

November 6, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
325 E Street, SW
Washington, D.C. 20024

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Office of Proceedings
November 6, 2019
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Re: STB Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*
STB Docket No. EP 759, *Demurrage Billing Requirements*
STB Docket No. EP 760, *Exclusion of Demurrage Regulation from Certain Class Exemptions*

Dear Ms. Brown:

The Portland Cement Association (PCA) respectfully submits these comments in response to the above referenced Notice of Proposed Rulemakings (“NPRMs”) (EP 759 and EP 760) and Notice of Proposed Statement of Board Policy (EP 757). PCA fully supports the Board’s initiatives to ensure that carrier demurrage and accessorial fee tariffs and programs are reasonable and balanced for all shippers, including hydraulic cement shippers, and contain reciprocal standards for railroad conduct to ensure the efficient movement and return of equipment by the railroads. PCA further urges the Board to finalize its pending proposal to revoke the exemption for hydraulic cement and provide cement shippers with the other rights and protections granted to other shipping stakeholders.

Identity and Interest

PCA’s members represent 91 percent of the United States’ cement production capacity and have facilities in all 50 states. PCA members rely on the railroads to meet their essential service requirements for hydraulic cement and to move their product to market, and often have no practical, feasible modal alternatives to railroad service to meet their business needs. Thus, PCA members have a strong interest in ensuring that railroad demurrage and related accessorial rules and charges are reasonable, warranted, and fairly applied to all shippers, including hydraulic cement shippers.

I. STB Docket No. EP 760, *Exclusion of Demurrage Regulation from Certain Class Exemptions*

In its NPRM served in EP 760 (“EP 760 NPRM”), the Board proposes, among other things, to amend its regulations at 49 C.F.R. § 1039.11 and § 1039.14, consistent with its existing rules and governing precedent, “to state unambiguously that the exemptions for certain miscellaneous commodities and boxcar transportation do not apply to the regulation of demurrage.” EP 760 NPRM at 5. PCA strongly supports the Board’s EP 760 NPRM.

The Interstate Commerce Commission exempted hydraulic cement from regulation more than two decades ago, although in a far different commercial and regulatory environment than exists today, absent the pervasive railroad competition that prevented railroads from abusing market power. *Rail General Exemption Authority – Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34) (ICC served July 26, 1995), 1995 WL 438371 at *4 (“*Hydraulic Cement Exemption Decision*”). Hydraulic cement is currently included under 1039.11 as one of the miscellaneous commodities to which the rail transportation of the commodity is exempt from the provisions of 49 U.S.C. sub-title IV.

However, as recognized by the Board, cement is not fully exempt from the regulatory protections of the Board. In its EP 760 NPRM, the Board confirms that “[t]he class exemptions for miscellaneous commodities and boxcar transportation already exclude the regulation of demurrage.” *Id.* at 4. In particular, the Board states that this is established under the miscellaneous commodities regulations, at 49 C.F.R. § 1039.11(a), which provide: “[h]owever, this exemption shall not be construed as affecting in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation regarding the use of equipment, whether shipper or railroad owned or leased . . .” *Id.* The Board further states that such an interpretation is also consistent with precedent, where the Board has rejected arguments that § 1039.11 precludes it from hearing demurrage disputes of commodities listed under that section. *Id.*

PCA agrees with the Board’s interpretation that the transportation of miscellaneous commodities under 49 C.F.R. § 1039.11(a), including hydraulic cement, is subject to the Board’s regulations, and to eliminate any uncertainty or ambiguity, the Board should “state unambiguously that the exemptions . . . do not apply to the regulation of demurrage.” *Id.* at 5.

However, while the proposed rules provide that miscellaneous commodities exemption “shall not apply to the regulation of demurrage,” the Board’s Proposed Policy Statement in EP 757 (“EP 757 Policy Statement”) addresses a number of practices and charges that relate to, and overlap with, demurrage but are not strictly limited to demurrage programs. These include unreasonable “congestion” charges, “not prepared for service” charges, insufficient and unreasonable notices of major changes to demurrage and accessorial tariffs, and other related accessorial charge matters. PCA does not believe that the STB intended through its proposed EP 760 NPRM to block regulatory access to cement shippers to address these related practices. However, if it did so intend, PCA submits that there is no valid legal or other basis to treat hydraulic cement differently from other non-exempt commodities with respect to its members’ right and ability to obtain regulatory protection and relief for all unreasonable railroad practices, and not just demurrage strictly.

To eliminate uncertainty and confusion, PCA respectfully suggests that the Board clarify that the exemption should not apply to the regulation of any railroad accessorial program or practice. This can be done by modifying the final rules to provide that “this exemption shall not apply to the regulation of demurrage **and other railroad accessorial programs** . . .”

