

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Docket No. EP 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) is pleased to provide its comments to the Surface Transportation Board’s (“STB” or “the Board”) Notice of Proposed Statement of Board policy on Demurrage and Accessorial Rules and Charges (the “Policy Statement”).¹ AFPM applauds STB’s work to date on the unfair and overly burdensome demurrage and accessorial policies of Class I carriers.^{2,3} Specifically, on May 22-23, 2019, STB held an oversight hearing on railroad demurrage and accessorial charges.⁴ As the hearing readily demonstrated, demurrage and accessorial charges, and recent changes to those charges, are a major concern for rail shippers, including AFPM members. The spread of Precision Scheduled Railroading (“PSR”) among the Class I carriers has contributed to significant increases in demurrage charges, abrupt changes in longstanding billing policies, and very little communication between rail carriers and their customers about the charges.

In response to shippers’ concerns voiced at the May 2019 hearing and in other venues, STB has taken new actions, including Dockets EP 757 and 759, to address the obvious faults and unreasonableness of the current implementation of demurrage fees by rail carriers. We are encouraged by STB’s movement on this serious issue and its related proposals (*e.g.*, EP 759 - STB’s Demurrage Billing Requirements Notice of Proposed Rulemaking).⁵

¹ See 84 *Fed. Reg.* 54717, “Demurrage Policy Statement.” Notice of Proposed Statement of Board Policy, Docket No. FD EP 757 proposed October 11, 2019, <https://www.federalregister.gov/documents/2019/10/10/2019-22200/policy-statement-on-demurrage-and-accessorial-rules-and-charges>. AFPM has also provided comments on EP 757.

² See STB Rate Reform Task Force Report https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf

³ See December 2018 letters from Chairman Begeman to the Class I railroads requesting updates on Demurrage and Accessorial Charges, https://www.stb.gov/stb/elibrary/NDP_Correspondence.html

⁴ See 84 *Fed. Reg.* 15662, “Oversight Hearing on Demurrage & Accessorial Charges.” Notice of Hearing, Docket No. EP 754 published April 16, 2019, <https://www.federalregister.gov/documents/2019/04/16/2019-07522/oversight-hearing-on-demurrage-and-accessorial-charges>.

⁵ See 84 *Fed. Reg.* 55114, “Demurrage Billing Requirements.” Notice of Proposed Rulemaking, Docket No. FD EP 759 proposed October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22202/demurrage-billing-requirements>

Through this proposed policy statement, the Board expects to facilitate more effective private negotiations and problem solving between rail carriers and shippers and consignees on issues concerning demurrage and accessorial rules and charges. It is the Board's hope that this policy document will "help prevent unnecessary future issues and related disputes from arising; and, when they do arise, to help resolve them more efficiently and cost-effectively." It should be noted that Board is not making any binding determinations or requiring complete uniformity across rail carriers' demurrage and accessorial rules and charges. However, when adjudicating specific cases, the Board will consider all facts and arguments presented in such cases.

AFPM member companies have noticed an increased frequency in the issuance of demurrage fees as well as an increased frequency in price hikes in those fees (quarterly vs. annual). This fee escalation has been paired with a more unpredictable service environment. How demurrage fees are assessed, noticed, frequently raised, challenged, and adjudicated varies drastically across the rail industry. This lack of consistency, and any oversight, is overly burdensome and unfair for rail shippers. While refiners and petrochemical manufacturers have felt the negative impacts of demurrage fees and the current processes related to them, Class I rail carriers have collected almost \$1 billion dollars in demurrage charges from rail shippers.⁶ The current practices related to demurrage fees demonstrate the clear problems with the status quo.

AFPM looks forward to working with the Board to ensure demurrage is for its' intended purposes; to compensate rail asset owners for the costs incurred when their assets are held up beyond a reasonable time and help promote an efficient rail network and to curb the practice of using demurrage as a revenue generator for the railroads. AFPM appreciates your consideration of written comments from all impacted stakeholders and believes this policy statement is an important first step in addressing an important issue.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics and synthetic resins — were delivered by rail in the U.S. in 2018.⁷ To that end, three principles guide AFPM's efforts around transportation and infrastructure issues impacting our members:

- 1. Safety & Security** - Ensure the ability to ship feedstocks and products, safely and securely.

⁶ Surface Transportation Board Non-Docketed Public Correspondence, Accessed 11/6/19, https://www.stb.gov/stb/elibrary/NDP_Correspondence.html.

