

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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STB Docket No. EP 759
Demurrage Billing Requirements

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

**COMMENTS OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.**

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COMMENTS OF THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES

The Institute of Scrap Recycling Industries (“ISRI”) hereby submits its comments on the proposed Policy Statement on Demurrage and Accessorial Rules and Charges,¹ proposed rules on Demurrage Billing Requirements,² and proposed rules on Exclusion of Demurrage Regulation from Certain Class Exemptions³ issued by the Surface Transportation Board (“STB” or “Board”) on October 7, 2019.

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process,

¹ Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. EP 757 (served October 7, 2019) (“Policy Statement”).

² Demurrage Billing Requirements, STB Docket No. EP 759 (served October 7, 2019) (“Billing Requirements NPRM”).

³ Exclusion of Demurrage Regulation from Certain Class Exemptions, STB Docket No. EP 760 (served October 7, 2019) (“Class Exemption NPRM”).

broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated \$117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

The U.S. scrap recycling industry is heavily dependent on a reliable and cost-effective transportation network of rail, trucks, barges, and ships to receive and deliver scrap materials. Rail transportation is a critical mode for shipments of ferrous and nonferrous scrap, especially at longer distances beyond 200 miles, and many of our members are captive customers who are served by only one Class I rail carrier. Due to the unique nature of shipping bulk scrap metal, there are many situations where rail is the only mode shipping this material. ISRI's rail shippers are subject to the railroads' demurrage and accessorial tariffs and have actively participated in the Board's recent proceedings to express their concerns over the reasonableness of existing demurrage and accessorial rules and charges.

The Board's proposed policy statement and rules stem from the discussions and concerns raised by a broad cross-section of rail customers during the oversight hearing on demurrage and

accessorial charges.⁴ ISRI and several of its members provided oral and written testimony⁵ and post-hearing comments⁶ to the Board. Thus, ISRI has a strong interest in the outcome of these related proceedings.

ISRI strongly commends the Board for addressing some of the major concerns of ISRI, as well as other industry stakeholders, regarding recent changes in demurrage and accessorial charges and practices as implemented by Class-I railroads as part of Precision Scheduled Railroading (“PSR”). ISRI strongly supports the Board’s proposals and hereby provides its comments on various issues raised in the three Board decisions.

EP 757 – POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

In the proposed Policy Statement, the Board proposes two main principles that would be used in evaluating the reasonableness of demurrage and accessorial charges. These principles are (i) “demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets,” and (ii) “transparency and mutual accountability by both rail carriers and shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial charges.”⁷ The Board also adds that the demurrage charges should reflect reasonable financial incentives and revenue generation should not be itself a purpose.⁸ ISRI strongly agrees that railroads’ demurrage rules and practices must be consistent with their long-recognized purpose of promoting an efficient rail network and that they should not serve as their own profit center. ISRI further believes that these general principles provide valuable guidance for the

⁴ Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019).

⁵ Submission of the Institute of Scrap Recycling Industries, Inc., STB Docket No EP 754 (May 8, 2019) (“ISRI Testimony”).

⁶ Post-hearing letter of ISRI, STB Docket No EP 754 (June 6, 2019) (“ISRI Post-Hearing Comments”). See also, ISRI Letter on Changes to NS Demurrage Tariffs, STB Docket No EP 754 (July 12, 2019) (“ISRI Letter”).

⁷ Policy Statement at 21.

⁸ Id.

future administration of demurrage and accessorial charges and practices by enabling industry stakeholders to evaluate reasonableness themselves in developing and applying such rules and practices.

The proposed Policy Statement also includes principles related to (a) free time, (b) bunching, (c) overlapping charges, (d) invoicing and dispute resolution, (e) credits, and (f) notice of major tariff changes. ISRI hereby provides its comments on these specific issues.

a) Free Time

At the oversight hearing, ISRI and many other rail customer representatives expressed serious concerns about reductions in free time that have resulted in substantial increases in demurrage charges that cannot be avoided. ISRI commends the Board for clarifying in the Policy Statement that the free time period provided by rail carriers “must be reasonable and consistent with the purpose of demurrage.”⁹ Additionally, ISRI appreciates the Board taking a clear stance against the unreasonableness of “reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service and do not serve to incentivize the behavior to encourage the efficient use of rail assets.”¹⁰ In this regard, ISRI strongly agrees with the Board’s concerns about the reasonableness of assessing demurrage charges that result from carrier-caused circumstances that are beyond railroad customers’ control, since such charges would not be consistent with the efficiency-enhancing purpose of the charges.¹¹

However, ISRI believes that the Board should take a stronger stance against the unreasonableness of current demurrage rules that provide only 24 hours of free time for system

⁹ Id. at 11.