Finally, while PCA strongly supports the EP 760 NPRM, as the Board has acknowledged, the proposed rules are designed to merely affirm the availability of regulatory protections for cement shippers under existing law. That confirmation is important and helpful. However, PCA respectfully submits much more needs to be done to protect cement shippers from unreasonable railroad rates and practices. As is discussed later, cement shippers should be able to participate as full stakeholders before the Board as is proposed in Docket No. 704, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*.

II. STB Docket No. EP 757, Policy Statement on Demurrage and Accessorial Rules and Charges

In its EP 757 Policy Statement, the Board seeks to provide stakeholders with the principles the Board will consider in evaluating the reasonableness of railroad demurrage and accessorial rules and charges. PCA believes that the Board has identified some of the major subjects of disagreement that have arisen between railroads and customers on such rules and charges, and believes the guidance provided by the Board is helpful.

A. General Principles

PCA agrees that the overarching purpose of demurrage is to incentivize the efficient use of rail assets, with respect to **both** customer and railroad provided equipment, and **both** customer and railroad behavior. The majority of railcars on the railroad systems today are provided by railroad customers, who lease or own the railcars. This is not a one-way street. If a railroad unduly delays shipments, those delays can strand valuable assets and harm equipment utilization and the efficient use of the assets. Also, railroad delays in the delivery of essential products such as hydraulic cement can and do harm PCA members' businesses and ability to serve their customers.

In particular, PCA strongly agrees with the Board's proposed Policy Statement that "[c]harges assessed for circumstances beyond the shipper's or receiver's reasonable control would, as a general matter, not fulfill the purpose of demurrage." EP 757 Policy Statement at 7. PCA agrees that in such instances, demurrage charges should not be assessed. *Id.* at 21. PCA also agrees with the Board's general principle that "transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges." *Id.* at 21.

While such principles are extremely important, PCA members have serious concerns that railroad tariff rules or demurrage collection practices generally do not reasonably incorporate such principles and guidance in their current form. While PCA agrees that "there may be different ways to implement and administer reasonable rules and charges," *id.* at 3-4, PCA is concerned that the Board's proposed Policy Statement lacks any requirement or mechanism to ensure that each rail carrier's tariff terms actually comply with the Board's Policy Statement and general principles, and requests that the Board take appropriate additional actions to ensure carrier compliance. In particular, PCA suggests that the Board should consider requiring carriers to (1) implement changes

to comply with the Board's Policy Statement within 90 days and (2) specifically incorporate into their rules, at least by reference, the Board's Policy Statement and provide notice to customers of their conforming changes. Such actions are necessary to ensure reasonable compliance and accountability, as well as to alert customers to the Board's governing principles for demurrage and accessorial charges.

B. Free time/Credits/Bunching

PCA generally agrees with the Board's free time principles, including that a carrier should provide a minimum of 24 hours of free time, and appropriate additional credits for each railcar. PCA also agrees that free time must reasonably take into consideration the physical capacity of the shipper or receiver to meet the allotted free time. The cement industry is subject to swings in demand based on seasonality, although often the high demand periods (*e.g.*, peak summer construction) are generally predictable. PCA members have expressed concerns that constant railroad changes to service days to their locations detrimentally impact their operations, and also detrimentally impact personnel schedules and material availability for customers. Yet the railroads' demurrage rules often do not factor into such service changes, the amount of weekly service provided, or the variability and inconsistencies of service.

For example, a PCA member recently made repairs to a facility to increase its unloading capabilities. The member engaged in full consultation with its serving rail carrier on the improvements, and informed the carrier that it could not halt shipments since it was a busy time of year and the member needed to keep inventory moving. Our member incurred a demurrage bill of over \$150,000. It tried to get the fee waived, and emphasized that it was expecting credits in the following month that would have wiped those debits out. However, the serving rail carrier would not waive the fees, and said that credit and debits do not cross over from one month to the next. Our member continued to dispute the charges, but was ultimately only able to obtain partial relief. Our member found this railroad conduct especially egregious, not only because the charges were unreasonable under the circumstances, but also because it undertook the repairs to improve business efficiencies and contribute to more efficient rail service and use of assets.

As the Board's EP 757 Policy Statement recognizes, the railroads' tariffs and demurrage collection practices generally fail to reasonably take into account "[c]hanges in historical practices on which the shipper or receiver has long relied (*e.g.*, regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties)." EP 757 Policy Statement at 12. The Board's proposed Policy Statement is helpful in this respect, as it requires carriers to afford shippers a reasonable opportunity to obtain and make use of the credits in question, and before any expiration date imposed by the rail carrier. *Id.* at 18.