⁷ Rail Traffic Data - Association of American Railroads. (2019). Retrieved from <https://www.aar.org/data-center/rail-traffic-data/>

2. **Free & Open Markets** - Promote free and open energy markets that benefit the U.S. economy.
3. **Ability to Build & Repair** - Ensure the ability to build, use, repair, maintain and replace energy infrastructure.

Refineries and Petrochemical manufacturers across the country rely on a robust rail network as an essential part of their supply chains. Over 75% of refiners and petrochemical manufacturers are only served by a single railroad (*e.g.*, captive) and thus have been negatively impacted by monopolistic practices including excessive freight rail rates, escalating and poorly communicated demurrage fees, and lack of competitive rail service for too long.⁸

The Board has an important oversight role in looking at the impact of freight rail policies on rail shippers, and this includes demurrage charges. As is pertinent to this policy statement, parties from a broad range of industries raised concerns about demurrage practices at the May hearings, including issues with the reduction in free time, bunching, overlapping charges, credit procedures, and an overall lack of communication. Both the written and verbal testimony related to the May hearing demonstrated that change and updates are essential to ensure a fair system is in place. The hearing also clearly showed that demurrage charges, as they are being currently implemented, are not achieving the intended purpose of promoting an efficient rail network and for compensating asset owners for the costs incurred when their assets are held up beyond a reasonable time. To this end, AFPM's comments on the policy statement focus on improvements to the policy that will improve fairness in demurrage practices, improve communication between rail carriers and rail shippers, halt abuses of demurrage fees, and provide clarity on the type of fees that are being levied and the circumstances related to those fees.

To truly improve demurrage regulations and practices the Board must address fundamental changes to the rail industry that have rendered the demurrage regulations and practices outdated and unfair. Demurrage charges were developed at a time when the railroads owned the rail tank cars and the rail industry was full of competing railroads. As this is no longer the case, AFPM encourages the Board to consider regulatory action that would update clearly outdated regulations related to demurrage. Specifically, the Board should consider providing rail shippers who own rail assets the ability to assess demurrage fees on the railroads. This would give rail shippers an avenue to be compensated for the costs incurred when their assets are held up beyond a reasonable time – which is the stated purpose of demurrage fees. While AFPM acknowledges, the changing dynamics of the rail industry warrant further consideration and a larger scale update of the regulations governing demurrage.

III. BACKGROUND

Pursuant to 49 U.S.C. § 10702(2), the Interstate Commerce Commission Termination Act ("ICCTA"), requires that a railroad "establish reasonable...practices" related to "transportation and service." Further, "[i]n section 10702, Congress did not limit the Board to a single test or

⁸ Escalation Consultants, "Competition at U.S. Freight Rail Stations by State." <https://railvoices.org/wp-content/uploads/2012/12/US-Map.pdf>. Accessed October 24, 2019.

standard for determining whether a rule or a practice is reasonable; rather, it gave the Board ‘broad discretion to conduct case-by-case, fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.’”⁹ This broad discretion applies to STB’s handling and oversight of demurrage charges issued by rail carriers.

The principle underlying demurrage is straightforward-when a person or entity holds someone else’s assets (*i.e.*, a rail car) beyond a reasonable period of time, it is taking up an asset for which the owner of that asset should be compensated. At the same time, when a person or entity holds someone else’s assets beyond a reasonable time, it can negatively impact the fluidity of the overall rail network. The Board even noted that “[d]emurrage charges serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient.”¹⁰ Moreover, “when a shipper’s privately-owned rail cars are idled on the railroad’s tracks, it is depriving the railroad of the use of that track.”¹¹ An efficient rail network is in the best interests of both rail carriers and rail shippers, therefore a reasonable and workable demurrage system has the potential to benefit all parties.

It must be noted the rail industry has changed tremendously since the adoption of demurrage regulations and implementation of demurrage practices. In the last three decades there has been considerable consolidation of the Class I railroads and ownership of tank car assets has shifted from the rail carriers to the rail shippers. Demurrage charges were developed at a time when the railroads owned the rail tank cars and the rail industry was competitive. Today, however, almost all tank cars are owned by rail shippers or rail lessors, not by the few Class I railroads left. Further railroads do not pay demurrage to shippers when they hold their assets (*i.e.*, a rail car owned by a rail shipper) beyond a reasonable period of time. The changing dynamics of the rail industry have created an unfair demurrage system where rail carriers hold all the power and rail shippers are the only entities punished for the mishandling of assets resulting in network congestion. The problems with the current system warrant a larger scale update of the regulations governing demurrage beyond a policy statement.

