IANA
INTERMODAL ASSOCIATION OF NORTH AMERICA

President & CEO – Joanne F. Casey

December 7, 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 Notice of Proposed Rulemaking**
Demurrage and Detention Billing Requirements
FMC Docket No. 2022-0066
Intermodal Association of North America

Dear Mr. Cody:

The Intermodal Association of North America ("IANA") submits the following comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Maritime Commission ("FMC") at 87 Fed. Reg. 62341 (October 14, 2022) with respect to the proposed rule governing demurrage and detention billing requirements (the "Proposed Rule").

I. IANA's Interest In The NPRM

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, stacktrain operators, port authorities, intermodal marketing and 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, chassis providers, and motor carriers. A copy of the current version of the UIIA 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 the promotion of 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 major railroads and multiple equipment leasing companies in the United States. Therefore, motor carriers who wish to do business with ocean carriers, rail carriers, or chassis providers typically become "participants"

to the UIIA. Current participants to the UIIA include over 14,000 intermodal motor carriers and 60 equipment providers (ocean carriers, rail providers, 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 industry. IIEC members are drawn exclusively from companies who are signatories to the UIIA.

Finally, as yet a further illustration of IANA's obvious interest in the NPRM, IANA notes that it received a letter from the FMC on November 2, 2022 (the "FMC Letter") that relates, at least in part, to the NPRM and the Proposed Rule. A true and accurate copy of that letter is attached hereto as **Exhibit 1**. Among other things, the FMC Letter specifically advises IANA to "consider" making various modifications to the UIIA including, but not limited to, modifications "to include the language contained in the forthcoming [Proposed Rule]" even before the Proposed Rule has been adopted. As the FMC Letter is intertwined with the NPRM and the Proposed Rule, IANA takes this opportunity to address certain points in the FMC Letter in IANA's comments below where appropriate.

II. IANA's Perspective Regarding Proposed 46 C.F.R. § 541.7(a)

Due to its diverse stakeholder constituency, IANA takes no position with respect to the Proposed Rule with the exception of 46 C.F.R. § 541.7(a). While IANA is fully supportive of FMC's efforts to promote further uniformity with respect to demurrage and detention practices, IANA has concerns that the proposed text of this specific section will diminish rather than enhance uniformity and will generally inject confusion into the intermodal marketplace.

Background

As explained in its comments to the Advanced Notice of Proposed Rulemaking that led to the issuance of this NPRM, Section E.6 of the UIIA obligates equipment providers 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. The uniform process described above has provided transparency, efficiency, and predictability for the intermodal industry for decades. In short, a uniform sixty (60) day period for issuing invoices serves the intermodal industry well.

OSRA-22

In the FMC Letter, the FMC suggests that the UIIA should "be modified to match the language in OSRA." As a starting point, IANA assures the FMC that IANA fully recognizes that, regardless of the outcome of the NPRM, the UIIA must conform with federal law. Currently, the UIIA is in perfect harmony with federal law, including the Ocean Shipping Reform Act of 2022 ("OSRA-22"). For example, OSRA-22 requires common carriers to include certain data elements on invoices for detention (*i.e*., on invoices for "Per Diem"). In contrast, the UIIA does not and has never dictated what information or data elements must be included on invoices for "Per Diem." The UIIA is silent on that point and, in light of that contractual silence, no conflict can possibly exist between OSRA-22 and the UIIA.

Hence, contrary to the implication contained in the FMC Letter, the mere passage of OSRA-22 did not require any modifications to the UIIA. While the IIEC could in theory draft, propose, and adopt an entirely new section of the UIIA addressing the content of invoices for "Per Diem," simply parroting in the UIIA the language of each and every law or regulation that might govern detention and demurrage serves no useful purpose as those laws and regulations already apply on their own terms by their very nature. For instance, modifying the UIIA to add a new section mandating inclusion of all data elements that ocean carriers must include on detention invoices under OSRA-22 would unnecessarily lengthen the UIIA without any commensurate benefit. UIIA participants naturally must comply with OSRA-22 and a provision of the UIIA requires compliance with federal law.[1] The FMC Letter identifies no reason why any modification to the UIIA is warranted under OSRA-22. Moreover, to the extent that such requirements were ever outlined in the UIIA, the IIEC would then have to modify the UIIA every time that Congress or the FMC modified the list of data elements required under OSRA-22. And, of course, OSRA-22 only governs ocean carrier invoicing and does not govern rail carrier or leasing company invoicing, meaning that modifying the UIIA to duplicate requirements already found in OSRA-22 would introduce a significant new disparity among the various modes under the UIIA. The UIIA is supposed to advance intermodal harmony and efficiency rather than produce unnecessary distinctions among the various modal participants.

