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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket EP 759

DEMURRAGE BILLING REQUIREMENTS

**OPENING COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Supplemental Notice of Proposed Rulemaking (“SNPRM”) served in this docket on April 30, 2020, the National Grain and Feed Association (“NGFA”) respectfully submits these Opening Comments on the Surface Transportation Board’s (“Board” or “Agency”) request for comments on certain modifications and additions to the minimum information that Class I rail carriers should be required to include in demurrage invoices sent to freight rail customers.

The NGFA commends the Board for its multi-pronged effort to address long-festerling egregious demurrage and accessorial practices and charges imposed by Class I railroads that are neither commercially fair, commercially achievable nor reciprocal. This includes Class I railroads’ practices for invoicing their customers for demurrage and accessorial charges, which frequently are inaccurate and impose burdensome, tedious, time-consuming and costly efforts on rail customers to investigate and challenge.

I. Identity and Interest of NGFA

Established in 1896, NGFA consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 75 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, NGFA has a strategic alliance and is co-located with the North American Export Grain Association and has a strategic alliance with the Pet Food Institute.

II. General Comments

As pointed out in NGFA's previous statements filed in response to the Agency's May 2019 oversight hearing on demurrage and accessorial charges (Docket No. EP 754) and subsequently in its "Notice of Proposed Rulemaking on Demurrage Billing Requirements" (Docket No. EP 759), Class I railroads generally have placed the sole burden on their customers to prove demurrage and accessorial charges are not accurate or valid. Further, the railroads have given themselves sole discretion to reject or modify an invoice that is subject to a rail-customer challenge. For these reasons, as an initial overarching comment, NGFA urges the Board to follow its path in Docket No. EP 757, "Policy Statement on Demurrage and Accessorial Rules and Charges," and also make the final rules in this proceeding applicable to invoices for accessorial charges "insofar as the purpose of an accessorial charge is to enhance the efficient use of rail assets in the same way as demurrage." See Docket No. EP 757 (served April 30, 2020) at 14.

In its previous filings to the Board on this matter, NGFA has urged that it require rail carriers, *prior to issuing invoices* for demurrage and accessorial charges, to (1) confirm that the charges are being assessed properly in conformance with the tariff terms and the general rule that such charges are improper if they are the result of carrier fault; and (2) notify and consult with the affected rail customer to validate the accuracy and legitimacy of the charge, with human intervention at the appropriate decision-making level being made available by the respective carrier.

As demonstrated repeatedly in evidence provided in EP 754 and EP 759 by NGFA and other rail customer organizations, the accounting and collection departments of Class I rail carriers overwhelmingly issue invoices automatically (which are often computer-generated) based solely on train movement data – often predicated on a simple code that reads car placement and release times and other simple binary data – without sufficient internal review by railroad personnel for accuracy or extenuating circumstances, including delays caused by the carrier. This places upon railroad customers virtually the entire burden of verifying the applicability and accuracy of such charges. As the Board heard from many shippers, this burden can be substantial and costly. NGFA has been informed of many cases in which shippers and receivers simply pay without challenging erroneous demurrage invoices merely because the time, hassle and cost of investigating and challenging them exceeds the individual charge itself. Yet, these erroneously billed charges are consequential when tallied over an entire year.

The railroads then control the process and timing for determining whether such invoices are valid – from reporting of performance by their crews (a potentially inherent conflict-of-interest)

to overreliance on railroad computer systems to determine when charges should apply, with minimal human intervention.

Thus, the Board is correct and fully justified in seeking comments on additional information that carriers should be required to include in demurrage (which NGFA respectfully submits also should apply to accessorial charge) invoices to at least somewhat facilitate rail customers' ability to verify and substantiate the accuracy of such charges.

III. Specific Comments of the NGFA on the SNPRM

The NGFA strongly supports the Board's initial notice of proposed rulemaking to require that Class I railroads include in their invoices the following minimum information:

- The unique identifying information (such as the reporting marks and number) of each car cited on the invoice;
- The following shipment information, where applicable:
 - the date the waybill was created;
 - the status of each car as to whether it was loaded or empty;
 - the commodity being shipped, if the car was loaded;
 - the identity of the shipper, consignee, and/or care-of-party, as applicable; and
 - the origin station and state where the shipment originated.
- The dates and times of:
 - actual placement of each car;
 - constructive placement of each car (if applicable and different from the actual placement). In this regard, NGFA recommends this information requirement be

expanded by clarifying that it is to include both origin and destination, with a listing of specific cars and the relevant events that precluded their actual placement at the facility;

- notification of constructive placement to the shipper, consignee or third-party intermediary (if applicable); and
- release of each car.
- The number of credits and debits attributed to each car (if applicable).

Additional Information Requirements: NGFA also strongly supports the Board going further by requiring specific additional information on or accompanying demurrage invoices from Class I carriers, as articulated in the SNPRM. In this regard, NGFA strongly supports the Board modifying its proposed regulations at 49 C.F.R. §1333.4 to require that Class I carriers include the following additional information in their invoices, and offers the following specific comments on each:

- The date range (billing cycle) covered by the demurrage invoice.
- The original estimated date and time of arrival of each car (as established by the invoicing carrier), as well as the date and time each car was received at interchange (if applicable) either on or with each invoice. In addition, as part of this requirement, NGFA recommends that the Board require Class I carriers to provide the following additional information:
 - The date and time car orders are placed with the carrier, including information on any verified notifications of changes to the original order dates, which is useful information to determine order identification;

- The date and time of actual placement (e.g., “spotting”) of the train (cars) for loading or unloading, as well as empty release, at the loading or receiving facility, including information on whether individual cars were spotted or pulled within the relevant service window. This is crucial information, given that railcars are assessed demurrage on both ends of a waybill – loading and unloading. (NGFA is informed that some carriers already provide this information); and
- Any missed switch dates and scheduled non-switch dates.
- The date and time of each car ordered in (if applicable).

