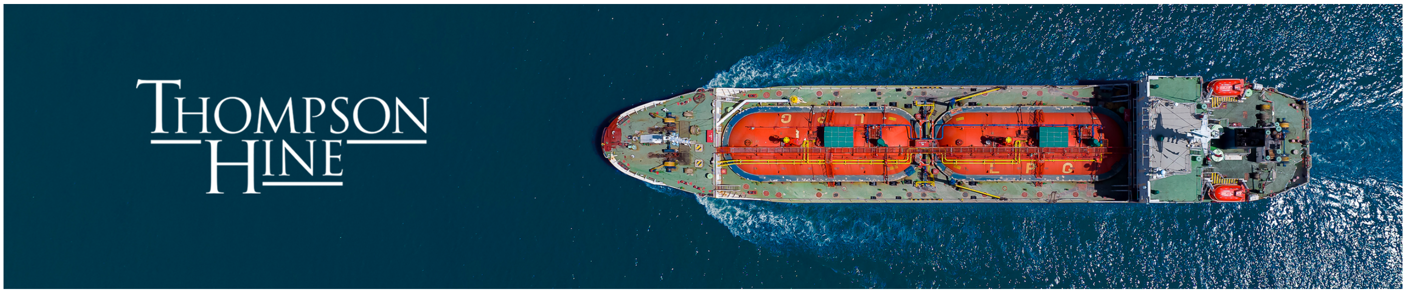

Transportation Update

September 2025

Court Sets Aside Part of FMC's Demurrage and Detention Billing Rule

On September 23, the D.C. Circuit Court of Appeals set aside part of the Federal Maritime Commission's (FMC) recent rule regulating demurrage and detention invoices. *See Demurrage and Detention Billing Requirements,* 89 Fed. Reg. 14330 (Feb. 26, 2024) (Final Rule). As we covered in a previous alert, the Final Rule implemented provisions of the Ocean Shipping Reform Act of 2022 (OSRA 2022). It required invoices for demurrage and detention to be issued to *only* the shipper that contracted with the billing party for ocean transportation or storage (i.e., the ocean carrier or NVOCC) or to a consignee. The Final Rule also required said invoices to contain specific information and outlined the procedures to dispute such invoices.

The Final Rule's limitation on who may be billed for demurrage and detention—and, specifically, its exclusion of motor carriers, was challenged by the World Shipping Council, which represents the global ocean carrier industry. The court determined that the FMC's billing rule which was largely based on billing the shipper in contractual privity with the ocean carrier was arbitrary and capricious for being internally inconsistent. The court found that the FMC failed to adequately explain why motor carriers that contract with ocean carriers could never be the billed party for demurrage and detention. Additionally, the court questioned the consistency of the FMC's decision to allow consignees to be billed regardless of whether they contracted with the ocean carrier.

The court's decision set aside the section of the Final Rule defining a "properly issued invoice," which states:

> (a) A properly issued invoice is a demurrage or detention invoice issued by a billing party to:
>
> > (1) The person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo; or
> >
> > (2) The consignee.
>
> (b) If a billing party issues a demurrage or detention invoice to the person identified in paragraph (a)(1) of this section, it cannot also issue a demurrage or detention invoice to the person identified in paragraph (a)(2) of this section.
>
> (c) A billing party cannot issue an invoice to any other person. *46 C.F.R. § 541.4*.

All other portions of the Final Rule remain in effect.

The court's decision removes the limitation on which parties can be billed for demurrage and detention. Additionally, since the court vacated § 541.4 in its entirety, billing parties may now issue invoices for demurrage or detention to more than one party.

In developing the Final Rule, the FMC reasoned that the parties contracting for ocean transportation or storage are best suited to resolve disputes over demurrage and detention because they have firsthand knowledge of the terms of the contract governing the service and are in the best position to abide by them. The FMC explained that "a primary purpose of this rule is to stop demurrage and detention invoices from being sent to parties who did not negotiate contract terms with the billing party." *Final Rule*, at 14336. In the Preamble to the Final Rule, the FMC stated that motor carriers could be billed for demurrage and detention when they negotiated directly with the ocean carrier. Despite this statement, the text of the Final Rule, published at § 541.4 (as cited above), excludes motor carriers from ever being billed for demurrage or detention.

After the Final Rule was published, the FMC received several inquiries highlighting this inconsistency. These comments cited § 541.4, which states that a "properly issued invoice" is one that is issued to "[t]he person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo." The comments asked whether a properly issued invoice could ever be issued to a motor carrier because the "ocean transportation or storage of cargo" is never provided to them, even if they negotiated directly with the ocean carrier. In response, the FMC acknowledged the ambiguity as "inadvertent" and issued a correction clarifying that it did not intend to create an exception authorizing motor carriers to be billed for demurrage and detention. It also said "contracts between a VOCC and a motor carrier not based on a through bill of lading" would not be subject to the Final Rule. *Demurrage and Detention Billing Requirements; Correction*, 89 Fed. Reg. 39569, 39570 (May 3, 2024).

On appeal, the court found that the central reasoning of the rule, i.e., that contractual privity with an ocean carrier makes a party properly subject to billing for demurrage and detention, and the FMC's complete bar on billing motor carriers for demurrage and detention even if they contract with an ocean carrier, were inconsistent with one another. According to the court, the FMC's failure to adequately explain this inconsistency was arbitrary and capricious.

The court also highlighted an additional inconsistency: the Commission's Rule authorized consignees to be billed without requiring contractual privity with the billing party. The court stated that "[t]here may well be sound explanations for allowing billing of consignees even absent privity, but the Commission's account of its decision to include consignees—which is found in the Rule's preamble—does not attempt to provide one."

Apart from the vacatur of 46 C.F.R. § 541.4, the FMC's Final Rule on demurrage and detention remains in effect. Thompson Hine has significant experience assisting companies with disputes over demurrage and detention invoices.

FOR MORE INFORMATION

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