Under 49 U.S.C. § 10746, “[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to; 1) freight car use and distribution; and 2) maintenance of an adequate supply of freight cars to be available for transportation of property.” Rail shippers share the goal of ensuring an efficient rail network, but demurrage charges assessed only against the shipper are unfair and demonstrate how outdated current demurrage regulations are. Moreover, there is great concern as to how rail carriers compute demurrage charges, establish rules related to their charges, and communicate those

⁹ *North America Freight Car Ass’n, et al. v. BNSF Railway Co. (“NAFCA”)*, STB Docket No. NOR 42060 (Sub-No. 1), slip op. at 8 (STB served January 26, 2007) (quoting *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005))

¹⁰ *NAFCA*, slip op. at 8. See also 49 CFR § 1331.1.

¹¹ *R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102, slip op. at 4 (STB served July 20, 2010).

charges. Further, the process of challenging non-meritorious charges is incredibly flawed due to a lack of oversight and inconsistency in the billing processes.

As noted, demurrage is subject to Board regulation under 49 U.S.C. 10702 and 49 U.S.C. 10746. These statutes require railroads to establish reasonable rates and transportation-related rules and practices, and to determine demurrage charges alongside rules related to those charges, in a way that will fulfill national needs relating to freight car use, distribution, and maintenance of an adequate car supply.

In 2018, Class I rail carriers levied almost \$1 billion dollars in demurrage charges on top of over \$900 million in other accessorial charges to rail shippers. As an entire industry, the amount collected for demurrage fees has increased over 200% since 2000.¹² Moreover, the rate at which demurrage fees are levied has increased. One AFPM member has engaged in 56 demurrage challenges since 2016 and as a result, recouped over five hundred thousand dollars. The dramatic increase in the number of times fees are assessed and the amount of the fees collected is evidence that the railroads are using this practice in an unreasonable way. In addition, demurrage fees particularly impact hazardous materials shipments, including AFPM members' products. AFPM member companies have noted that demurrage fees for hazardous materials shipments are often double those of non-hazardous materials.

Rail shippers are often saddled with burdensome demurrage tariff charges that are easily triggered; whereas rail carriers face limited or even no penalties should they not provide an adequate level of service. This situation seems inherently unreasonable and unbalanced, particularly with ownership of rail cars now largely being the primary responsibility of rail shippers and lessors—not the railroads. With many refiners and petrochemical manufacturers captive to a single rail carrier, they are at the mercy of rail carriers regarding service, rate determinations, and demurrage fees. Our members are frequently faced with late or partial rail shipments in direct conflict with agreed-upon service agreements. The result is lost profits, angry customers, and partial orders that disrupt the supply chain and goods delivered to the American consumer. In addition, delayed shipments cause refineries and petrochemical manufacturers to incur overtime or trucking costs to make up for a missed railcar.

The following comments address STB's proposal to develop principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. The desired intent of policy statement is laudable - to facilitate more effective private negotiations and problem solving between rail carriers and shippers and receivers on issues concerning demurrage and accessorial rules and charges; to help prevent unnecessary future issues and related disputes from arising; and, when they do arise, to help resolve them more efficiently and cost-effectively. These are goals upon which shippers and carriers alike can agree. STB has made it very clear in this policy statement that they are "not making any binding determinations" and they are not "promoting complete uniformity across rail carriers' demurrage and accessorial

¹² 2018 data retrieved from Surface Transportation Board Non-Docketed Public Correspondence, Accessed 2/22/19, https://www.stb.gov/stb/elibrary/NDP_Correspondence.html. All other data retrieved from Surface Transportation Board Complete R-1 Railroad Annual Reports, Accessed 2/21/19, https://www.stb.gov/stb/industry/econ_reports.html.

rules and charges.” The Board is simply outlining the principles they will consider when adjudicating specific cases.

AFPM supports the intention of this policy statement, however we remained concerned that without binding requirements, the impact of the statement may be minimal. While AFPM provides comments on the policy statement, we encourage STB to examine any and all improvements at its’ disposal including binding regulatory actions. While STB believes “that there may be different ways to implement and administer reasonable rules and charges,” the lack of firm requirements and uniformity in demurrage procedures prompted the concerns raised by so many rail shippers at the May 2019 Hearings.