On the issue of railcar "bunching" of trains, a PCA member is currently experiencing bunching of outbound shipments at one of their plants. The rail carrier has closed a local rail yard, which is causing considerable congestion, and its cars are not being interchanged from the member's local serving short-line because they are so backed up. This has resulted in 100 railcars sitting at the point

of interchange. This member has tried shipping out of a different location 3 days/week to keep cars moving and prevent bunching. The rail carrier has provided no plan to improve the situation, other than to suggest that our member try to come up with its own self-help actions to address the railroad's service failures.

PCA agrees with the proposed EP 757 Policy Statement that "[w]here rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled," and demurrage should not be charged. Too often, the railroads' tariffs completely fail to address the issue of train bunching, penalizing shippers for acts and omissions of the carriers themselves.

For these reasons, PCA again respectfully requests that the Board take proactive steps to require that carriers' tariff rules comply with and incorporate the free time, credits, bunching, and related principles and guidance addressed in the Board's proposed Policy Statement.

III. STB Docket No. EP 759, *Demurrage Billing Requirements*

In its NPRM served in Docket No. EP 759 ("EP 759 NPRM"), the Board proposes to require railroads to provide certain minimum information with any demurrage invoice, and require rail carriers to refrain from issuing invoices where the shipper is not at fault. PCA especially agrees that demurrage should only be invoiced when the charges are "accurate and warranted." EP 759 NPRM at 10. Recently, cement shippers have experienced an increase in demurrage charges and invoices as the railroads have moved towards "precision railroading," even when the customer is not actually shown to be at fault.

The intent of demurrage is to ensure the efficient use of rail assets. PCA's members work to do this at all times when shipping their products by rail. Class I rail carriers, in turn, possess the information to ascertain the true cause of the demurrage and determine demurrage responsibility. Prior to sending an invoice, rail carriers should first take steps to ascertain the true cause of the demurrage and ensure that the demurrage charges are both accurate and warranted. This approach would lead to more balanced and appropriate incentives for both customers and railroads and a reduction in demurrage.

PCA also appreciates the Board taking steps to increase the accuracy and transparency of demurrage charges. In particular, PCA supports the Board's proposal to require Class I rail carriers to include specific information in demurrage invoices, including unique identifying information of each car involved, information related to the shipment, the dates and times of phases of placement of a car, and the number of credit and debits attributable to each car. This will help reduce the vagueness of the demurrage charges which are often very hard to assess and validate. For example, many PCA members have raised concerns that current demurrage invoices make it hard to know exactly when a Class I rail carrier believes an infraction has occurred, and shippers lack the backup information to reasonably assess the charges.

IV. The Board Should Finalize its Cement Exemption Removal NPRM (Docket No. EP 704)

Finally, while PCA strongly supports each of the NPRMs related to demurrage, PCA respectfully submits that much more must be done to protect cement shippers from unreasonable railroad rates and practices.

In this respect, PCA strongly agrees with the Board's prior determination that the justification for exempting hydraulic cement from the Board's other regulatory protections no longer exists, and that cement shippers should be able to participate as full stakeholders before the Board. *See Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (STB served March 23, 2016). ("Cement Exemption Removal NPRM"). As PCA emphasized in its *Cement Exemption Removal NPRM* comments, there is no legitimate reason to block hydraulic cement shippers from accessing the other regulatory protections established by the Board to ensure reasonable practices and rates and adequate service without first bringing individual revocation petitions. *Cement Exemption Removal NPRM*, Comments of the PCA (filed July 26, 2016); *id.*, Reply Comments of the PCA (filed Aug. 26, 2016); *id.*, Summaries of Ex Parte Meetings between PCA and Chairman Ann Begeman, Vice Chairman Patrick Fuchs, and Board Member Martin Oberman (filed June 21, 2019).

As such, PCA urges the Board to promptly finalize and adopt its *Cement Exemption Removal NPRM*, as soon as possible in fulfillment of the national Rail Transportation Policy, and preferably by the end of this calendar year.

V. Conclusion

PCA appreciates the opportunity to submit these comments. PCA respectfully requests that the Board adopt its proposals, with the additional protections suggested above, and that the Board promptly finalize and adopt its *Cement Exemption Removal NPRM*. Please do not hesitate to contact me at 202-719-1977 or cfranklin@cement.org if you would like to discuss these comments further.

Sincerely,

Charles L.
Franklin

Charles Franklin

Vice President and Counsel, Government Affairs

Digitally signed by Charles L. Franklin
DN: cn=Charles L. Franklin, o=Portland
Cement Association, ou=Government
Affairs, email=cfranklin@cement.org,
c=US
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