

Before the Surface Transportation Board

STB Docket No. EP 759**Demurrage Billing Requirements**

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**Joint Comments of the
American Chemistry Council, Corn Refiners Association, The Chlorine Institute, and
The Fertilizer Institute
on the Supplemental Notice of Proposed Rulemaking**

The American Chemistry Council, Corn Refiners Association, The Chlorine Institute, and The Fertilizer Institute (collectively, the “Joint Commenters”) hereby submit these comments on the Supplemental Notice of Proposed Rulemaking the Surface Transportation Board served in the above-captioned proceeding on April 30, 2020 (the “SNPRM”). In response to the demurrage billing rules the Board initially proposed in its October 7, 2019 decision in this proceeding (the “NPRM”), Joint Commenters filed comments¹ espousing the Board’s efforts to promote transparent demurrage² billing practices and recommending revisions to the proposed rules to further promote transparency. Joint Commenters commend the Board’s decision to issue the SNPRM, which proposes revisions to the initial proposed billing rules consistent with many of the revisions that Joint Commenters and other rail users had recommended. The proposed revisions will make demurrage invoices more transparent and less burdensome to validate, which is consistent with the purpose of demurrage to incentivize efficiency and with principles of mutual accountability and transparency.³

¹ The Joint Commenters submitted individual opening comments.

² In these comments, demurrage includes private car storage. *See* SNPRM at 1-2 n.2.

³ *See* Policy Statement on Demurrage and Accessorial Rules and Charges, EP 757, slip op. at 21 (STB served Apr. 30, 2020) (stating that the overarching purpose of demurrage is to incentivize

These comments focus on the aspects of the SNPRM proposals that the Joint Commenters have not addressed in their NPRM comments. These comments also address the Board's request in the SNPRM for additional comments on the measures Class I carriers should take to ensure demurrage charges are accurate and warranted. To avoid duplication in the record, Joint Commenters refer the Board to their NPRM comments for additional views on the SNPRM proposals.

I. Billing Cycle Information

The Board should adopt its proposal to require carriers to identify the billing cycle covered by each demurrage invoice. Providing this information promotes transparency and reduces the burden of verifying demurrage charges. Moreover, it should not be costly for carriers.

Billing cycle information provides important clarity about the demurrage invoices. Demurrage charges relate to a specific day or days of car dwell. A rail user thus cannot readily understand the basis for an invoiced charge unless the user knows the dates to which the charge applies. Similarly, if a rail user does not know when an invoice starts and stops, identifying whether invoiced charges overlap charges in an adjacent invoice is difficult and time-consuming.

Billing cycle information also enables rail users to more efficiently gather information for verifying invoice charges. It clearly identifies the period to which the information must pertain. It also reduces the burden of pulling demurrage-related information from carrier websites. In fact, Joint Commenters have received feedback from their members stating that

efficiency; identifying transparency and mutual accountability as fundamental principles that should be reflected in demurrage and accessorial practices).

billing cycle information is needed to readily locate demurrage event information on certain carrier websites.

Providing this essential information on every invoice should not be burdensome for carriers. Carriers have access to this information since they generate the invoices. Moreover, billing cycle information is commonly provided on a wide range of invoices.

II. Original ETA and Date and Time Cars Received at Interchange

The Board should require carriers to provide an original ETA and the date and time that cars are received at interchange on demurrage invoices. This information would promote mutual accountability by enabling rail users to identify when carrier-caused delays give rise to demurrage.

The Board has made clear that “the overarching purpose of demurrage is to incentivize the efficient use of rail assets.”⁴ Demurrage does not incentivize efficient use when a carrier collects cars in bunches before delivering them to a rail user. It also does not incentivize efficient use when delays otherwise overwhelm a rail user’s ability to accept a car. Thus, rail users rely on carriers to transport cars in an efficient and timely fashion.

Having a car’s original ETA, as defined below, and the date and time the car was received at interchange, will help rail users avoid demurrage charges that arise when transit delays prevent rail users from accepting cars promptly upon arrival. Original ETA provides a clear standard for identifying transit delays on the delivering carrier’s line. The time a car was received at interchange allows a rail user to identify if upstream delays occurred. Thus, rail users can use original ETA and the date and time of a car’s interchange to dispute demurrage charges

⁴ *Id.* at 4.

arising from transit delays and to address delays with the specific carrier on whose line the delay occurred.

The remaining portions of this Part II responds to the Board's specific requests concerning the definition of original ETA, the interchanges about which an invoicing carrier should provide information, and how carriers should provide original ETA and interchange information.

