

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB Ex Parte No. 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

**JOINT REPLY COMMENTS OF THE
AMERICAN CHEMISTRY COUNCIL, CORN REFINERS ASSOCIATION,
THE FERTILIZER INSTITUTE, AND THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE**

The American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, and The National Industrial Transportation League (“Joint Association Commenters”) hereby submit these Joint Reply Comments regarding the “Policy Statement on Demurrage and Accessorial Rules and Charges” issued by the Surface Transportation Board (“STB” or “Board”) in the above-captioned docket on October 7, 2019.¹ Each of the foregoing associations separately filed opening comments on November 6, 2019. This Joint Reply focuses on the opening comments filed by the Association of American Railroads (“AAR”) and various Class I railroads.

Railroad stakeholders make three points, either directly or implicitly, to which the Joint Association Commenters desire to respond. First, they charge that the Policy Statement pays lip service to the dual objectives served by demurrage – efficiency and compensation – but only gives effect to former.² Second, they challenge the Board’s suggestion that demurrage credits should expire.³ Third, they imply that delivering carriers should not be precluded from charging

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

² AAR Comments at 1-5; CSX Comments at 1-3.

³ CSX Comments at 3-4; UP Comments at 4-6.

demurrage for bunching that occurs on an upstream carrier.⁴ The second and third points are derivatives of the first and thus they are addressed collectively herein.

The main contention of railroads is that the Policy Statement ignores the role of demurrage to compensate carriers for the use of their assets. They contend that the Board disregards this objective by suggesting that shippers should only be responsible for demurrage when they are at fault. Instead, the railroads cite precedent which they contend holds the shipper liable unless the railroad is at fault. Neither position accurately portrays the law.

While the precedent is clear that shippers *may* be liable for demurrage even when they are not at fault, it does not hold them liable in every circumstance in which the railroad is not at fault. Many decisions, including several cited by AAR have not held shippers liable for demurrage when Acts of God prevented the timely release of rail assets.⁵ In other cases where the shipper owed demurrage charges without fault, a third party with which the shipper had a contractual relationship, and the railroad did not, was at fault, which provided the shipper with recourse that was not available to the railroad.⁶ The shipper thus was in the better position to protect itself and the demurrage charges provided an appropriate incentive for it to do so while compensating the faultless railroad. Therefore, it is inaccurate for the railroads to assert that shippers are liable for demurrage in all instances unless the delivering rail carrier is at fault.

⁴ CSX Comments at 3 (noting only that CSX does not bill customers for bunching on CSX).

⁵ *E.g.*, *Chrysler Corp. v. N.Y.C. R.R. Co.*, 234 I.C.C. 755, 758-59 (1939); *Foreston Coal Int'l v. The B & O R.R. Co.*, 349 I.C.C. 495, 500 (1975). *See also*, *The Penn. R.R. Co. v. Moore-McCormack Lines, Inc.*, 370 F. 2d 431, 432 (2d Cir. 1966).

⁶ *E.g.*, *Apex Tire & Rubber Co. v. N.Y., N. Haven & Hartford R.R. Co.*, 277 I.C.C. 1, 3 (1950). *Cf. Intercontinental Mfg. Co., Inc. – Pet. For Declaratory Order – Demurrage Charges on Bomb Casings*, 357 I.C.C. 300, 304 (1978) (demurrage resulting from a business decision was not beyond shipper's control even though shipper was under a contractual obligation to a third party).

The railroads are correct that demurrage has a compensatory objective in addition to an efficiency objective. But they fail to acknowledge that shippers should not be responsible for the penalty component of demurrage unless the shipper is at fault.⁷ The federal court decisions cited by the railroads do not demonstrate otherwise because the courts have observed that they must enforce the terms of a tariff and that only the agency has the power to alter the terms of a tariff to make the charges reasonable.⁸ That is why the precedent holding that shippers are not liable for the penalty component of demurrage when they are not at fault is manifested primarily in decisions by the agency.

The takeaway from these decisions is that there are exceptions to a shipper's demurrage liability other than railroad fault, those exceptions are predicated upon whether it would be reasonable to impose liability under the circumstances, and the Board may adopt additional exceptions in appropriate circumstances. Historically, shippers have been liable for demurrage except when such charges are attributable to the fault of the railroad or an Act of God; but absent the fault of the shipper, its demurrage liability should extend only to the compensatory component of the demurrage charge. Shippers should not be responsible for the penalty component when there is nothing the shipper could have done to avoid demurrage.

