

**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

DOCKET NO. EP 757

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**POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES
AND CHARGES**

**DOCKET NO. EP 759
DEMURRAGE BILLING REQUIREMENTS**

NOTICE OF PROPOSED RULEMAKING

**DOCKET NO. EP 760
EXCLUSION OF DEMURRAGE REGULATIONS FROM
CERTAIN CLASS EXEMPTIONS**

NOTICE OF PROPOSED RULEMAKING

**REPLY OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) is a non-profit trade association representing the interests of approximately 500 small railroads and 500 railroad supply company members in legislative and regulatory matters. Small railroads operate 50,000 miles of track in 49 states, or approximately 38% of the national railroad network, originating or terminating one out of every four railcars moving on the national railroad network, serving customers who otherwise would be cut off from the network.

The Surface Transportation Board (“STB or “Board”) issued these three decisions concurrently to address matters arising from its May 29, 2019, two-day hearing on railroad demurrage and accessorial charges announced in Docket No. EP 754, Oversight Hearing on Demurrage and Accessorial Charges. In Docket No. 757, Policy Statement on Demurrage and Accessorial Rules and Charges, the Board provided information on principles it would consider in evaluating the reasonableness of demurrage and accessorial rules and charges, in such areas as free

time, bunching, overlapping charges, invoicing and dispute resolution, credits, notice of major tariff changes, and warehouseman liability.¹ In Docket No. 759, Demurrage Billing Requirements, the STB proposed that Class I railroads include on or with demurrage invoices specific, minimum information to assist shippers and receivers in verifying charges, determining who was responsible for delays, and evaluating whether and how they can expedite their handling of cars.² The Board also proposed that Class I railroads send invoices directly to the shipper and not the warehouseman. In Docket No. 760, Exclusion of Demurrage Regulation from Certain Class Exemptions, the STB proposed to clarify its regulations concerning exemptions for certain commodities to state these exemptions do not apply to the regulation of demurrage. On November 6, 2019, ASLRRA filed Comments separately in each of the proceedings.

In its Comments in EP 757, ASLRRA generally agreed with the principles that the STB recounted as the overarching purpose of demurrage, *i.e.*: (1) to incentivize the efficient use of rail assets by holding rail users accountable when the actions or operations use those resources beyond a specified time and (2) that any period allowed a rail user before the imposition of demurrage must be reasonable. It also agreed with the Board's statement that demurrage should not be charged to a rail user if the delay is beyond the reasonable control of that rail user and that demurrage disputes are best resolved on a case-by-case basis. ASLRRA also said it accepted the premise that Class II and III railroads should provide accurate demurrage statements with as much information as reasonably possible. However, it pointed out that there are both structural and technical reasons that detailed demurrage billings as proposed by the STB simply are not be reasonable or possible for small railroads. Small railroads lack the personnel, resources, and often some of the offline data required to supply the extensive information listed in the proposed guidelines. As a result, it is critical that small railroads continue to be exempted as proposed by the Board in these proceedings to ensure their continued success as part of the national rail network.

In its Comments in EP 759, ASLRRA stated that although the Demurrage NPRM focuses on Class I railroads, the proposed rule could adversely affect small railroads if it is extended to

¹ The Board did not direct Class II and III railroads to include the information on any demurrage invoices but "... encouraged Class II and Class III carriers to do so to the extent they are capable of doing so." Ex Parte 757, p.16

² The Board did not propose to require Class II and III railroads on this proposal but invited comments on their exclusion.

these those small companies. No small railroad possesses the data processing capabilities of the Class I railroads. Nor do they have the resources, large IT departments or technical capabilities to provide the information the proposed rule requires. Small railroads simply do not have the tools or staff to process demurrage bills in the manner the Board proposes to require of Class I railroads. The investment required of small railroads to equip themselves to provide this information would be prohibitively expensive and divert precious resources better used on improving their infrastructure and serving their customers. ASLRRA stated that small railroads will endeavor to provide as much of the invoice information proposed by the Board as practicable and will maintain a focus on open, productive, and communicative relationships with their customers, which is the lifeblood of the small railroad business.

In its Comments in Ex Parte 760, ASLRRA stated its concerns about the proposed changes for two reasons. First, while the Board faithfully recited the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (“RFA”), it does not reference the Small Business Regulatory Fairness Act of 1996 (Pub. L. 104-121) (“SBREFA”) that requires regulatory agencies to maintain policies concerning small entities subject to regulation by the STB. The second reason ASLRRA stated about the proposed rule is that it could lead to the removal of the exemptions that are under consideration in Docket No. Ex Parte 704 – the proverbial slippery slope.

ASLRRA REPLY

While the three proceedings have not been consolidated by the Surface Transportation Board (“STB” or “Board”), because the three are inextricably intertwined, ASLRRA is filing this Reply in one pleading. It will address each Ex Parte proceeding seriatim.