¹⁰ Id. at 12.

¹¹ Id. (the Board identified the following circumstances: “charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by the missed switch); charging demurrage for transit days to move cars from constructive placement in remote locations; or charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the shipper or receiver has had a reasonable opportunity to process the excess volume of incoming cars.)

cars, and zero days of free time provided for private rail cars. As ISRI explained in its previous filings in STB Docket No. 754, the recent reduction in free time to “zero days for private cars has made it virtually impossible for some ISRI members to avoid demurrage/storage charges.”¹²

When shippers and receivers do not have the ability to avoid these charges because the current free time regime itself is too narrow and, thus, unreasonable, the charges cease to incentivize the shippers and receivers to use rail assets more efficiently. To the extent that the railroads provide credits for any service irregularities, ISRI considers this as merely shifting the burden to the shippers or receivers to prove the carrier-caused circumstances. Thus, ISRI believes that the Board should consider declaring in the final Policy Statement that providing zero days of free time for private cars is presumed to be an unreasonable practice unless the railroads can rebut that presumption based on the existing facts and circumstances.

b) Bunching

In the proposed Policy Statement, the Board explained 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.”¹³ The Board added that this principle applies to both bunching caused by the serving carrier, as well as bunching caused by an upstream carrier.¹⁴ ISRI strongly agrees with the Board’s position on this issue. ISRI previously identified bunching as a “recurring service problem resulting in increased demurrage/storage charges.”¹⁵ ISRI continues to believe that bunching is a prevalent problem in the industry, and agrees strongly that it is not reasonable to

¹² ISRI Testimony at 8.

¹³ Policy Statement at 14.

¹⁴ Id.

¹⁵ ISRI Testimony at 5.

assess demurrage (or fail to provide credits) when the cause of the car detention arises from bunching by the railroads.

Overlapping Charges. The Board's proposed Policy Statement includes a section on overlapping charges (e.g., "congestion" charge assessed by NSR and "not prepared for service" charge assessed by UP).¹⁶ Accordingly, the Board expressed its concerns about the reasonableness of rules and practices which seek "to impose a charge, in addition to otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid."¹⁷ ISRI strongly agrees with the Board's views, since ISRI also expressed its concerns about the "congestion" and "not prepared for service" charges that had been assessed by NSR and UP prior to the oversight hearing,¹⁸ respectively, and that were abolished following an outcry from the industry stakeholders during the oversight hearing. ISRI thanks the Board for addressing these concerns.

c) Invoicing and Dispute Resolution

ISRI commends the Board for expressing its "concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim."¹⁹ ISRI will address the Board's proposal in connection with invoicing and dispute resolution below separately.

d) Credits

The Board's Policy Statement addresses two major issues in connection with determining the reasonableness of credit rules and practices: (i) the Board stated that it would take into account "whether the shipper or receiver has been afforded a reasonable opportunity to make use

¹⁶ Policy Statement at 13.

¹⁷ Id.

¹⁸ ISRI Testimony at 6-7.

¹⁹ Policy Statement at 17.

of the credits in question, before any expiration date imposed by the rail carrier,” and (ii) the Board suggested that railroads could compensate shippers and receivers “for unused credits at the end of each month, rather than the credits merely expiring.”²⁰ In its previous filings, ISRI raised concerns about the expiry of credits at the end of each month which can restrict its members from benefitting from the credits that would otherwise reduce their demurrage liability that resulted from circumstances beyond their control.²¹ ISRI continues to believe that such practice diminishes the value of the credits, and agrees that credits must be available for a continuing period of time to permit the rail customer to obtain their value and that failure to do so is unreasonable.