IV. COMMENTS ON THE POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

Below are AFPM’s comments on the demurrage and accessorial policy statement organized by topic area. These comments focus on ways to foster more reasonable and fair demurrage practices, improve communication between rail carriers and shippers, halt the clear abuses of demurrage fees, and provide clarity on the type of fees that are being levied and the circumstances related to those fees. AFPM also suggests the Board consider developing binding requirements of regulations related to specific demurrage issues.

A. FREE TIME

In the railroad industry, “free time” is the period allowed for a shipper or receiver to finish using rail assets and return them to the railroad before demurrage charges are assessed. Free time is a critical aspect of demurrage charges, the purpose of which, as noted above, is “to promote car efficiency by penalizing undue detention of cars.”¹³ The concept of “free time” was a major focal point of the May 2019 oversight hearing as much of the concerns related to the recent abusive demurrage practices and increases in fees levied relates following abrupt changes in the free time offered by the railroad. The issue at hand is not only what is a reasonable amount of free time, but also how changes in free time are considered and calculated by the railroad, and lastly how those changes are communicated from rail carriers to shippers.

The uniform code that historically governed demurrage allowed 48 hours of free time for loading and unloading until 1975, when the ICC approved a reduction of free time for loading to 24 hours. In 1985, the ICC allowed rail carriers to establish individualized demurrage and storage rules and charges. However, until recently, it remained common practice for a rail carrier to provide at least 24 hours of free time (or one credit day) to load rail cars and at least 48 hours of free time (or two credit days) to unload cars.

In recent years, the Board became aware that Class I carriers had implemented or announced significant tariff changes that made or would make, among other things, substantial reductions to the free time allowed to shippers and receivers. To monitor PSR implementation, STB Chair Begeman requested data from Class I railroads on demurrage fees. This data, along with numerous shippers’ testimony in the May 2019 demurrage hearings demonstrate that the

¹³ *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co.*, [253 U.S. 319](#), 40 S. Ct. 532, 533, 64 L. Ed. 928.

spread of PSR paired with widespread and abrupt reductions in free time were contributing factors to exponential rises in demurrage fees collected. While rail carriers often cite a desire to improve cycle times, service reliability, and overall network fluidity as the rationale to reduce free time, rail shippers failed to see these benefits and in fact were frequently saddled with demurrage and reduced and unpredictable service.

The Board notes in their proposed policy statement that they are troubled by the adverse impacts of reductions in free time to rail users and they have serious concerns about the reasonableness of reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service. AFPM shares these concerns. To address these concerns, STB suggests free time must be “reasonable” and “consistent” with the purposes of demurrage. The Board is also concerned that, in some circumstances, such reductions may be inconsistent with rail carriers’ statutory charge to compute demurrage and establish related rules in a way that fulfills the national needs specified in § 10746. The Board believes that reductions in free time may be incompatible with the overarching purpose of demurrage—namely, to encourage the efficient use of equipment by penalizing the undue detention of cars. The Board was particularly concerned when carrier-caused circumstances give rise to a situation in which it is beyond the shipper’s or receiver’s reasonable control to avoid charges, demurrage.

In the policy statement, the Board provides some parameters that could be used to gauge whether the provision of a limited amount of free time is justified. Specifically, the Board recognizes that reductions in free time might be justified if there were evidence to show, by way of example, that:

- Advances in technology or productivity, or other changes across the industry, have made compliance with the shorter time frames reasonable to achieve;
- Service improvements resulting from more efficient use of rail assets would facilitate the ability of shippers and receivers to adjust to the reductions;
- Reductions are necessary to address systemic problems with inefficient behavior or practices by shippers or receivers; or
- Rail carriers have implemented tariff provisions or program features, such as credits for bunching, service variabilities, and certain capacity constraints, that place the avoidance of demurrage charges within the reasonable control of a shipper or receiver.

AFPM supports STB’s summary of issues surrounding reductions in free time but seeks more clarity and detail in the policy statement. As written, the policy statement only justifies what would be an acceptable change in free time and does not list out what would be, “by way of example” considered an unacceptable practice. Further, three of the four elements listed as examples for justified changes are overly broad and subjective. It is likely that rail carriers will point to PSR as rationale to meet the first three examples. While from the railroads’ perspective this would be a perfectly “reasonable” justification, as Board members heard in testimony, the data presented to support PSR’s may not be telling an accurate story. AFPM is supportive of the final example related to program features within the reasonable control of a shipper or receiver as this would encourage fairness.

