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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

POLICY STATEMENT ON DEMURRAGE	)	Ex Parte No. 757
AND ACCESSORIAL RULES AND CHARGES)	)	
	)	

DEMURRAGE BILLING REQUIREMENTS	)	Ex Parte No. 759
	)	

**JOINT REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE
AND SEMINOLE ELECTRIC COOPERATIVE, INC.**

WESTERN COAL TRAFFIC LEAGUE

SEMINOLE ELECTRIC COOPERATIVE, INC.

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Their Attorneys

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The Western Coal Traffic League (“WCTL”)¹ and Seminole Electric Cooperative, Inc. (“Seminole”) (collectively, “Coal Shippers”) submit these Joint Reply Comments in response to the proposed Policy Statement and Notice of Proposed Rulemaking (“Notices” or “Proposals”) that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceedings on October 7, 2019.² These Joint Reply Comments respond to the opening comments, and in particular, to those filed by

¹ WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal, mined west of the Mississippi River, transported by rail. WCTL members currently ship and receive in excess of 90 million tons of coal by rail each year. WCTL’s members are: Ameren Missouri, Arizona Electric Power Cooperative, Inc., Austin Energy (City of Austin, Texas), CLECO Corporation, CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Western Fuels Association, Inc., and Wisconsin Public Service Corporation.

² These proceedings have not been consolidated.

the Association of American Railroads (“AAR”), BNSF Railway Company (“BNSF”), and Union Pacific Railroad Company (“UP”) (collectively, the “Railroads”).

SUMMARY

The Coal Shippers in their Joint Comments filed on November 6, 2019 generally supported the Board’s proposed Policy Statement in EP 757 and the proposed demurrage billing requirements in EP 759, with modest modifications and additional guidance to ensure that unit train coal shippers are not subjected to unreasonable practices and fees. Specifically, the Coal Shippers requested that the Board go further than simply stating it “expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage,” Policy Statement at 17, by adopting clear standards and then requiring the railroads to incorporate these standards into their tariffs. The Coal Shippers also sought the establishment of reasonable guidelines and definitions for train “bunching” and credits, and that the Board allow all potentially affected parties to comment in individual proceedings when the general terms of a demurrage or accessorial tariff are at issue in an unreasonable practice complaint.

In their opening comments, some of the Railroads do not appear to disagree with the Coal Shippers proposals in principle. For example, UP agrees that demurrage and accessorial fees should not be assessed in circumstances where the shipper or receiver is not at fault.³ However, AAR stridently contends that the shipper

³ First provision of UP’s Customer Bill of Rights for Accessorial and Demurrage Charges provides that “UP customers do not and will not incur

should be charged even “in circumstances beyond the shipper’s or receiver’s reasonable control.”⁴ This intra-carrier disagreement over the fundamental principle of causation only serves to underscore the need for the Board to intervene and adopt the Coal Shippers’ proposals to help ensure certainty and fairness in demurrage invoicing.

The Coal Shippers in their Comments also requested the Board review the level of demurrage and accessorial charges being assessed because there should be some rational, and reasonable, relationship to the underlying costs incurred by the railroads. The railroads continue to argue the need for the “compensation” component of demurrage, even though car ownership generally has shifted from the railroads to shippers, but have presented no cost information to support the charges being assessed, even though they promised to provide such follow-up information to the Board during the *Oversight Hearing*.⁵ It therefore comes as no surprise that the Railroads generally seek to maintain the status quo, even when faced with well-documented substantiation of abusive billing practices, and a demonstrated need for the modest changes proposed by the Board and Coal Shippers.

accessorial and demurrage charges for circumstances beyond their reasonable control.” UP EP 757 Comments, *Policy Statement on Demurrage & Accessorial Rules & Charges*, STB Docket No. EP 757 (filed Nov. 6, 2019) at 3 (“UP EP 757 Comments”).

⁴ AAR Comments, *Policy Statement on Demurrage & Accessorial Rules & Charges*, STB Docket No. EP 757 (filed Nov. 6, 2019) (“AAR EP 757 Comments”) (AAR disagrees with proposed Policy Statement specifying that “charges should not be assessed in circumstances beyond the shipper’s or receiver’s reasonable control.”).

⁵ Docket No EP 754, *Oversight Hearing on Demurrage & Accessorial Charges* on May 22-23, 2019 (“*Oversight Hearing*”).