e) Notice of Major Tariff Changes

ISRI previously raised concerns about the lack of sufficient notice provided by the railroads in connection with the recent changes in demurrage rules and practices.²² ISRI commends the Board for addressing this issue in the proposed Policy Statement. Specifically, the Board stated that the “railroads should provide sufficient notice of major changes to demurrage and accessorial tariffs to enable shippers and receivers to evaluate, plan, and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges.”²³ The Board further encouraged the railroads to take other actions to help their customers in complying with tariff changes, including “delayed billing and working with those that needed more flexibility.”²⁴ ISRI believes that 45 days’ notice provided by the railroads in connection with the recent changes is unreasonable, “and results in a revenue windfall for the railroads,” since such amount of time is not sufficient “for many customers to adjust their operations (e.g., building or acquiring new

²⁰ Id. at 18.

²¹ See ISRI Testimony at 9. See also ISRI Letter at 2.

²² ISRI Testimony at 10.

²³ Policy Statement at 19.

²⁴ Id.

infrastructure, adjusting inventory, or altering plant shift schedules).”²⁵ Thus, ISRI strongly supports the Board’s views on the notice of major changes.

In sum, ISRI believes that the Policy Statement appropriately outlines key principles and examples of reasonable practices that will be considered by the Board in evaluating the reasonableness of demurrage and accessorial rules and practices, while providing flexibility to account for differing factual circumstances inherent in the receipt and shipment of goods by rail. The non-binding nature of the Policy Statement accounts for the fact-specific circumstances that the Board may have to adjudicate but outlines a non-exhaustive list of principles that clarify circumstances that would likely constitute unreasonable demurrage and accessorial rules and practices.

EP 759 – DEMURRAGE BILLING REQUIREMENTS

The Board initiated a rulemaking proceeding in connection with the demurrage billing requirements. Accordingly, the Board proposes to (i) impose certain minimum information requirements on Class-I railroads pertaining to demurrage invoices, (ii) require railroads to ensure that the demurrage charges are accurate and warranted before sending the invoices to their customers, and (iii) require railroads to send the demurrage invoices directly to shippers, if the railroad has been notified of an agreement between the shipper and the warehouseman pertaining to shipper’s responsibility for paying demurrage charges.²⁶

ISRI strongly agrees with the Board’s proposals imposing certain minimum information requirements and requiring railroads to review the invoices before sending them to their customers.

²⁵ ISRI Testimony at 10.

²⁶ Billing Requirements NPRM at 8.

ISRI believes that the minimum information standards listed in the proposal address many of the issues that ISRI members have been concerned about. The lack of adequate information in demurrage invoices impedes ISRI members' ability to audit and challenge the charges, as it is difficult to determine if they were actually responsible for the car detention that resulted in the charges. Providing more detailed information with demurrage invoices will promote greater efficiencies in their review and evaluation and could facilitate adjustments to rail customer behavior to avoid future demurrage charges.

Nonetheless, ISRI strongly believes that the Board should consider requiring the railroads to include several additional elements of information in their demurrage bills to assist rail customers in validating demurrage charges. Specifically, ISRI recommends that the following elements also be included:

- Original estimated time of arrival ("ETA"). ISRI is aware that at least one Class I railroad, NSR, provides credits for early or late arrivals of railcars if its original estimated time of arrival ("ETA") provided to its customers through its online platform is not met.²⁷ Our members have reported, however, that NS will replace the original ETA for a given car with a new date, if any delays occur with respect to that car. Consequently, if NSR's rail customers do not keep track of the original ETA issued by taking screen shots or printing reports before it changes, then they risk receiving fewer (or perhaps zero) credits than what they are actually entitled to receive. In order to avoid this burdensome and unfair administrative process of tracking original ETAs, ISRI believes that the original ETA should also be required to be provided with the railroads' demurrage bills.

²⁷ See NS Tariff 6004-D at Item 950.

- For credits applied due to railroad-caused delays, the date and nature of the event resulting in the credits should be provided (e.g. missed switch).
- At open gate facilities railroads should provide the car arrival date and time, in addition to car numbers, and should provide car inventory on hand at the serving yard.

