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LEGAL UPDATES

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Detention and Demurrage Fees in the Context of Work Stoppages

With the International Longshoremen's Association (ILA) preparing to strike on October 1, 2024, a key concern of impacted shippers is how to minimize demurrage charges for inbound containers that may be inaccessible for the duration of the strike (however long that may be) and how to avoid compounding detention charges for the delayed return of empty containers during the same period. The Federal Maritime Commission (FMC) issued a Final Rule intended to add clarity to invoicing requirements outlined in the Ocean Shipping Reform Act of 2022 (OSRA 2022), which reaffirmed that ocean carriers, marine terminal operators, and ocean transportation intermediaries may not fail to establish, observe, and enforce **just and reasonable regulations and practices** relating to or connected with receiving, handling, storing, or delivering property.

But the FMC did not address whether and to what extent shippers could be liable for demurrage and detention charges that accrue during a strike. Rather, the FMC left intact competing interpretations of which party should bear the costs of such delays. First, the FMC continued to apply the "incentive principle," that demurrage and detention charges must serve their intended primary purposes as financial incentives to promote freight fluidity. 46 C.F.R. § 545.5. By itself, this principle would tend to support the argument that demurrage and detention charges during a strike period do not provide any such incentive, as shippers are powerless to remove cargo from a pier or to return empty containers during that time. But the FMC retained discretion to consider other purposes for these charges in deciding whether to enforce them. The FMC added a "non-preclusion" clause to their "incentive principle" regulations, which states that "[n]othing in this rule precludes the commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule." 46 C.F.R. § 545.5(f). Indeed, the FMC stated in their rule-making documents that "the rule does not preclude ocean carriers

and marine terminal operators from arguing and producing evidence regarding the **compensatory** (emphasis added) aspects of demurrage and detention in individual cases.”

What this means to you

While the FMC may determine that charging demurrage and detention charges during the ILA strike is unjust and unreasonable, shippers and carriers alike will need to take steps to protect their interests and to document their efforts as well in preparation for what will likely be a protracted battle over who bears the demurrage and detention costs of the strike.

Contact us

If you have questions regarding how a prospective ILA strike will impact your operations, please contact Julie Maurer, James Duncan, or your Husch Blackwell attorney.