In addition, AFPM suggests the Board consider adding additional examples to its policy statement that would detail what would constitute unacceptable changes in free time. These could include: consideration of who owns the asset, consideration of days serviced related to free time allowed; a threshold for an acceptable percentage of reduction of free time; acceptable notice of reductions in free time; reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service; reductions related to potential infrastructure build-outs; and carrier-caused circumstances giving rise to a situation beyond the shipper's or receiver's reasonable control to avoid charges.

AFPM also supports an STB policy that would recognize the tremendous changes the rail industry has undergone since the adoption of demurrage regulations and implementation of demurrage practices. With almost all tank cars now owned by rail shippers or rail lessors, STB should embrace regulations or policy which recognize this as the current ones do not. The Board should prohibit rail carriers from issuing demurrage charges on shipper, or lessor, owned assets unless a delay is clearly related to shipper action. Further, the Board should consider allowing for the rail carrier to compensate a rail shipper that owns tank cars (through a demurrage charge), when the circumstances around a delay are due to carrier actions.

B. BUNCHING

The term “bunching” in the rail context refers to the accumulation of rail cars for loading or unloading in excess of rail orders often the result of rail car deliveries that are not reasonably timed or spaced. Bunching-related issues were identified as a common problem by rail users across a broad range of industries at the May hearing and in other venues. AFPM members note that they regularly experience bunched deliveries of rail cars and frequently are charged demurrage for related backlogs that are beyond their span of control. This is often the result of sporadic and unpredictable services. Bunched deliveries increased in frequency following changes to rail carriers’ operating plans and in the refining and petrochemical manufacturing context not only impact rail network fluidity, but plant operation. AFPM members have also noted that recent operating changes and actions by rail carriers, most likely related to PSR, are resulting in rail car deliveries that are not “reasonably timed or spaced,” which the shipper or receiver cannot prevent.

In the policy statement, the Board notes that “[d]emurrage disputes pertaining to bunching are best addressed in the context of case specific facts.”¹⁴ They continue to note that when 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 purposes of demurrage is not fulfilled. Thus, STB suggests that when “analyzing the appropriateness of demurrage charges, rail carriers should consider these principles both when cars originate with the serving carrier and when cars originate on an upstream carrier.”¹⁵ AFPM strongly supports this statement and the idea that the entire trip should be considered as part of this analysis.

¹⁴ See 84 *Fed. Reg.* 54722, “Demurrage Policy Statement.” Notice of Proposed Statement of Board Policy, Docket No. FD EP 757 proposed October 11, 2019, <https://www.federalregister.gov/documents/2019/10/10/2019-22200/policy-statement-on-demurrage-and-accessorial-rules-and-charges..>

¹⁵ *Id.*

During the May hearings, rail carriers frequently cited automatic billing processes and their role in issuing demurrage charges. While these systems may improve efficiencies, they are not without their flaws, and can result in non-meritorious billing, as AFPM members have noted. The STB policy statement also notes that rail carriers should consider whether their automatic billing processes sufficiently account for carrier-caused bunching (for cars that originate on their network or upstream, and bunching attributable to missed switches), and in resolving any related disputes. AFPM supports this idea and points to the companion docket on billing requirements for potential suggestions on how to improve automatic billing.

AFPM supports STB's summary of issues related to bunching. We would particularly note the need to recognize the issues beyond a shipper's control, and the railroad's need to consider the entirety of the movement including previous segments and first and last miles. Moreover, as bunching is often a result of changes in trip plans, AFPM suggests the Board consider establishing a tolerance related to original scheduled delivery date (i.e., +/- a number of days or a percentage off the target date). Should a railroad exceed the acceptable tolerance, it would then be deemed unreasonable to charge a demurrage fee on a rail shipper. This could incentivize rail carriers to develop more accurate delivery estimates and thus reduce bunching and improve network fluidity. Lastly, as previously stated rail shippers should be fairly compensated for the costs incurred when their assets are held up beyond a reasonable time due to bunching.

