc Blubaugh, IANA General Counsel