⁷ *E.g., Chrysler Corp. v. N.Y.C. R.R. Co.*, 234 I.C.C. 755, 762 (1939) ("Neither party, carrier or shipper, being at fault, without attempting to apportion the damage due to the lawlessness of others, it seems reasonable that the delivering carrier should be compensated for the use of the cars but that the element in the demurrage charge which represents penalty should not be imposed."); *Balfour, Guthrie & Co., Ltd. V. C., M., St. Paul & Pac. R.R. Co.*, 235 I.C.C. 437, 440 (1939) (Where cars held beyond control of both shipper and carrier, while the shipper is not relieved of its responsibility to compensate the carrier for the expense it suffered, "There is no sound reason why defendants should be permitted to collect charges, designed to force the release of such equipment, that are substantially in excess of the cost of furnishing the cars.").

⁸ *The Penn. R.R. Co. v. Moore-McCormack Lines, Inc.* 370 F. 2d 431, 432-33 (2d Cir. 1966).

Furthermore, shippers should not be liable for any demurrage, compensatory or punitive, when caused by bunching on upstream carriers. The Policy Statement, at page 14, encourages carriers to consider the absence of fault by the shipper when demurrage is caused by bunching on an upstream carrier. The railroads are conspicuously silent on this subject, however, only acknowledging that they do not assess demurrage when caused by bunching on their own lines. Perhaps that is because the overall rail industry position, that only the fault of the delivering carrier absolves a shipper of demurrage liability, would make shippers liable for upstream bunching. This is unacceptable. When a shipper does its best to space its shipments sufficiently apart to match the rail car storage capacity at the destination, bunching by any carrier on the route should not result in demurrage charges. Bunching is a matter best resolved between the carriers participating in the movement without inconveniencing the shipper. Therefore, the Board, as a matter of policy, should absolve shippers of liability even for the compensatory element of demurrage when caused by bunching on an upstream carrier. By assessing a full demurrage charge, i.e. both compensatory and penal, when the shipper is not at fault (and when a credit is not available for railroad fault), the collection of demurrage should be facially unreasonable.

The rail industry has made it very difficult to enforce the foregoing principles because no railroad has broken its demurrage charges into its compensatory and punitive components. Although Board Members repeatedly asked for that break-down at the May 22, 2019 hearing in Docket No. EP 754, *Oversight Hearing on Demurrage & Accessorial Charges*, every railroad demurred on grounds that the break-out was commercially-sensitive. Yet there is no evidence that any carrier followed up with the Board after the hearing to provide the information confidentially, as several had promised to do. That information deficiency, in turn, makes it

impossible for a shipper or the Board to assess the reasonableness of the compensatory element when railroads charge demurrage for causes beyond a shipper's control.

By not providing the penalty component of their demurrage charges, and simultaneously asserting that shippers are liable for demurrage unless the railroad is at fault, railroads are laying claim to the entire demurrage charge unless a shipper challenges that charge at the Board and proves how much is compensatory. This should not be the shippers' burden. Demurrage charges almost certainly are tilted heavily towards the punitive component. This will be especially true for demurrage charges associated with private rail cars because the compensation is not for detention of a costly rail car, but for occupancy of 30-50 feet of track space within a yard. Therefore, if railroads choose not to break-out the penalty and compensation elements of their demurrage charges, the Board should adopt a policy that shippers are not liable for demurrage at all unless the shipper is at fault.⁹

The adoption of a demurrage Policy Statement for today's rail marketplace also should account for significant changes from the past. Demurrage originated as a source of asset compensation for railroads and an efficiency incentive for shippers not to detain railroad-owned cars for an unreasonable duration. Indeed, much of the demurrage precedent is associated with periods of extreme rail car shortages in which demurrage was an invaluable tool to discourage shippers from exacerbating the shortage by hoarding rail cars. Also, because railroads had made significant investments in rail cars, demurrage facilitated their ability to earn a sufficient return on that investment through greater utilization in productive line-haul service.

⁹ No railroad has explained why this is commercially-sensitive information. It is important for shippers and the Board to know this information to audit demurrage invoices and enforce the principles that demurrage is not a profit center and shippers are not responsible for the penalty component when they are not at fault.

Today, a clear majority of rail cars are privately-owned. Over time, many shippers have concluded that the best way to ensure a reliable car supply is to undertake that responsibility for themselves. In addition, industries that rely upon rail cars for storage determined that it was more economic to own the car than pay demurrage. Some industries also ship highly-specialized products that require special rail cars and/or dedicated rail fleets, which are best achieved through private car ownership. Due to this sea-change in car ownership, the objective of compensating railroads for the unreasonable detention of railroad-owned cars has shifted to compensation for the track occupied by a private rail car while awaiting instructions from the consignor or consignee. This is a far smaller cost than rail car ownership and, unlike rail car costs, track costs can vary significantly by geography due to differences in real estate prices and alternative uses for the track by the railroad.