A. Defining Original ETA

For private cars, original ETA should be defined as the estimated date and time of constructive placement as determined by the delivering carrier immediately upon the carrier's receipt of a car in interchange or, for single-line movements, upon the proper release of the car to the carrier at the origin. AAR's interchange rules should govern when a carrier has received a car.

This definition is narrowly tailored to enable a rail user to identify transit delays that impact demurrage. First, it references the date and time of constructive placement, which is when a carrier provides notice that a car is available for delivery.⁵ Demurrage typically begins to accrue starting the next day and stops accruing when the consignee instructs the carrier to deliver the car. Having the estimated date of constructive placement will give rail users a better understanding of when they should have capacity available to receive a car. It will also enable them to determine if a transit delay on the delivering carrier gave rise to demurrage by causing the car to arrive late.

⁵ For deliveries at open-gate facilities, constructive placement is synonymous with attempted delivery.

Second, this definition specifically refers to the estimated date of constructive placement generated immediately upon the carrier receiving control of the car. This ensures that the estimated constructive placement date can be compared with the actual constructive placement date to measure transit delays occurring on the delivering carrier's line. In contrast, if the definition is predicated upon when a carrier first moves the car after interchange or release, any delay caused by the carrier prior to such movement will not be captured by the estimate. Since many carrier-caused delays arise from the carrier allowing cars to dwell at origin or interchange, the Board should be clear that the original ETA must be generated immediately upon the carrier's receipt of the car in interchange or the release of the car to the carrier.

Joint Commenters do not believe original ETA needs to be defined differently for loaded and empty private cars because railroad demurrage rules generally apply the same calculation and constructive placement concept to all private cars.

B. Upstream Interchange Information

The billing rules should require carriers to provide the date and time of a car's interchange to each Class I railroad involved in the car's movement. This information will help a rail user readily identify the upstream carrier responsible for any bunching so the user can attempt to address it with the carrier. The opportunity to address bunching is important to rail users. Rail users that successfully address bunching can reduce costs since more shipments are generally necessary to avoid supply disruptions when shipments are frequently delayed by bunching events.

Knowing the railroad responsible for bunching also can help rail users obtain credits for resulting demurrage. While the Board's policy is that "carriers should consider the actions of

upstream carriers when administering their demurrage rules and charges,”⁶ some invoicing carriers may choose to ignore this as nonbinding. With upstream interchange information, a rail user that incurs demurrage because of upstream bunching will have the information it needs to contest the imposition of demurrage charges on cars when those charges could have been avoided but for upstream bunching.

C. Providing Original ETA and Interchange Information

Carriers should be required to provide the original ETA and interchange information on each invoice. Rail users may not have easy access to information that demonstrates whether bunching occurred. For many rail users, the employees that review demurrage invoices would have to research whether a bunching event occurred because they are not the same employees that handle bunching events. These users would be especially burdened by a requirement that they request original ETA and interchange information every time they receive an invoice.

Even if a rail user could easily determine that bunching occurred, requesting the original ETA and interchange information is burdensome. Accessing information from carrier websites in a format that enables a rail user to readily audit a demurrage invoice is time-consuming. In its reply comments to the NPRM, Dow, Inc.,⁷ explained at length the difficulties it had experienced pulling critical demurrage information from carrier websites.⁸ Forcing rail users to use these sites will merely delay their receipt of bunching information and audit of demurrage charges. Additionally, where an invoiced party is not served by the delivering carrier, it may not be able to easily gain access to the carrier’s website.

⁶ *Id.* at 12.

⁷ Dow is a member of the American Chemistry Council.

⁸ Dow NPRM Reply Comments at 3-5.

Moreover, requiring carriers to provide this information only upon reasonable request makes little sense. It would appoint carriers as the gatekeepers of the information that rail users need to validate demurrage charges that the carriers assess. Also, rail users would not be requesting this information if it was readily available to them in the first place because it would only make the process of reviewing demurrage invoices more burdensome.

III. Ordered-In Date and Time

Carriers should be required to provide ordered-in date and time on or with their invoices. In its NPRM opening comments, the American Chemistry Council provided extensive comments supporting a requirement that carriers provide this information.⁹ Joint Commenters adopt those comments and stress that the ordered-in date and time must be the actual date and time the carrier receives the order to place the cars at the receiving facility. Canadian Pacific appears to purposefully record a different ordered-in date and time in its system. According to feedback Joint Commenters have received from their members, this has resulted in unwarranted demurrage charges that Canadian Pacific has been slow to resolve.

