

Transportation Update

September 2024

Key Steps to Protecting Supply Chains Amid East and Gulf Coast Port Strikes

Key Notes:

- An impending dock worker strike threatens to shut down East and Gulf Coast ports beginning October 1.
- The port shutdown will likely cause severe supply chain disruptions.
- This bulletin outlines key steps that importers and exporters can take to protect their businesses.

Dock workers at ports along the East and Gulf Coasts are poised to strike on October 1 which will likely cause severe supply chain disruptions and significant additional costs for businesses that send and receive goods by ocean transportation. This bulletin presents several steps exporters and importers (“shippers”) can take to protect their businesses.

A strike is imminent. The current labor contract covering dock workers at East and Gulf Coast ports expires on September 30. The International Longshoremen’s Association (ILA), which represents these workers, says its members are ready to strike on October 1 if a new contract is not in place.

Talks between the ILA and the United States Maritime Alliance (USMX), which represents the container carriers, terminals, and port associations that employ the ILA’s members, are at an impasse. The USMX reports that the ILA has not engaged in negotiations since at least June, while the ILA claims that USMX’s offers have been “insulting.”

If the strike occurs, it will have serious repercussions for businesses. A strike would shut down container and automotive roll-on roll-off operations at ports up and down

the eastern seaboard and along the Gulf Coast. These ports handle about half of the nation’s containerized cargo. JP Morgan analysts estimate that the strike could cost the economy up to \$4.5 million per day.

Although some traffic could be diverted through ports on the West Coast and Canada, those ports might not have sufficient capacity to handle a material portion of the traffic impacted by the strike. Also, moving that traffic across the country by rail and truck may pose operational hurdles. Further, diversions might be too costly for many low-value commodities, including certain agricultural products.

Key steps to mitigate the impact of a strike. In addition to making operational adjustments and diverting cargo, shippers can take actions to reduce their exposure to a strike.

1. Pick up cargo and return containers before ports shut down.

Shippers face demurrage and detention charges if their loaded containers are held at a port or they return empty containers beyond the allowed “free time.” The best way to protect against these charges is to pick up import cargo and return containers within the allotted free time and before ports close.

Some ports may offer extended hours to facilitate the pick-up and return of containers before the strike. Ports also are establishing deadlines for when containers must be picked up or returned. Shippers should monitor these schedules and deadlines, as they may change.

2. Understand your responsibility for demurrage and detention charges.

Shippers that are unable to pick up loaded containers and return empty containers during the allowed free time may face demurrage or detention charges. Service contracts and carrier tariffs specify when and how these charges will be assessed. Reviewing these documents before a strike occurs is critical for shippers to understand their potential demurrage and detention liability.

Federal law requires that demurrage and detention charges be reasonable. According to the Federal Maritime Commission's (FMC) interpretive rule ([46 CFR § 545.5](#)), charges are reasonable if they promote freight fluidity in the ocean transportation network by incentivizing shippers to timely retrieve loaded containers and return empty containers to help reduce port congestion and facilitate container usage.

Demurrage or detention assessments may be unreasonable when delays in the pick-up or return of containers are due to port or ocean carrier operations, such as port closure, port congestion, lack of terminal appointments, changes in terminal hours, or a carrier's failure to provide timely notice of container availability after vessel discharge. Increases in demurrage and detention charges while ports are closed also may be unreasonable.

The reasonableness of demurrage or detention charges resulting from port closures, congestion, or changes to terminal hours *after* free time has expired is uncertain and will depend on the specific circumstances of each case. This is especially uncertain after the recent court decision in *Evergreen Shipping Agency Corp. v. FMC*, 106 F.4th 1113 (D.C. Cir. 2024), which held that detention charges assessed to a trucker for days that a port was closed on a container that was returned to the port after free time had expired still provide an incentive to return containers during free time. A critical factor in that case was that the trucker received advance notice of the port's closure before it picked up the container for return to the port.

