Transportation Update

March 2024

FMC Issues Final Rule on Billing Requirements and Practices for Detention and Demurrage Invoices

On February 26, 2024, the Federal Maritime Commission (FMC) issued its Final Rule on Detention and Demurrage Billing Requirements. The final rule identifies the parties to whom an invoice must be issued and who are responsible for payment of demurrage and detention charges, specifies the minimum contents of an invoice for demurrage and detention charges, and outlines procedures for invoicing and resolving disputes. The rule implements provisions of the Ocean Shipping Reform Act of 2022 (OSRA 2022), and it applies to invoices issued by ocean common carriers, marine terminal operators (MTOs), and non-vessel operating common carriers (NVOCCs).

The rule implements transparency requirements mandated by OSRA 2022 to improve demurrage and detention billing practices in response to complaints from shippers, receivers, and truckers over vague and untimely invoices assessing significant charges. The rule defines *demurrage or detention* to "mean any charges, including 'per diem' charges, assessed by ocean common carriers, marine terminal operators, or non-vessel-operating common carriers related to the use of marine terminal space (e.g., land) or shipping containers, but not including freight charges."

Although many MTOs objected to the rule's application, the FMC found it has statutory authority to regulate MTOs, as well as NVOCCs and vessel operating common carriers (VOCCs) under 46 U.S.C. § 41102(c). Moreover, the FMC found that excluding MTOs from the final rule would create a "regulatory loophole" that would undermine the effectiveness of the rule.

The rule has significant consequences for shippers of containerized cargo in international commerce and the carriers and MTOs who assess demurrage and detention charges for the use and storage of containers. Failure of the billing party to abide by the invoice content and timing requirements relieves the billed party's obligation to pay an invoice for detention and demurrage charges.

The rule provides that an invoice for detention or demurrage charges can only be issued to either (1) the person for whose account the billing party provided ocean transportation and who contracted for the ocean transportation or cargo storage or (2) the ultimate recipient of the cargo (i.e., the consignee). The rule prohibits common carriers, MTOs, or NVOCCs from issuing an invoice for detention or demurrage charges to any other person. This rule will change the current practice whereby invoices are issued in certain cases to the trucker picking up or returning loaded and empty containers from the marine terminals.

Based on these changes, shippers and consignees will want to evaluate their contracts with their ocean carriers and truckers carefully to allow for reimbursement of demurrage and detention charges paid when their conduct did not cause delays in the pickup or return of containers that resulted in the assessment of the charges.

The FMC decided to use a contractual relationship as the basis for establishing the parties that must receive an invoice for detention and demurrage. The FMC reasoned that parties with a contractual relationship, i.e., either the shipper or the consignee, have firsthand knowledge of the terms of the contract governing the service and are in the best position to abide by its terms. The FMC expanded the billing parties in the final rule to include consignees who are the receivers of the transported goods because they can frequently mitigate against detention and demurrage and may be in the best position to dispute the charges given their knowledge of the shipment.

The final rule requires the carrier or MTO issuing an invoice for detention and demurrage to do so within 30 calendar days from the date of the last charge. This is intended to assure billed parties that the invoices they receive are not stale and based on events that occurred months prior. This timeframe is slightly different for NVOCCs, which must issue the invoice within 30 calendar days from the issuance date of the invoice the NVOCC received from the ocean carrier. Because an NVOCC is acting as both a billing party vis-à-vis its shipper customer and the billed party vis-à-vis its contract with the ocean carrier, an additional 30 calendar days is allowed for the NVOCC to dispute the charges. The FMC extended this time for NVOCCs because NVOCCs do not always control the assets and typically receive an invoice from the VOCC. Regardless of the identity of the party that issues the invoice, failure to issue an invoice within these timeframes relieves the billed party of the obligation to pay the detention and demurrage charges.

The party that receives the invoice has 30 calendar days from the date of issuance to request mitigation, refund, or waiver of the charges. In finalizing the timeline to dispute an invoice, the FMC balanced the benefits to billed parties against the detriment to billing parties. It had concerns that the longer the billed party takes to investigate and validate the charges for detention and demurrage, the longer the billing party must wait to learn whether the billed party intends to pay.

Upon receiving a mitigation, refund, or waiver request, the carrier or marine terminal must attempt resolution of the dispute within 30 calendar days. However, attempts to resolve the dispute can be extended if mutually agreed upon by the parties involved. Notably, nothing in the rule prevents a billed party from filing a complaint with the FMC either during the 30-day dispute period or at any time thereafter. In addition, billed parties can still file a complaint without first disputing the invoice with the billing party.

Finally, an invoice for detention or demurrage charges must contain identifiable information regarding the containers (bill of lading number, container number, ports of discharge), information regarding timing (invoice date, deadline to pay charges, free time start and end, container availability, and the dates for the detention or demurrage charges), rate information (amount due, applicable tariff rule), and information on how the billed party can dispute the invoice. Failure to include this information, whether in an attachment or in the actual invoice, relieves the billed party's obligation to pay the charges.

Unlike the other provisions of the final rule, the FMC delayed the informational requirements indefinitely, pending approval from the associated Collection of Information by the Office of Management and Budget. Except for the information requirements, the final rule becomes effective on May 28, 2024.

FOR MORE INFORMATION

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