IV. Machine-Readable Invoicing

Joint Commenters support the Board's proposal to require machine-readable invoice data; their comments responding to the NPRM explain why this requirement is necessary.¹⁰ Below, Joint Commenters respond to the Board's requests for specific comments related to the definition of "machine-readable," accessibility, and how carriers should transmit these invoices.

The Board should define "machine-readable" consistent with the Joint Commenters' proposed definition:

⁹ American Chemistry Council NPRM Comments at 2.

¹⁰ Joint Commenters NPRM Reply Comments at 5-8.

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.¹¹

First, this definition would enable the machine-readability requirement to achieve its purpose of allowing efficient and effective invoice audits. Efficient and effective audits require freely analyzable data. Joint Commenters' definition is consistent with this principle:

- It requires data to be structured, which enables computers to make sense of and process the data.¹²
- It requires an open format. An open format does not require a proprietary system to access and use the data.¹³ This promotes accessibility.
- It requires data to be easily processed by computer. To allow efficient auditing, human intervention should not be necessary for a computer to process the data. Nor should any specialized computing requirements be necessary.

Second, this definition ensures data is accessible to smaller rail users. By requiring data to be open, structured, and easily processed by computer, all rail users will be able to analyze the data without developing special code. Some users, however, may choose to develop special code to make their analyses more efficient.

Third, the definition provides carriers flexibility to select a machine-readable format. Carriers would not be restricted to a specific file format that would be difficult to support under their current system. Nevertheless, Joint Commenters anticipate that carriers would use either CSV or XLSX files to provide data consistent with the proposed machine-readability requirement.

¹¹ SNPRM at 10; Joint Commenters' NPRM Reply Comments at 2 n.2.

¹² See Memorandum from Sylvia Burwell, Director, Office of Mgmt. & Budget, Executive Office of the President, OMB M-13-13 at 5 (May 9, 2013) (indicating that structured data allows computer processing).

¹³ See *id.* (describing open data formats as non-proprietary and critical to accessibility).

The Board should also require carriers to provide machine-readable invoices by email to any rail user who requests email delivery. Joint Commenters have received member feedback stating that retrieving demurrage information from carrier websites is time-consuming and difficult. The burden of downloading machine-readable data from these sites would undercut the benefits of the data. To avoid this, the Board should require carriers to provide machine-readable invoices to all rail users by email, either as an attachment or via a direct link in the email, or give rail users an option to opt-in on email delivery of machine-readable invoices.

V. Appropriate Actions to Ensure Accurate and Warranted Demurrage Charges

The Board should require carriers to adopt common-sense measures to ensure accurate and warranted demurrage charges. Inaccurate and unwarranted charges unfairly burden rail users. They require rail users to incur costs to dispute errors that, in many cases, are careless. And if a rail user does not recognize an inaccurate or unwarranted charge, the charge results in unearned revenue for the carrier at the rail user's expense.

Common-sense measures carriers should adopt to ensure accurate and warranted demurrage charges include transparent billing practices and simple quality controls. Their invoices should show how they calculated the invoiced charges so that the calculation can be audited. The invoices should also show the data underlying the calculation so rail users can verify that the calculation was based on correct information. Additionally, carriers should regularly audit a statistically significant sample of each rail user's invoices to make sure they are accurate. They also should audit the inputs to their billing systems to ensure the correct demurrage rates and other data are being used. These audits would ensure that rail users are not the only defense against inaccurate and unwarranted charges.

Each carrier should also account for website functionality issues that prevent rail users from ordering in a car. These issues can lead to demurrage especially where the carrier does not

provide any credit days for constructive placement.¹⁴ For example, Canadian Pacific requires cars to be ordered in via its website, but according to feedback from Joint Commenters' members, the website may not provide the option to order in a car until the day after constructive placement, when demurrage already has begun to accrue, or until late in the day after the rail customer's personnel have left work. Because Canadian Pacific does not provide any credit days for constructive placement at a closed-gate facility, this website issue has resulted in demurrage assessments against impacted customers.

VI. Conclusion

Joint Commenters applaud the Board's efforts to promote just and reasonable demurrage practices. They respectfully request that the Board adopt a final demurrage billing rule consistent with their comments in this proceeding.

¹⁴ Carriers that do not provide credit days upon constructive placement of a private car include BNSF Railway and Norfolk Southern. Canadian National does not provide credits days for constructive placement of loaded private cars.

Respectfully submitted,

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