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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 759

DEMURRAGE BILLING REQUIREMENTS

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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Dated: June 5, 2020

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The National Industrial Transportation League (“NITL” or “League”) hereby submits its comments in response to the supplemental notice of proposed rulemaking (“SNPRM”) issued by the Surface Transportation Board (“STB” or the “Board”) on April 30, 2020.¹

The SNPRM follows the Board’s notice of proposed rulemaking issued on October 4, 2019,² which largely stemmed from the discussions and concerns raised by a broad group of rail customers during the oversight hearing held on May 22-23, 2019.³ As part of the oversight hearing, the League testified before the Board, and submitted its pre-hearing⁴ and post-hearing

¹ Demurrage Billing Requirements, STB Docket No. EP 759 (served April 30, 2020) (“SNPRM”).

² Demurrage Billing Requirements, STB Docket No. EP 759 (served October 4, 2019) (“NPRM”).

³ Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019).

⁴ Testimony of the National Industrial Transportation League, STB Docket No. EP 754 (May 8, 2019).

comments.⁵ The League also submitted its comments⁶ and reply comments in response to the NPRM.⁷

I. Statement of Interest

The League represents a broad cross-section of American businesses, united in their need for reliable, efficient and competitive transportation services. Our rail members ship chemicals, petroleum, agricultural products, paper and forest products, and many other commodities using all modes of transportation, including rail. NITL members have developed complex supply chains to support their operations and efficient and competitive rail service. Fair rules and practices related to such service, are critical to maintaining the supply of goods required to meet the demand of American businesses and consumers and to compete effectively with producers around the world.

II. Comments

The League commends the Board for addressing the important issues related to demurrage billing requirements set forth in its initial NPRM and this SNPRM. The League strongly supports the Board taking these steps to address the wide-spread concerns for many shippers and receivers regarding the lack of adequate information on demurrage invoices.⁸

In the SNPRM, the Board proposes to modify its proposal in the NPRM to require Class I railroads to provide certain information in demurrage invoices. Specifically, the Board proposes

⁵ Supplemental Submission of the National Industrial Transportation League, STB Docket No. EP 754 (June 6, 2019).

⁶ Comments of the National Industrial Transportation League, STB Docket Nos. EP 757, 759 and 760 (November 6, 2019) (“NITL Comments”)

⁷ Joint Reply Comments of the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, and the National Industrial Transportation League, STB Docket No. EP 759 (December 6, 2019) (“NITL Reply Comments”).

⁸ NITL Comments at 9.

to require the railroads to include: (i) the billing cycle information, (ii) the original estimated date and time of arrival (“ETA”) of each car (as established by the invoicing carrier) and the date and time each car was received at the interchange, and (iii) the date and time of each car ordered in.⁹

The Board also proposes requirements for Class I railroads to provide access to demurrage invoicing data in machine-readable format.¹⁰ Finally, the Board invites further comments on its proposed rule that would require Class I railroads to take appropriate action to ensure that demurrage charges are accurate and warranted prior to sending demurrage invoices.¹¹

Billing Cycle Information: In the SNPRM, the Board proposes to require Class I railroads to include on demurrage invoices “the billing period covered by the invoice.”¹² The League strongly supports the Board’s proposal and concurs with the Board’s finding that this information will be helpful for the League members in evaluating the timing of the charges with their own records. The League also echoes the Board’s comments that this requirement would not be burdensome for Class I railroads.

Original ETA and Date and Time Cars Received at Interchange: The Board proposes to require Class I railroads “to provide on or with their demurrage invoices (1) the original ETA of each car (as established by the invoicing carrier); and (2) the date and time at which each car was received at interchange, if applicable.”¹³

The League strongly believes that the original ETA information will assist its members with verifying demurrage charges because it will help them identify whether potential service problems contributed to delays in car deliveries and determine if demurrage credits should be

⁹ SNPRM at 5.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id. at 7.

applied. The ETA information will be relevant to understanding the root cause of the delays and could help both rail customers and the railroads modify their behaviors if warranted and apply credits as appropriate. As a result, Class I railroads and their customers will be more accountable for their own actions.

Furthermore, the League supports the Board's proposal to require the railroads to include the date and time at which each car was received at an interchange on demurrage invoices. This important information will also help League members evaluate demurrage responsibility and validate invoices. The Board is specifically seeking comments on whether the information on date and time of interchange "should be limited to the last interchange with the invoicing carrier."¹⁴ The League believes that the Board should require Class I railroads to provide at least the last interchange information on or with demurrage invoices but it also supports requiring additional interchange data because it would help receivers determine if the delay leading to demurrage charges was caused by upstream bunching.