A total of 39 Comments were filed in one or more of the captioned proceedings by shippers, receivers, warehousemen, associations representing various parties, and individuals (“Rail Users”). ASLRRA filed Comments as did the AAR and each of the Class I railroads.

In general, the Rail Users supported the STB proposed guidances and rules contained in all three proceedings. However, many of them said the Board did not go far enough and therefore suggested numerous, burdensome additional requirements to be placed on railroads. ASLRRA will first address the Comments the Rail Users made in each Ex Parte proceeding and then address the issue of whether Class II and III railroads should be exempted from the Ex Parte proceedings.

EP 757

While, every Rail User generally supported the guidelines the STB proposed, many said those guidelines did not include enough requirements to ensure that demurrage invoices are accurate. For example, commenters variously said invoices should include information showing (1) the detentions of the subject cars was the fault of the invoiced party and not that of the railroad; (2) the identity of upstream carriers; (3) missed switches, bunching or other events beyond the control of the invoiced party; and (4) a brief explanation of the basis for the charge. Some commenters urged the Board to require Class I railroads to adopt and maintain a resolution process. One Rail User suggested 12 additional items that should be listed on a demurrage invoice. In addition to these suggestions, some Rail Users requested even more details in the guidelines such as:

- The Board should elaborate on what it would consider to be examples of railroad-adopted reasonable rules and practices for dealing with variability of service and carrier caused bunching;
- The Board should add such circumstances as excess transit days for cars or trains of cars, lost cars, unwarranted crew shortages, locomotive breakdowns, and similar carrier- caused sources of delay outside the control of Rail Users; and
- The Board should clearly define bunching and free time extended when bunching is caused by the carrier; when railroads create bunching and similar delays, Rail Users should receive credits that do not expire at the end of the month or can be redeemed; railroads should be required to adopt and incorporate the Policy Statement as part of their tariffs and certify their compliance with it; other potentially affected parties should be allowed to participate in any complete proceeding.

As stated by ASLRRA in its Comments in EP 757, even the less extensive requirements the STB proposed for Class I railroads' demurrage invoices would place an impossible burden on small railroads, for all the reasons stated in ASLRRA's Comments. The addition of the laundry list of additional items suggested by the Rail Users would place an insurmountable burden on them. Small railroads do not possess and/or cannot access much of the information the STB and Rail Users suggest should be on invoices.

Moreover, Class II and III railroads are oftentimes the delivering carrier, providing the proverbial "last mile" service. As such, they have no influence over the upstream participants in

the movement of freight from an origin. For example, some Rail Users complained about bunching. Small railroads themselves can be subject to such problems as bunching that results from events occurring long before cars are interchanged to them. They also will have not information of upstream service problems. Notwithstanding the statement by the Board that Class II and III railroads are exempted from the proposed rules the Board may promulgate, if the STB were to decide to include small railroads within the scope of any final rules, those companies could unfairly bear the cost arising from the offline events.

EP 759

Again, the Rail Users generally stated their support of the list of requirements the STB proposes that need to be included on demurrage invoices. In these Comments, they argued again that additional items should be added on invoices. Examples given included expected delivery date and actual delivery date, a statement that railroad tariffs include a certification that the tariff complies with the Board's Policy Statement, the date and time a car is ordered into the facility or submitted on the outbound switch list, the date and time the delivering carrier received the car at interchange, the number of additional days of dwell time impacting deliveries, and supporting data in computer-readable format.

These additions, on top of those suggested in the Comments by the Rail Users in EP 757 add to the overall burden on small railroads if any rules adopted are applied to those companies. Small railroads would have little ability to add these items and even trying to locate much of the information would be extremely time-consuming and take resources small railroads do not have. Small railroads work closely every day with their customers and if there arises a question about invoices, services or anything else, the customer and small railroad resolve those issues in a timely manner directly between them. There simply is no need for the level of bureaucratic red tape suggested by the Rail Users as it relates to small railroads.

The proposed rule, if applied to small railroads, would have significant adverse effects on these companies. They would be required to spend scarce resources defending an allegation that they were not in compliance with the proposed demurrage or accessorial rules proposed by the STB in EP 759. The fact is that if the STB adopts its proposed rules and applies them to small railroads, they will indeed have to engage in more paperwork and record keeping.

Ex Parte 760

Only a few Rail Users commented on EP 760. Those that did generally supported the clarification that demurrage applies to boxcars and certain agricultural commodities. Some shippers argued that the STB should ensure that demurrage and accessorial practices apply to all shippers of currently exempt commodities. Furthermore, three Rail Users (The Institute of Scrap Recycling Industries, Inc., Portland Cement Association, and The American Forest & Paper Association) used this proceeding to reargue their position on revoking exemptions altogether. *See, e.g.,* the Comments of The Institute of Scrap Recycling Industries, Inc, p.11-12.