Lastly, the Coal Shippers requested that the Board require the railroads provide better online access to train data, timely notice when a train is laid down, and that additional supporting information be provided with demurrage invoices. UP protests that “[t]here is simply no need for well-intentioned but ultimately counterproductive, one-size-fits-all regulatory intervention in the detailed text and content of each and every accessorial and demurrage invoice that Union Pacific transmits to its customers.”⁶ However, as fully demonstrated by the Coal Shippers and the dozens of other shippers participating in these proceedings, there is an essential need to have the types of reasonable supporting information that the Board and Coal Shippers are seeking, especially in light of the computer-generated and error prone invoicing that have been established by the Railroads in recent years.

REPLY COMMENTS

A. Causation is an Essential Component of Demurrage and Fees Must be Reasonable

In its Opening Comments, Coal Shippers stressed that the Board’s Proposed Policy Statement should be fine-tuned to adequately address the need for reciprocity and fairness. One fundamental fairness item that the Board recognizes and incorporates into its proposals is that charges must be accurate and warranted. The Coal Shippers agree with UP’s Customer Bill of Rights for Accessorial and Demurrage Charges (“Bill of Rights”) providing that “UP customers do not and will not incur

⁶ UP Comments, *Demurrage Billing Requirements*, STB Docket No. EP 759 (filed Nov. 6, 2019) at 2 (“UP EP 759 Comments”).

accessorial and demurrage charges for circumstances beyond their reasonable control.”⁷

This also aligns with the Board’s Policy Statement providing that “[t]he overarching purpose of demurrage is to incentivize the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those resources beyond a specified period of time.”⁸ However, AAR argues that there is a “compensation function of demurrage” and that it is solely the shipper that “should bear the risk of a delay in accepting or returning a car if *neither* the shipper nor the railroad is at fault.”⁹ Specifically, AAR argues it is “the party benefitting from the use of the car” that “should bear the risk of a delay in accepting or returning a car.”¹⁰

However, it is not typically the shippers that determine the schedule or route, so making shippers responsible when they have no control, as UP has recognized, does not incentivize shippers to change their behavior. The Coal Shippers agree with UP’s position and encourage the Board to require all rail carriers to adopt a similar statement and to include this provision within their accessorial and demurrage tariffs.

Also, AAR’s position that the rail carriers should be compensated even if both the shipper and rail carrier are not at fault is both incorrect as a matter of law, and even when shipper-caused, does not account for rail customers that own or lease their

⁷ UP EP 757 Comments at 3.

⁸ *Policy Statement on Demurrage & Accessorial Rules & Charges*, STB Docket No. EP 757 (STB served Oct. 7, 2019) at 6-7.

⁹ AAR 757 Comments at 4.

¹⁰ AAR EP 757 Comments at 4.

own rail cars.¹¹ This is significant, because the rail industry has changed during the past century and the risks and costs of car ownership have frequently been transferred to the shipper. GATX states that of “[a]pproximately 1.6 million railcars” railroads only own 18% as of January 2019, and that “[o]wnership of railcars has been declining.”¹² The rest are owned or leased by shippers. Coal Shippers urge the Board to disallow rail carriers to charge for use of an asset that is frequently either owned or leased by the rail customer.

Additionally, where charges address use of railroad assets, the railroads remain silent with respect to what their actual costs are, and no individual railroad has provided any explanation for how these costs relate to the assessed charges. If shippers are to in fact reimburse rail carriers for any incurred loss, the Board should require greater transparency. The railroads have reported significant revenues from demurrage and accessorial fees, with UP reporting \$232 million in revenue and BNSF reporting \$279 million in revenue from demurrage and accessorial fees in 2019. On a per customer basis, each UP customer on average paid \$22,236 in demurrage and accessorial fees in 2018.¹³ However, no individual railroad has substantiated the compensatory nor the

¹¹ AAR fails to explain what would be reasonable compensation, or how compensation should be determined when it is the shipper, and not the rail carrier that owns or leases the rail car. *See* AAR EP 757 Comments at 2-4.

¹² GATX, *Company Overview Presentation* (May 2019) (citing UMLER data as of Jan. 2019) at 28, <https://ir.gatx.com/static-files/e7c23f2b-358c-4187-a16f-5cc23c8764fe>.

¹³ UP reported that in 2018 It had 10,000 customers ($\$232360000/10,000 = \$22,236$). *See* UP Company Overview, https://www.up.com/aboutup/corporate_info/uprover/index.htm.

incentive (i.e., “penalty”) portion of its demurrage fees, despite promises made during the *Oversight Hearing* that such costing information would be provided.