As the Board explained in the policy statement issued "[w]here rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the rail user to avoid, the overarching purpose of demurrage is not fulfilled."¹⁵

In the NPRM, the Board explained that the underlying purpose of the requirements related to demurrage invoices was to ensure that rail customers are provided adequate information to validate the demurrage invoices, as well as to properly allocate demurrage

¹⁴ Id.

¹⁵ Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. 757 (served April 30, 2020) ("Policy Statement").

responsibility or modify their behavior, as appropriate.¹⁶ The information proposed in the SNPRM will promote demurrage charges achieving this purpose by way of providing more visibility to rail customers to determine the actual cause of the delays, including bunching by the delivering or an upstream carrier, and enable customers to dispute charges that are not within their reasonable control to avoid. Accordingly, the League believes that both original ETA information and the interchange data will be essential in achieving this purpose.

Finally, the Board has requested comments on whether “Class I carriers should instead be required to provide these items to the invoiced party upon reasonable request, but not include them on or with every invoice.”¹⁷ It appears that this inquiry is based upon the Board’s finding that such information “may not be relevant to every invoice recipient in all circumstances.”¹⁸

The League disagrees with the Board. First, the information proposed in the SNPRM is “readily available to carriers as it is used in the ordinary course of business to track car movement and place cars.”¹⁹ Thus, it will not be burdensome for Class I railroads to provide this information on or with all demurrage invoices to the recipients. Furthermore, as explained herein, the League believes that this information will be helpful to rail users in determining the sources of any potential delay or carrier-caused bunching.

Ordered-In Date and Time: The Board also proposes to require Class I railroads “to provide the ordered-in date and time on or with demurrage invoices.”²⁰ The League concurs with the Board’s findings that “the ordered-in date and time is essential to the calculation of demurrage at closed-gate facilities,” and that such information will be valuable for demurrage

¹⁶ NPRM at 10.

¹⁷ SNPRM at 7-8.

¹⁸ Id. at 7.

¹⁹ Id.

²⁰ Id. at 9.

accrual and verification purposes.²¹ The League believes that this information will help the League members compare this information with their own records and facilitate verification of the charges.

Machine Readable Data: In the SNPRM, the Board also proposes to require Class I railroads “to provide machine-readable data, such as through a machine-readable invoice, a separate electronic file containing machine-readable data, or a customized link so the rail user could directly download the data in a machine-readable format.”²² As the League explained in its previous comments, it believes that placing “demurrage information in machine-readable invoices is a reasonable and worthwhile approach to reducing the significant burdens rail users face when attempting to verify and understand the basis for demurrage charges.”²³ The Board’s proposal will eliminate the resource-intensive task of auditing demurrage invoices that are not machine-readable, increase efficiency and “enable rail users to catch erroneous charges that otherwise go undetected.”²⁴ Thus, the League strongly supports the Board’s proposal.

Furthermore, the Board is also seeking comments on how to define “machine-readable.” As the League explained in its previous comments, it believes that machine-readable should mean “a structured data file format that is open and capable of being easily processed by a computer. A format is open if it is not limited to a specific software platform and not subject to restrictions on re-use.”²⁵ The League believes that having this information in an Excel format that provides the ability to use Microsoft tools will be sufficient for purposes of the proposed rule.

²¹ Id. at 8.

²² Id. at 10.

²³ NITL Reply Comments at 2.

²⁴ Id. at 5.

²⁵ Id. at n. 2.

Appropriate Action to Ensure Demurrage Charges Are Accurate and Warranted:

Finally, the Board is also seeking comments on “what actions Class I carriers reasonably should be required to take, to ensure that demurrage invoices are accurate and warranted.”²⁶ The League reiterates its support for the Board’s proposal and continues to believe that “the proposed rule, once promulgated, will ensure that Class I railroads create internal mechanisms to filter out inaccurate and erroneous invoices and facilitate the resolution of many rail customers’ concerns.”²⁷

The Board’s proposal correctly allocates the burden to ensure that demurrage invoices are accurate and warranted on the Class I railroads as the invoicing party. Auditing demurrage invoices is a resource-intensive and burdensome task for many League members. They are currently being forced to expend enormous resources to try and audit and validate demurrage invoices and find that many have errors. They pay “large amounts in erroneous charges that are burdensome to detect.”²⁸ Incorrect invoices also undermine the principal dual-purpose of demurrage charges.²⁹ Thus, the Board’s proposal will be very helpful in ensuring that railroads audit demurrage charges in the first instance before invoicing, and account credits to customers upfront as appropriate. The League strongly supports the proposal.

²⁶ SNPRM at 11.

²⁷ NITL Comments at 10.

²⁸ NITL Reply Comments at 5.

²⁹ Id. 6.

For the foregoing reasons, the League respectfully requests that the Board finalize its proposals in this docket consistent with these comments and the prior comments submitted by the League.

Respectfully submitted,

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