C. OVERLAPPING CHARGES

During the May 2019 oversight hearing, rail shippers informed the Board of the practice that effectively equates to double billing or double recovery for the rail carrier. In some instances, rail carriers have implemented a secondary charge that effectively serves the same purpose (incentivizing the prompt removal of cars held in railroad yards) as demurrage charges, to which the cars in question were also subject. While two rail carriers who implemented such charges have since responded to these concerns, the Board nevertheless notes that, when adjudicating specific cases, it would have significant concerns about the reasonableness of any tariff provision that sought to impose a charge, in addition to the otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid.¹⁶

AFPM supports STB's position related to overlapping charges or double recovery. STB should deem any tariff provision that sought to impose a charge, in addition to the otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid, as unreasonable. AFPM members also noted the "not ready for service," charges which was identified as one type of overlapping charge, is very subjective and difficult for shippers to challenge unless they have photographic evidence to support the claim. AFPM suggests the Board consider language in its policy statement about billing accuracy. Specifically, the Board should note that demurrage billing information should include

¹⁶ See 84 *Fed. Reg.* 54722-23, "Demurrage Policy Statement." Notice of Proposed Statement of Board Policy, Docket No. FD EP 757 proposed October 11, 2019, <https://www.federalregister.gov/documents/2019/10/10/2019-22200/policy-statement-on-demurrage-and-accessorial-rules-and-charges>.

information that can not only ensure accuracy, but also can ensure overlapping charges have not been issued.

D. INVOICING & DISPUTE RESOLUTION

At the May 2019 oversight hearing, Class I rail carriers frequently touted on-line systems and programs they use to administer and dispute their demurrage and accessorial charges. Rail shippers provided a vastly different view of such systems noting they are difficult, time-consuming, and costly to dispute. It was also stressed that invoices are often inaccurate, or lack basic information needed to assess the validity of the charges. Further, given the automatic nature of many systems, erroneous invoices are issued even when the tariff expressly provides for relief or the rail carrier has acknowledged its responsibility for the problem. This compels the shipper or receiver to initiate a protracted dispute resolution process.

If rail carrier practices effectively preclude a rail user from determining what happened, then the user would not be able to determine whether it was responsible for the delay. The responsible party would not be incentivized to modify its behavior and the demurrage charges would therefore not achieve one of their stated purposes. To facilitate a fair and reasonable demurrage program, rail shippers must be able to review and, if necessary, dispute charges without the need to engage a forensic accountant or expend extensive time and money to research charges and seek to resolve disputes.

AFPM has provided comments related to the topic of billing requirements, specifically required information and accuracy of that information to Docket No. EP 759 and we encourage STB to consider those edits. Premising those requirements alone will not fully address the issues with the current dispute resolution process. AFPM would highlight the following additional issues of concern- specifically time frames for disputes, costs charged to file initiate a dispute, and the lack of a formal demurrage dispute resolution process.

The Board notes in their policy statement that rail shippers and receivers should be given a reasonable time period to request further information and to dispute charges, and the rail carrier likewise should respond within a reasonable time period. AFPM supports this aspect of the policy statement. AFPM is concerned that, this is a non-binding policy statement and “reasonable time period” may have different meanings to different parties. While the Board notes that they are not seeking “complete uniformity” in demurrage processes, AFPM believes timelines for dispute is one area that may require uniformity to ensure fair adjudication of disputes.

The Board has serious concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim and this is stated in the policy statement. AFPM shares these concerns. As the stand-alone cost (“SAC”) model has clearly demonstrated, having a large cost burden to challenge a rate creates a scenario where a rail shipper is disincentivized to bring forth cases unless they are of extraordinary significance. By applying fees to dispute demurrage, rail carriers are applying this same principle to demurrage. AFPM strongly opposes these fees.

While the board seeks a non-binding and flexible (e.g., non-uniform) way to address demurrage issues, not all aspects of demurrage policy can be addressed with this approach. Specifically, the demurrage dispute resolution process is in need of binding requirements and uniformity. The way the current system is established, rail carriers are: the accuser; the provider of any and, in most cases, all evidence related to the demurrage charge; the creator of the processes used to determine viability of that charge and; the adjudicator of the final verdict related to the challenge. Under the current system they are the simultaneously the police, the lawyer, and the judge. This is an untenable position for rail shippers. AFPM suggests STB consider actions beyond this policy statement that would develop regulations detailing how demurrage cases are disputed and resolved. Further, we encourage the Board to allow parties to settle claims outside of the STB process through methods such as arbitration. AFPM believes this is well within STB's statutory authority and envisions a streamlined process that would establish timelines and expectations for all parties involved.¹⁷

E. CREDITS

In the rail industry, demurrage charges are often calculated using a credit / debit system. For most Class I carrier cars delivered to a customer, one credit day is granted for empty rail cars and one credit day is granted for loaded rail cars. The days that a rail car spends waiting to be placed at a customer's facility or sitting at a customer's siding are debited. At the end of each month, cars, credit days and debit days are totaled for all loaded Carrier cars handled at a specific customer's location. If total credit days exceed total debit days, no charges accrue whereas when debits exceed credits, demurrage is charged. The credit / debit system seems particularly outdated when considering most rail shippers own the tank car assets.