These arguments go right to the heart of ASLRRA's point in its Comment that Rail Users should not be allowed to use these proceedings as a "back door" to have the STB adopt their positions in Ex Parte 704 (Sub-No. 1).

Regarding Ex Parte 760, ASLRRA is concerned about the proposed changes for two reasons. First, while the Board faithfully recites the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) ("RFA"), it does not reference the Small Business Regulatory Fairness Act of 1996 (Pub. L. 104-121)("SBREFA") that requires regulatory agencies to maintain policies concerning small entities subject to regulation by the STB. Class III railroads meet the economic criteria established for inclusion in 49 CFR 1201.1. and as the Board itself recognizes on pages 7 and 8 of the Exclusion NPRM, the proposed rule could have a significant adverse economic impact on substantial number of small entities. Second, ASLRRA is concerned that some parties might try to use these proceedings to re-argue their position in EP 704 to try to convince the STB to use these proceedings to revoke the exemptions on a broad range of commodities to the detriment of small railroads.

Finally, the Board's proposal to reregulate demurrage for certain agricultural commodities is ill-considered. ASLRRA submits that unlike other commodities, the Interstate Commerce Commission specifically exempted these agricultural commodities from all regulation, including demurrage. The inclusion of the certain agricultural commodities in EP 760 without conducting a full analysis of whether the exemption on then should be partially or totally repealed is legally wrong.

Reply Regarding Whether to Include Class II and III Railroads

Only seven Rail Users commented on the issue of whether the proposed demurrage rules should be applied to small railroads. This is understandable since not one Rail User

complained about Class II or III railroads in their Comments, at the hearing or in any supplemental Comments. At least three of the Rail Users acknowledge this fact but join the others in declaring Class II and III railroads should be included within the ambit of the proposed regulations nonetheless.

The general theme of these Comments is that including Class II and III railroads would not be burdensome on them. As pointed out by ASLRRA in its Comments, even some of the Class I railroads do not have the current technology to provide all the information the STB proposes to require be on demurrage invoices. No small railroad possesses the anything close to the data processing capabilities of the Class I railroads nor do they have the resources, large IT departments or technical capabilities to provide all the information the proposed rule requires. While some small railroads utilize the RMI revenue database for revenue and car reporting purposes, some do not and even those that do, do not have a sophisticated means to translate from that database to demurrage bills processes. To undertake equipping themselves to provide this information would be prohibitively expensive and divert precious resources better used on improving their infrastructure and serving their customers.

American Fuel & Petrochemical Manufacturers (AFPM³) acknowledged that including Class II and III could be a burden on these companies and only it is the sole Rail User that said that Class III railroads could be exempted.³ Three other Rail Users said although the proposed regulations would likely not be a burden on small railroads, small railroads claiming burdens could seek an exemption or file a show cause proceeding to be exempted from the requirements. None of these Rail User describes what showing a small railroad would have to make in a case-by-case proceeding or a show cause demonstration. Additionally, requiring a small railroad to file for an exemption from any of these Ex Parte proceedings would be very time consuming and expensive for small railroads which, have limited financial capacity and resources.

Next, in nearly identical language, the National Grain and Feed Association, the National Industrial Traffic League, and the American Forest & Paper Association all advance a unique and improbable theory that the absence of regulation of demurrage invoices for Class II and III railroads "...may result in Class I railroads exploiting the lack of regulation for other carriers and could lead to a shift in having demurrage invoices issued by Class II and III railroads where

³ AFPM says it would support a *de minimis* exemption "...for very small carriers (e.g., Class III and smaller) and that exempting only Class III carriers may be more appropriate."

possible to evade the regulatory requirements.” This is little more than a base conspiracy theory with no basis in fact. Class I carriers each file their own demurrage tariffs and would not change their practice in this regard as they would not want to cede the control of their operations or practices to others or the compensation they receive for the misuse of their rail assets.

The Freight Rail Customer Alliance asserts that entities such as Genesee & Wyoming, OmniTRAX, and Watco, to name only a few, have substantial operations, and they should be required, not merely “encouraged” to comply with the proposed requirements. This assertion shows a fundamental misunderstanding about how holding companies conduct business. The fact is that the railroads owned or managed by the holding companies are operated as separate small businesses and the holding companies themselves do not operate as railroads.

None of the arguments raised by these few Rail Users justifies the inclusion of small railroads in any of these Ex Parte proceedings. The STB was correct in excluding them and should continue to do so.

Respectfully submitted,

A handwritten signature in cursive script that reads "Keith T. Borman".

Keith T. Borman
Senior Vice President and General Counsel
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