B. Credits should Not Untimely Expire or Shippers Should Be Compensated for Unused Credits

The Coal Shippers and several commenters in EP 757¹⁴ urged the Board to not allow credits to untimely expire, or alternatively, and as the Board suggested in its Policy Statement, for the shippers and receivers to receive payment for any unused credits. UP contends that credits should expire monthly because it “is consistent with commercial usage and the accounting course of business” and so that the demurrage and accessorial fees will continue to incentivize “better transportation practices by Union Pacific’s customers.”¹⁵ However, UP also maintains that the “point of the credits and debits part of the program is to bring fairness to the process for the customer.”¹⁶ From this, the simplest, and fairest solution, at a minimum, is for UP to reimburse shippers and receivers for any unused credits at the end of each month. Therefore, the Coal Shippers request that the Board either require that credits not expire, or alternatively, that shippers and receivers can redeem these credits at the end of the month.

¹⁴ Coal Shippers’ Joint Comments at 7-8; Fertilizer Inst. Comments, *Policy Statement on Demurrage & Accessorial Rules Charges*, STB Docket No. EP 757 (filed Nov. 6, 2019) at 9; American Iron & Steel Inst. Comments, *Policy Statement on Demurrage & Accessorial Rules Charges*, STB Docket No. EP 757 (filed Nov. 6, 2019) at 8; Nat’l Grain & Feed Ass’n Comments, *Policy Statement on Demurrage & Accessorial Rules Charges*, STB Docket No. EP 757 (filed Nov. 6, 2019) at 18.

¹⁵UP EP 757 Comments at 4-5.

¹⁶ UP EP 757 Comments at 4.

C. The Board Should Require Additional Billing Information and Better Access to Train Data.

Coal Shippers have requested that (1) the Board provide additional guidance regarding online access for shippers to train data; (2) railroads give timely notice to shippers when a train is laid down; and (3) railroads include additional information with their demurrage invoices so shippers can more easily review them for accuracy. The rail carriers have effectively shifted the time and costs for reviewing invoices to shippers, by either not performing an initial review of invoices, or by not having adequate safeguards in place. Kenny Rocker with UP in his testimony on May 22, 2019 at the *Oversight Hearing*, admitted that UP does not perform a detailed review of the invoices and investigate whether the charges are warranted unless they are disputed by the customer.¹⁷ As shippers repeatedly testified at the *Oversight Hearing* and stated in Comments to EP 759, the time spent reviewing invoices is significant and as a result, the current programs burden shippers with significant administrative costs.

UP in its EP 759 Comments quote Mr. Rocker's testimony at the *Oversight Hearing* that "Union Pacific maintains a billing accuracy of roughly 95%," in what is clearly an attempt to minimize this issue.¹⁸ However, such a statement is highly misleading. At the *Oversight Hearing*, Mr. Rocker admitted that UP did not "have a way of telling" the percentage of invoices that were incorrect aside from relying on the

¹⁷ *Oversight Hearing*, Day 1 Transcript at 191-194.

¹⁸ UP EP 759 Comments at 3.

number of disputed charges that were found to be credible. UP obviously has not relied on a reasonable sampling or audit of its invoices, and the 95% figure is not credible.

UP also contends that all relevant information that is needed is provided,¹⁹ but complete historic information and train data is not always readily accessible to shippers.²⁰ UP also takes issue with the burdensome costs of generating longer invoices,²¹ but nowhere substantiates its claims. The Coal Shippers encourage the Board to rely on the substantial comments and testimony provided by rail customers on the grossly unfair and disproportionate costs and time the shippers are currently spending in resolving invoice issues when evaluating the significance of the invoicing problem and weighing whether the “burden” imposed on rail carriers to provide additional information is necessary. Respectfully, shippers are in the best position to know what information they need to validate the invoices and the types of modest additional information being sought is clearly reasonable. Additionally, as requested in the Coal Shippers’ Joint Comments, the Board should require the railroads to provide timely notice of when a train is laid down so that the shipper can timely protest and, if possible, help reduce the delays for that train.²²

¹⁹ UP EP 759 Comments at 6 (“Union Pacific customers already have ready access to the data needed to both verify their invoices and dispute accessorial and demurrage charges.”).

²⁰ For example, UP will omit sequence numbers from its historic train record data that is accessible to shippers which makes it more difficult to review invoices. Coal Shippers’ Joint Comments at 12.

²¹ UP EP 757 Comments at 5.

²² Coal Shippers’ Joint Comments at 11.

CONCLUSION

The Coal Shippers respectfully request the Board adopt its proposed modifications to the Board's Policy Statement and Notice, in order to provide shippers with more certainty, and promote more fair and balanced demurrage and accessorial programs.

Respectfully submitted,

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