Further, NGFA believes carriers should be required to provide this additional information automatically, without the invoiced party having to request it, so as to expedite the rail customer’s review and avoid the cumbersome process and delays involved in obtaining such information from many carriers.

Machine-Readable Format: In addition, NGFA supports requiring that Class I railroads provide demurrage and accessorial invoice data in a machine-readable format to make verification by customers of such charges less burdensome, in lieu of railroads providing such information in paper or PDF files unless the latter formats expressly are requested by the rail customer.

In this regard, NGFA generally is supportive of the definition of “machine-readable format” proposed in the Joint Reply of the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute and National Industrial Transportation League. However, NGFA suggests that consideration be given to building on their proposed definition by including the following additional language (new language boldfaced and underscored; deleted language

stricken through): “*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~~ is not subject to restrictions on re-use, and can be read and interpreted automatically by a computer program without the need for manual intervention.*”

Members of NGFA’s Rail Shipper/Receiver Committee (comprised of 33 representatives of a cross section of NGFA’s diverse membership) also provided the following examples of specific machine-readable formats that would be most useful to rail customers, including smaller shippers and receivers: (1) Excel spreadsheets; using a customized link that a rail customer could access to directly download carrier data into a machine-readable format; (2) Office Open XML; and (3) Open Document spreadsheets.

The preponderance of views was that providing such information in Excel spreadsheet format likely would be the most user-friendly for smaller shippers and receivers. Providing an on-line portal/customized link on the railroad’s website or automatically generated emails from the carrier also were cited as suitable mechanisms to provide smaller shippers and receivers with access to invoice information.

Finally, several NGFA members concur with other commenters in commending the Norfolk Southern Railway Co. for its current approach in sending a PDF file containing a summary of demurrage charges, supplemented by an Excel spreadsheet containing machine-readable data to facilitate its customers’ review.

Appropriate Action to Ensure Demurrage Charges are Accurate and Warranted:

NGFA generally supports the previously submitted proposal of the North American Freight Car

Association to revise 49 C.F.R. §1333.4(b) to require Class I carriers to provide “a concise explanation of how the charge was calculated and the carrier’s reasons for the charge being assessed” to help rail customers verify the accuracy of demurrage invoices. NGFA believes such “explanations” of charges should be substantiated by requiring the Class I railroad to include signed and certified documents, photos and original trip plans attesting to the accuracy of the invoice.

NGFA also recommends that Class I railroads be required to inform the Board in writing of the specific steps each one takes to ensure the accuracy of its respective demurrage invoices, with the Agency subsequently making such carrier statements publicly available on its website.

Finally, to facilitate transparency and the Board’s monitoring function, NGFA suggests that the Board’s Rail Customer and Public Assistance Office create a portal on its website to collect reports submitted by rail customers of erroneous invoices generated by individual Class I railroads so the Agency can track trends in carrier performance. NGFA believes the Board should communicate directly with senior management of any Class I carrier that exhibits a pattern of repeatedly generating inaccurate billings to discuss and determine corrective actions that should be taken. In this regard, NGFA encourages the Board at some point to consider amending its Policy Statement on Demurrage and Accessorial Rules and Charges to recommend that rail carriers – particularly repeat offenders – provide offsetting credits (that do not expire) to rail customers that successfully challenge erroneous invoices to partially compensate them for the time, effort and cost expended in challenging such billings. See Docket No. EP 757 (served April 30, 2020) at 15-16.

IV. Additional Comments on Demurrage

While not directly relevant to this proceeding, NGFA also wishes to utilize this opportunity to suggest one additional demurrage-related data reporting requirement that Class I carriers should submit to the Board, and which the Agency should make available publicly on its website: A summary of all railcars that have been “bunched” on the rail network. One suggested metric that could be used to determine when bunching is deemed to have occurred is to require reporting of cars in the possession and control of a rail carrier that have not moved for more than 72 hours with any car-location management status other than actually or constructively placed.

Conclusion

The NGFA again commends the Board for its actions to address demurrage and accessorial practices and charges, and for providing this opportunity for stakeholders to submit additional comments and recommendations concerning Class I railroad demurrage billing requirements. NGFA underscores its overarching belief that given the “track record” of several Class I carriers of repeatedly submitting erroneous demurrage and accessorial invoices to their customers – and foisting upon those customers the responsibility for verifying and challenging the accuracy of carrier-generated invoices – it is incumbent upon the Board to require additional information from carriers to enable rail customers to do so as efficiently as possible.

NGFA believes the additional information requirements and other recommendations it proposes herein are reasonable and achievable by Class I carriers, and are justified based upon their current demurrage billing practices and processes. Further, NGFA believes their adoption by the Board actually could contribute to more internal review and verification activities by the railroads themselves before they disseminate such invoices to customers.

NGFA appreciates the priority attention being given by the Board to this matter, and respectfully requests that the Board give due consideration to NGFA's comments and recommendations in expeditiously crafting a final rule.

Respectfully submitted,



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