Ultimately, there is no bright-line standard for determining when demurrage or detention charges are reasonable.

Reasonableness will depend on the specific facts of each demurrage and detention assessment.

3. Document difficulties picking up or returning containers.

Shippers should document the problems they face when picking up or returning containers. This can help support potential challenges to unreasonable demurrage and detention charges.

For example, shippers should document attempts to obtain appointments to pick up or return containers and the unavailability of appointments, attempts to pick up or return containers and why those attempts were unsuccessful, communications with carriers and terminals about picking up or returning containers or securing off-port storage of empty containers, and reductions or extensions of terminal hours impacting pick-up or return of containers.

4. Monitor carrier tariffs for new surcharges.

Carriers might add new surcharges due to the strike. For example, Maersk has announced a Port Disruption Surcharge effective October 21.

Check carrier tariffs and the FMC website for any new surcharges or changes to existing surcharges. Carriers may impose new or increased surcharges if they publish them in their tariffs 30 days before they become effective. The FMC may allow new or increased surcharges sooner upon carrier request, and the agency has the authority to evaluate the reasonableness of new surcharges.

Shippers should also check their service contracts to determine whether they prevent any new or increased surcharges.

5. The Federal Maritime Commission may address unreasonable practices, including demurrage, detention, and other charges.

The Federal Maritime Commission is responsible for regulating ocean carrier transportation to and from the United States. The FMC also enforces violations of federal

statutes that protect shippers from new or increased charges that carriers do not publish in advance in their tariffs, unreasonable rules and practices of ocean carriers including, but not limited to, demurrage, detention, and cargo handling at ports. In an [industry advisory](#), the FMC has stated that all statutes and regulations it administers will remain in effect during the anticipated port strike.

If a shipper faces a violation of these laws, including unreasonable demurrage, detention, or other charges, the shipper can:

- File a formal complaint with the FMC against a carrier or terminal.
 - File a charge complaint with the FMC regarding an unlawful charge assessed by an ocean carrier, which the FMC will investigate. If the FMC determines that the charge was unlawful, it will order a refund or waiver of the charge.
 - Seek informal dispute resolution assistance from the FMC's Office of Consumer Affairs and Dispute Resolution Services.
 - Report the violation to the FMC's Bureau of Enforcement, Investigations, and Compliance for potential investigation. This will not result in any FMC-ordered refund or award of damages.
6. Evaluate the potential scope of supply chain disruption and its impacts on rights and obligations under supplier, customer, and logistics contracts.

A strike may disrupt a shipper's supply chain by interfering with its suppliers' obligations to deliver goods or the shipper's obligations to deliver goods to its customers. Businesses should review their supplier, customer, and carrier contracts to understand their rights, obligations, and potential liabilities for delayed or diverted deliveries. Force majeure provisions might excuse delays or other breaches resulting from the disruption. Also, businesses should check for provisions that allow a pass-through of increased costs.

Regarding logistics contracts, minimum volume commitments might not be fulfilled due to the strike. Contracts also may address cargo diversions, demurrage, and detention charges, and whether logistics providers can pass through costs arising from strike-related disruptions. Force majeure provisions are likely to excuse both parties

from performance failures occurring during the strike, but these provisions should be reviewed to determine their scope and if any notice or other procedures are required to invoke the clause.

Thompson Hine is ready to assist. Thompson Hine's transportation team focuses on helping shipper address freight transportation challenges. We have experience advising companies and trade associations on a wide range of ocean transportation issues including contract rights and remedies and Federal Maritime Commission regulation and proceedings.

FOR MORE INFORMATION

For more information, please contact:

Karyn A. Booth
202.263.4108
Karyn.Booth@ThompsonHine.com

Jason D. Tutrone
202.263.4143
Jason.Tutrone@ThompsonHine.com

Richard M. Couch
202.973.2736
Richard.Couch@ThompsonHine.com

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