46 C.F.R. § 541.7(a)

Unlike OSRA-22 itself, the proposed regulation embodied in 46 C.F.R. § 541.7(a) does partially conflict with Section E.6 of the UIIA and would therefore partially abrogate UIIA participants' rights and obligations under the UIIA by operation of law. That abrogation will require more than the IIEC simply modifying the UIIA to replace a sixty (60) day time period with a thirty (30) day time period. For instance:

- Section E.6.c of the UIIA would need to be modified to recognize the FMC's distinction between detention charges relating to a container and those relating to a chassis. At present, the sixty (60) day billing requirement in Section E.6.c of the UIIA applies to <u>all</u> "Per Diem." Under Section B.22, "Per Diem" is broadly defined as including charges to be paid when intermodal "Equipment" is not returned by the end of the allowable free time. "Equipment" is defined under Section B.12 of the UIIA and includes <u>both</u> containers and chassis. In contrast, proposed 46 C.F.R. § 541.7(a) requires a billing party to issue a "demurrage or detention" invoice within thirty (30) days from the date on which the charge was last incurred. Notably, however, the definition of "demurrage or detention" in the Proposed Rule <u>excludes</u> charges related to other equipment, such as chassis. While that definition is consistent with 46 C.F.R. § 545.5, it is inconsistent with the definition of "Per Diem" under the UIIA. In other words, adoption of the Proposed Rule would immediately create an unnecessary dichotomy under the UIIA and in the market between the maximum time to invoice "Per Diem" charges for containers (*i.e.*, thirty (30) days) and the maximum time to invoice "Per Diem" charges for chassis (*i.e.*, sixty (60) days).

[1] See Section G.11 of the UIIA.

- Section E.6.c of the UIIA would have to be modified to draw a distinction between "Per Diem" owed to ocean carriers and "Per Diem" owed to rail carriers and chassis providers. As noted above, the FMC does not have jurisdiction to regulate detention charged by rail carriers and equipment leasing companies, and the Proposed Rule does not purport to govern detention charged by rail carriers and chassis providers. Therefore, no law or regulation would require the IIEC to reduce the time period in question from sixty (60) days to thirty (30) days as to "Per Diem" charged by UIIA equipment providers other than ocean carriers. As a result, the Proposed Rule would introduce new complexity and disparity into what is currently a uniform practice across all modes.

- Section E.6.c. of the UIIA would likewise need to be modified in order to nullify the second paragraph (relating to invoicing the incorrect party) with respect to any ocean carrier's "Per Diem" charges for containers. Again, the extended time period would remain applicable to "Per Diem" invoices relating to chassis, and "Per Diem" related to rail carriers and equipment leasing companies but would have no effect as to "Per Diem" invoices from ocean carriers relating to containers.

In other words, adoption of 46 C.F.R. § 541.7(a) will require the IIEC to consider and work through these issues (among various others), draft precise language that conforms with the law, and then proceed with the modification process. The process for modifying the UIIA, outlined in Appendix I, Sections IV and V of the UIIA, takes considerable time due to the notice and comment period included in that process. So, at the very least, any adoption of 46 C.F.R. § 541.7(a) should have an effective date no earlier than ninety (90) days from the date of publication in order to minimize or avoid inevitable confusion.

Apart from the unintended complexities of modifying the language described above, creating these distinctions between containers and chassis and between ocean carriers and rail carriers and chassis providers is inconsistent with the IIEC's efforts to advance uniformity throughout the intermodal industry. In addition, adoption of the Proposed Rule will, at a minimum, require significant operational changes for UIIA participants. For instance, UIIA participants will retain their legacy billing systems with respect to chassis while developing a new billing system for containers, not only imposing cost but creating inefficiencies and resulting in commercial confusion. And 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 after decades of uniformity would require stakeholders who are also UIIA participants to alter existing procedures and systems (which may include not only accounting systems but reprogramming of information technology systems), and otherwise modify their existing business practices.