Rail shippers have explained that there are a number of rules and practices implemented by Class I railroads that diminish the utility of credits as a means of offsetting debits that are incurred. The current system is unfair as credits expire if not used in a specified period or time, but debits, and thus demurrage, do not expire until paid.

During the May 2019 hearing, Board members clearly indicated they were concerned by a very clear lack of reciprocity when it comes to credit days. The Board was particularly concerned with situations where the expiration date of a credit, in effect, undermines the value of a credit or credits that were allocated for a problem or delay that was not within the reasonable control of a shipper or receiver.

As part of its policy statement, STB detailed what the Board would consider when determining the reasonableness of credit rules and practices. Again, the Board was focused on problems or delays not within the reasonable control of a shipper or receiver. The Board stated they recognize "that credits issued for carrier-caused problems and delays serve a different purpose than credits that function as a proxy for free time, and that different types of credits

¹⁷ Given the scope is limited to the reasonableness of fee (e.g., is it valid or not), consideration of market dominance and other more complex issues related to rate cases would not need to be considered effectively truncating the timeline of the process.

might have different expiration time frames.”¹⁸ The Board noted its focus would be on the credits’ purpose and function and if shippers and receivers were compensated for the value of unused credits at the end of each month rather than the credits merely expiring.

AFPM appreciates the acknowledgement of credit days being an issue of concern, but the policy statement is light on details when compared to other issues in this policy statement. AFPM understands that the Board will consider whether the credit is within the reasonable control of a shipper; the purpose and function of the credit, and the expiration. This does not seem to resolve the clear inherent inequities of the credit debit system. It is unclear what the Board’s stance is on expiring credits or how the Board would address a dispute over credits. AFPM suggests the idea of reciprocal demurrage be considered as a way to resolve this issue. A potentially more agreeable solution would be looking at credits and debits over differing durations, like a 12-month rolling time period.

F. NOTICE OF MAJOR TARIFF CHANGES

Insufficient notice, particularly with respect to demurrage changes involving reductions in free time, was identified as a widespread problem in the feedback the Board received in the May 2019 hearings. AFPM members wholeheartedly concur and have cited instances when notice of major tariff changes has been provided with as little as two-weeks’ notice. Further, AFPM members have faced major tariff changes that would require potential infrastructure buildouts with project timelines that clearly would not be feasible or even possible. In addition, tariffs changes are noticed with little or no description of the rationale or data used to support why the tariffs is being modified.

The Board recognizes that a 20-day notice period is statutorily prescribed for changes to common carrier rates and service terms.¹⁹ Despite statutory floors on tariff notice, rail carriers themselves recognized that 20 days is insufficient for many of the changes recently implemented, and generally provided between 45 and 60 days. In the proposed policy statement, STB stresses that 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.

In the Policy Statement, the Board encourages rail carriers to support all rail users facing the financial, operational, or other challenges of adjusting to major tariff changes, and to thoughtfully consider the amount of advance notice that should be given, and to be especially cognizant of and accommodating to any unique obstacles a shipper or receiver may face in adapting to demurrage and accessorial tariff changes.

AFPM members support the intent of the Board’s policy statement relating to notice of change, but we propose more robust and detailed language be provided in the policy statement and potential binding regulatory action. AFPM believes it is reasonable for a rail carrier to delay

¹⁸ See 84 *Fed. Reg.* 54724, “Demurrage Policy Statement.” Notice of Proposed Statement of Board Policy, Docket No. FD EP 757 proposed October 11, 2019, <https://www.federalregister.gov/documents/2019/10/10/2019-22200/policy-statement-on-demurrage-and-accessorial-rules-and-charges>.

¹⁹ See 49 U.S.C. § 11101(c).

implementation of a tariff that requires infrastructure build outs or changes in storage (yard counts) by a reasonable amount of time consistent with the size and scope of the project (potentially at least 1 year). AFPM members also were interested in the Board's position on the diversion of demurrage fees to go towards the cost of an infrastructure project that would address the change in the tariff. While this may not be suitable for all situations, there is the potential that this could improve the rail network for all.