The owners of private rail cars have the same incentives as railroads to get the most efficient use out of their assets. One of, if not the, primary factor influencing the efficient use of private cars is the reliability and predictability of rail service. This problem can be exacerbated because, when railroads do not supply the rail car, making the most efficient use of that car is not a priority for them. Unreliable and unpredictable rail service requires shippers to own larger fleets of rail cars and imposes additional costs on their traditional business operations. But there is no means comparable to demurrage for private car owners to be compensated for these costs when a railroad unreasonably detains a private car. This is what so many participants in this proceeding mean when they insist upon “reciprocity.”

At the May hearing, the Board Members appeared sympathetic to the need for reciprocity but seemed confounded by how to implement it in practice. That is understandable given that demurrage is assessed based on a single measurable and objective standard whereas railroad

service measures are numerous and service variability is commonplace. Nevertheless, there are ways that the Board can address reciprocity without implicating these concerns.

The Board, for example, can reverse the standards that govern shipper responsibility for demurrage on railroad-owned cars when railroads charge demurrage on private cars. As noted above, in certain cases, a shipper may be responsible for demurrage on railroad-owned cars even when it is not at fault. When it comes to private cars, therefore, reciprocity means that the shipper likewise should typically not be responsible for demurrage unless it is at fault. This creates a more balanced regulatory environment where the asset-owner, whether it be the railroad or the shipper, is treated similarly. It also recognizes that the shipper already has incentives to utilize its private cars efficiently and has absolved the railroad of any duty to supply a rail car to the shipper. Therefore, a shipper should be responsible only for demurrage associated with occupying railroad track beyond a reasonable free-time when the shipper is at fault.

The Board itself has suggested another form of reciprocity when it comes to demurrage credits. Specifically, the Board declared that some of its reciprocity concerns “would be allayed if shippers and receivers were compensated for the value of unused credits at the end of each month, rather than the credits merely expiring.”¹⁰ CSX and UP contend that this misapprehends the purpose of those credits. CSX asserts that “credits for service failures are targeted to cancel the demurrage that otherwise would have been incurred due to that service failure, so it would be unusual for such credits to build up over time.”¹¹ That may be true in some circumstances and, if so, CSX’s concern would appear to be moot. But credits also accrue under average demurrage when the shipper releases a car before the expiration of free-time (that is before the railroads

¹⁰ Policy Statement at 18.

¹¹ CSX Comments at 4.

reduced free-time to zero days).¹² In other words, shippers could earn credits by being more efficient in the normal course of business, not just for railroad service failures. That efficiency accrues to the railroad's benefit even though it is the shipper's actions that make it possible. The shipper should be compensated appropriately with a monthly payment for unexpired credits. This also acts as an added incentive for efficient behavior. Moreover, it acts as a check on demurrage rate levels because railroads will have to consider how much they pay out in addition to how much they receive. If this true-up occurs monthly, there is no inconsistency with the precedent that UP cites.¹³ Credits would not survive indefinitely and defeat the purpose of demurrage as CSX and UP claim would occur.

Finally, reciprocity is manifested in the amount of free-time granted to private cars. Although the Policy Statement expresses concern with the recent reductions to free-time across the rail industry, the railroads hardly mention that fact at all and no railroad has yet offered any justification for its reductions. In the past, when rail carriers have reduced their free-time on demurrage, they have demonstrated a need to do so and offered justifications based upon changed circumstances.¹⁴ Furthermore, the agency has considered, but not necessarily deemed dispositive, service variability when determining the reasonableness of free-time reductions.¹⁵ Where free-time has been eliminated entirely, service variability takes on greater importance because the railroad has eliminated any buffer at all against such variability. In view of the

¹² Docket No. FD 35406, *Portland & W. R.R., Inc. – Pet for Declaratory Order – RK Storage & Warehousing, Inc.*, slip op. at 4 (served July 27, 2011).

¹³ UP Comments at 5.

¹⁴ *E.g., Free Time on Export Traffic, U.S. Ports*, 346 I.C.C. 379, 381-82 (1974); *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 781-84 (1975).

¹⁵ *See Free Time on Export Traffic, U.S. Ports*, 346 I.C.C. at 395-96.

shipper's investment in the rail car and the impact of service variability upon that investment, the Board's Policy Statement should affirm that railroads must provide free time for private cars. .

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jeffrey O. Moreno', written over a horizontal line.

Jeffrey O. Moreno

Karyn A. Booth

Jason D. Tutrone

THOMPSON HINE LLP

1919 M Street, N.W., Suite 700

Washington, D.C. 20036

(202) 263-4107

Counsel for the Joint Association Commenters

December 6, 2019