In short, IANA remains unconvinced that a clear public good will be achieved by abrogating part of a voluntary agreement that has been the subject of widespread use throughout the industry for decades. IANA fears that the regulation will dilute and complicate, rather than enhance and simplify, intermodal practices and the UIIA itself.

Other

IANA notes that the FMC Letter requests that IANA consider these modifications to the UIIA even though FMC is still engaged in rulemaking and no actual rule is yet promulgated. The FMC itself acknowledges in the FMC Letter that the anticipated changes "are still a moving target." In other words, the FMC Letter appears to be asking IANA to put the cart before the horse. Nevertheless, as set forth

above, IANA is in the process of considering the issues set forth not only in the Proposed Rule but also in the FMC Letter.

Finally, the FMC Letter appears to be advising that IANA should modify the UIIA "to reflect who might be liable for payment of detention and demurrage fees." To begin with, as the UIIA is a contract, it can only address the liability of those who are parties to the contract. As described above, UIIA participants consist exclusively of certain ocean carriers, rail carriers, chassis providers, and motor carriers. Most importantly, the UIIA *already* establishes who might be liable for payment of "Per Diem" and "Ocean Demurrage Charges." Section E.6 of the UIIA sets forth detailed treatment of under what circumstances motor carriers are responsible for "Per Diem" and "Ocean Demurrage Charges" that accrue under the UIIA. Further, Section H of the UIIA provides for a dispute resolution procedure as well as a binding arbitration process that itself is described over the course of two pages in Exhibit D to the UIIA. Simply put, IANA does not understand what the FMC is proposing that IANA do with respect to this bullet-point.

III. Conclusion

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 the billing and collection of 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 stood the test of time and brings a valuable degree of uniformity and predictability to an otherwise fragmented industry. Accordingly, IANA urges the FMC to take these significant benefits into account when evaluating whether to promulgate 46 C.F.R. § 541.7(a).

Despite IANA's concerns regarding the proposed change in billing timeframes under 46 C.F.R. § 541.7(a), IANA appreciates the FMC's well-intentioned efforts and, as always, is pleased to answer any questions that the FMC may have.

Sincerely,

Joanne F. Casey

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

Attachments

cc: Marc Blubaugh, IANA General Counsel

FEDERAL MARITIME COMMISSION

November 2, 2022

Ms. Joni Casey
President & CEO
Intermodal Association of North America (IANA)

Dear Ms. Casey,

As the Federal Maritime Commission works to implement the Ocean Shipping Reform Act of 2022 (OSRA-22) and the industry adjusts to a new generation of ocean shipping policy, we wanted to raise an issue that I believe to be timely to the maritime and intermodal shipping industry and IANA's membership. IANA plays a vital role in providing a cross-section forum for intermodal shipping policies, and serves as custodian to the implementation of the Uniform Intermodal Interchange & Facilities Access Agreement (UIIA). I believe it is vital to avoid legal conflict that the implementation of OSRA-22 should also coincide with the updating of the UIIA.

As you know, the UIIA was crafted decades ago, under the original purview of the Department of Transportation, to standardize policies related to the exchange of intermodal shipping. The pandemic and ensuing shipping congestion has prompted Congress to review our Shipping Act policies, and to update them. To avoid the potential that OSRA 22 requirements do not conflict with and cost needless litigation, I believe it is prudent that compliance issues be considered upfront. There are probably other areas where a review of the UIAA would also improve the fair and efficient method to interchange intermodal equipment, but I suggest beginning with the following issues. Specifically at a minimum, I recommend that you consider amendments to the UIIA to:

- Amend that the language in the UIIA concerning billing requirements be modified to match the language in OSRA regarding the same subject.
- Amend that the UIIA should be modified to include the language contained in the forthcoming Detention and Demurrage Rule.

- Amend that the UIIA be amended to reflect any changes to reflect who might be liable for payment of detention and demurrage fees.

While I recognize these issues are still a moving target, I believe that active consideration of potential alterations to the UIIA has merit. I welcome the opportunity to have further discussion with you and IANA's Executive Committee on these issues.

I look forward to speaking with you soon.

Sincerely,

Carl Bentzel

Carl W. Bentzel
Commissioner
Federal Maritime Commission