Furthermore, ISRI believes that the Board's proposal to require railroads to ensure that the demurrage charges are accurate and warranted before sending the invoices to their customers addresses a very important aspect of demurrage rules and practices. ISRI has previously expressed its concerns about "meritless demurrage bills sent by railroads," and urged the Board to "require railroads to verify and audit their demurrage bills before sending them to their customers to ensure greater accuracy and reduce disputes."²⁸

In its NPRM, the Board proposed to exclude Class II and Class III railroads from the proposed demurrage billing requirements since most of the concerns expressed at the hearing involved Class I railroads and due to its concerns that compliance costs may be more difficult for smaller railroads to absorb. Although ISRI agrees that the majority of rail customer concerns involved Class I railroads, many Class II and III railroads mimic the rules adopted by the Class I and ISRI does not believe that the compliance costs would be too burdensome, especially for Class II carriers. Additionally, by applying the same billing rules to all railroads, a more uniform standard would be applied across the industry which would also help to promote efficiencies in demurrage payments and dispute resolution.

²⁸ ISRI Post-Hearing Comments at 3.

EP 760 – EXCLUSION OF DEMURRAGE REGULATION FROM CERTAIN CLASS EXEMPTIONS

Finally, the Board initiated another rulemaking proceeding to amend its regulations governing exemptions for certain commodities, including ferrous scrap, and boxcar transportation in order to clarify that demurrage as applied to such exempt commodities and traffic continues to be subject to Board regulation.²⁹ Specifically, the Board proposes to amend 49 C.F.R. § 1039.11 and § 1039.14 “to state unambiguously that the exemptions for certain miscellaneous commodities and boxcar transportation do not apply to the regulation of demurrage,”³⁰ and to amend 49 C.F.R. § 1039.10 to partially revoke “the exemption to permit the regulation of demurrage related to non-intermodal transportation of certain agricultural commodities.”³¹

ISRI strongly supports the Board’s proposals, especially since, iron and steel scrap materials are among the commodities that have been exempted from STB regulation under 49 C.F.R. § 1039.11. As explained by ISRI in detail in the Board’s pending EP 704 proceeding which concerns revocation of the iron and steel scrap exemption, access to STB regulatory oversight and allowing for direct recourse against the railroads is essential for the iron or steel scrap industry.³² Indeed, in proposing to revoke the commodity exemption for agricultural commodities with regard to demurrage which is required based on the differences between § 1039.10 and § 1039.11 , the Board recognized the importance of this principle in finding that the Board otherwise “would need to grant partial revocation of the class exemption as it applies to demurrage in every individual case, which may add to the complexity, length and cost of such

²⁹ Class Exemption NPRM at 1.

³⁰ *Id.* at 5.

³¹ *Id.* at 7.

³² Reply Comments of the Institute of Scrap Recycling Industries, Inc. to Memoranda Summarizing Ex Parte Communications, STB Docket No. EP 704 (July 2, 2019) at 9.

proceedings to the parties and the Board.”³³ ISRI contends that this principle applies not only to demurrage but also to other important areas of Board regulation concerning rail service, rates, competitive access and more. Lastly, while ISRI acknowledges that court and agency decisions concluded that the exemptions for the iron or steel scrap industry do not apply to the Board’s regulation of demurrage,³⁴ it believes that it is of utmost importance to expressly clarify this conclusion in the Board’s regulations to avoid any confusion. Accordingly, ISRI strongly supports adoption of the Board’s proposed rules in EP 760.

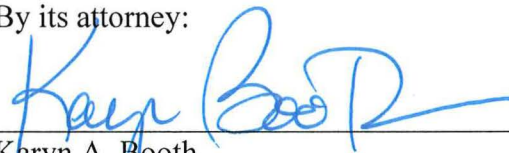
CONCLUSION

ISRI commends the Board for addressing these critical issues related to demurrage and accessorial charges. ISRI strongly agrees with the Board’s views in the proposed Policy Statement and rules issued in STB Docket Nos. EP 757, 759 and 760. ISRI believes that these proposals, if promulgated, will facilitate the resolution of many issues that ISRI members have been experiencing with the current demurrage and accessorial charges rules and practices. ISRI appreciates the opportunity to comment on the proposed rules, and thanks the Board for taking a strong stance on many of the issues raised in STB Docket No. EP 754.

Respectfully submitted,

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³³ Class Exemption NPRM at 6.

³⁴ *Id.* at 5.