

Comments of the International Liquid Terminals Association
on
Demurrage Billing Requirements
Surface Transportation Board
Docket No. EP 759

ENTERED
Office of Proceedings
November 6, 2019
Part of
Public Record

The International Liquid Terminals Association (ILTA) appreciates the opportunity to provide comments on the Surface Transportation Board's (STB's) proposal to modify its regulations regarding demurrage billing requirements. The International Liquid Terminals Association (ILTA) represents more than 85 companies operating liquid terminals in all 50 U.S. states and in 37 countries. Our members' facilities form a critical link in the transportation of a wide range of liquid commodities, including crude oil, refined products, chemicals, renewable fuels, fertilizers, vegetable oils and other food grade materials.

ILTA strongly supports this proposal as a significant and positive step forward. ILTA thanks the Board for its willingness to address the unintended consequences brought about by the 2014 regulations concerning the assessment of demurrage charges. Overall, ILTA feels that the proposed rule will bring greater clarity to the assessment and collection of demurrage charges and will help ensure fair treatment of consignees such as terminal operators.

Importantly, the proposed rule would require the railroads to accept the shipper, and not the terminal, as the guarantor of payment for demurrage charges. ILTA appreciates the STB's specific clarification that carriers are permitted to bill shippers directly, as some carriers have expressed the view that they are compelled to invoice terminal operators under the current framework. The proposed rule's requirements that the carriers provide additional billing information will bring much needed transparency to the process. We also support the STB's further requirement that the carrier must bill the shipper directly when notified that this has been agreed to by the terminal and shipper.

In the remainder of our comments, we briefly explain why this proposed rule is urgently needed. We also suggest further modifications that would build on the improved process proposed by the STB.

In 2014, STB issued a final rule that established a new option for railroads – the ability to seek compensation for demurrage from consignees, rather than shippers, for delays in loading and unloading railcars and returning them to the carrier at origins and destinations. This left warehousemen, including terminal operators, liable for demurrage charges, even though they had no contractual relationship with the railroads, and no control over the frequency or volume with which shippers may consign railcars to them.

As described in ILTA’s testimony during the May 223 hearing, the situation has become untenable for terminal operators since the 2014 final rule went into effect. During the previous rulemaking process, ILTA noted in its comments that [the rule] “...would virtually guarantee constant disputes and endless litigation on the question of whether ‘actual’ notice had been provided to one or both of the parties to a demurrage claim.” In fact, that situation has come to pass. Railroads and terminal operators are increasingly involved in litigation over payment for demurrage incurred on shippers’ railcars.

Terminal operators are not customers of the railroads and have no direct contract or service agreement with the railroads. Instead, terminals and railroads share customers, who contract with the terminal to provide a fixed volume of storage and a rated capacity to load and/or unload railcars for their account. Terminal operators serve as agents for their customers in directing railcar activity at the terminal. These shared customers – the shippers – specify the number of railcars in use based on loading and unloading capacities specified in their contracts with the terminal. Terminal operators do not own the products, do not initiate shipments, and do not schedule receipts.

Railcar storage and demurrage (hereafter “demurrage”) are legitimate services and railroads are due proper compensation for delays and inefficiencies caused by other parties. Prior to 2014, railroads assessed demurrage charges directly to their customers. In some cases, a failure of service on the part of the terminal operator would cause a delay. Under these

circumstances, the charged customer (the shipper) would pay the demurrage charges assessed by the railroad, and then seek compensation from the terminal operator.

ILTA supports the proposal that Class I carriers provide more detailed information with their demurrage invoices so that those being invoiced can determine the legitimacy of those charges and how to apportion them. We applaud the STB's decision to require railroads to provide the identity of the shipper, consignee and care-of party with or in their invoices. This will allow a full picture of the parties involved and the shipper, consignee and care-of party on every waybill. We believe that providing this additional information should not impose a significant burden on the railroads. Railroads should easily be able to provide this information.

The proposed rule could also be improved by clarifying what is required to meet the "notification" provision of the proposed rule. Many terminals include clauses in their contracts with shippers that delineate responsibility for demurrage charges. However, it is not feasible for terminals or shippers to share contracts in their entirety because doing so would expose business confidential information. It is important that the rule specify that the notification requirement can be met by sharing an excerpt, or redacted version, of the contract showing the agreement between the terminal and the shipper. Alternatively, the rule could specify that a letter, or email, between the pertinent parties would suffice. The rule could be further strengthened by addressing issues where railroad performance causes delays, and by providing a dispute resolution process.

Additionally, the proposed rule could be improved by addressing the deadlines imposed by railroads for disputing demurrage charges. In some cases, railroads allow extremely short periods (e.g., as few as 5 days) to dispute demurrage charges when invoices can take weeks to reach the involved parties. The STB should require railroads to adhere to dispute timelines that allow for adequate review and response to unwarranted charges.

Lastly, while ILTA supports the modifications that STB has proposed to its regulations regarding the payment of demurrage, in our view, returning to the regulatory environment that existed prior to the 2014 rule would be a superior solution. As discussed during the May hearing, the policy change that led to the railroad's ability to hold consignees responsible for demurrage charges was an unintended consequence of a related decision. We understand that, in the 2014 decision, the Board was attempting to remedy a split between the courts regarding notice. No policy aim was served by allowing railroads to charge terminals directly for demurrage fees. We submit that the simplest and most efficient means of addressing the problems that have resulted from the 2014 decision would be to undo the portion of the decision that created the problems.

In closing, ILTA would like to again affirm our strong support and appreciation for the STB in addressing the demurrage issue. We would like to offer our particular thanks to Chairman Begeman for her leadership in turning attention to current demurrage practices overall, as well to our industry's specific concerns as noted within these comments. By conducting a transparent and inclusive process, we believe the Board is making it possible for us all to move closer to our shared goal of a more efficient, accountable, and fair rail transportation network. We appreciate the opportunity to comment on this action and will be available to answer any questions the STB may have.

Kathryn Grover Clay
1005 N. Glebe Road
Arlington, VA 22201
kclay@ilta.org
ILTA