Further, AFPM believes the policy statement should address the very real situation where a rail shipper has no reasonable or feasible way to address the changes in the tariff. The May 2019 Hearings relayed multiple examples of changes to yard counts or storage agreements that made it impossible for a rail shipper to address the tariff and virtually ensured demurrage would be charged in perpetuity. Given this is becoming a more common occurrence, the Board should address this in any revision of the policy statement.

Lastly, the Board's approach to addressing demurrage invoices under Docket No. EP 759 has the potential not only to improve the accuracy of demurrage billing, but also to improve the process overall by reducing the number non-meritorious charges brought forth by the rail carriers, and provide clarity during the dispute resolution process should a shipper wish to dispute a charge. The process of identifying a set of information encourages rail carriers to do their due diligence prior to issuing a fee is a creative way to improve the process. AFPM suggests the Board consider a similar regulatory action related to how demurrage tariffs are changed and notified to rail shippers. Multiple AFPM members have commented on the lack of descriptions or rationale provided when serving a tariff change. Requiring a specific set of information could improve the reasonableness of such changes and avoid situations where shippers are unable to comply with tariff changes or the tariffs are clearly not reasonable.

V. SUGGESTED REGULATORY ACTION

The Board has made it clear that this Policy Statement does not implement any binding determinations or require complete uniformity across rail carriers' demurrage and accessorial rules and charges. The intent of this document is that it will inform and assist the Board, rail carriers and shippers when adjudicating specific cases. AFPM wishes to reiterate certain points stated in our comments that should be considered for regulatory action and are in need of a uniform approach. By codifying these formally AFPM believes the Board may be able resolve many of these issues faced related to demurrage.

Rail Carrier Demurrage / Reciprocal Demurrage – While demurrage charges were developed at a time when the railroads owned the rail tank cars, today most tank cars are owned by rail shippers or rail lessors, not by the railroads. AFPM believes a separate approach to demurrage is required for shippers that own their own rail cars. A railroad should not be able to charge demurrage for the shipper's use of its own assets. When a railroad is late in picking up or delivering shipper-owned railcars, the railroad should pay the shipper demurrage. By way of reciprocity, when a locomotive shows up at a scheduled time to haul rail cars and those cars (even if owned by the shipper) are not ready, the railroad should be able to recover its costs in waiting for the cars to be properly prepared. This would accomplish the primary purpose of demurrage – ensuring proper compensation for the equipment owner – and would best

incentivize railroad efficiency. AFPM strongly believes the changed dynamics of the rail industry warrant a larger scale update of the regulations governing demurrage.

Notice of Tariff Changes – Requiring a specific set of information that details a rail carrier’s rationale for changing a tariff as well as evidence the rail carrier thoughtfully considered the feasibility of the change would improve the reasonableness of such changes and avoid situations where shippers are unable to comply with tariff changes or the tariffs are clearly not reasonable. This would also drastically decrease the number of demurrage charge disputes.

Service Metrics and Tolerances – As stated in comments to Docket No. EP 759, AFPM recommends the Board require “original scheduled delivery date” on billing invoices. AFPM suggests the STB could establish a tolerance related to original scheduled delivery date (i.e., +/- a number of days or a percentage of the target date). Should a railroad exceed the acceptable tolerance, it would then be deemed unreasonable to charge a demurrage fee on a rail shipper. This could incentive rail carriers to develop more accurate delivery estimates and improve network fluidity.

Demurrage Dispute resolution – AFPM suggests STB consider actions beyond this policy statement that would develop regulations detailing how demurrage cases are disputed and resolved. AFPM believes this is within STB’s statutory authority. AFPM envisions a streamlined process that establishes timelines and expectations for all parties involved. AFPM is confident this is feasible as demurrage disputes are far more straightforward than rate cases.

VI. CONCLUSION

AFPM thanks STB for its time and consideration of our testimony related to the oversight of demurrage and accessorial charges. AFPM emphasizes the importance of a fair and competitive rail market to the energy industry and more broadly the U.S. economy. It also stresses the importance of “reasonable” demurrage or accessorial fees. Collecting additional data and hearing from all relevant stakeholders is essential to the formation of important policy decisions to protect rail shippers from these obvious abuses by rail carriers. AFPM shares STB’s goal of ensuring the flow of commerce on our nation’s rail system. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

A handwritten signature in blue ink that reads "Rob Benedict".

Rob Benedict,
Senior Director Petrochemicals, Transportation,
and Infrastructure
American Fuel & Petrochemical Manufacturers