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June 5, 2020
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 759

Demurrage Billing Requirements

**COMMENTS OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.**

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Dated: June 5, 2020

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The Institute of Scrap Recycling Industries (“ISRI”) hereby submits its comments in response to the supplemental notice of proposed rulemaking regarding Demurrage Billing Requirements issued by the Surface Transportation Board (“STB” or “Board”) on April 30, 2020.¹ The Board’s SPNRM addresses certain comments it received in response to its notice of proposed rulemaking on Demurrage Billing Requirements issued by the Board on October 4, 2019.² ISRI filed opening and reply comments in this docket on November 6, 2019 and December 6, 2019, respectively. ISRI commends the Board for its actions to address concerns expressed by its members regarding demurrage invoices that too often are inaccurate and lacking adequate information to verify the charges. ISRI has supported the Board’s prior proposals to mandate that demurrage invoices include certain minimum information requirements. As explained below, ISRI also strongly supports the Board’s proposals set forth in the SNPRM.

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”).

I. STATEMENT OF INTEREST

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated \$117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

The U.S. scrap recycling industry is heavily dependent on a reliable and cost-effective transportation network of rail, trucks, barges, and ships to receive and deliver scrap materials. Rail transportation is a critical mode for shipments of ferrous and nonferrous scrap, especially at longer distances beyond 200 miles, and many of our members are captive customers who are served by only one Class I rail carrier. Due to the unique nature of shipping bulk scrap metal, there are many situations where rail is the only mode shipping this material. ISRI's rail shippers are subject to the railroads' demurrage and accessorial tariffs and have actively participated in the Board's demurrage proceedings.

II. COMMENTS

In the SNPRM, the Board proposes to modify the proposed regulations to require Class I railroads to provide additional information on or with their demurrage invoices, including (i) billing cycle information, (ii) the original estimated date and time of arrival (“ETA”) of each car and the date and time cars are received at interchange, and (iii) the date and time of each car ordered in.³ The Board also proposes to require Class I railroads to provide access to demurrage data in a machine-readable format.⁴ Finally, the Board is seeking additional information about its proposal in the NPRM that would require Class I railroads to “take appropriate action to ensure that the demurrage charges are accurate and warranted.”⁵

A. Billing Cycle Information.

ISRI strongly supports the Board’s proposal to require Class I railroads to add billing cycle information to their demurrage invoices. ISRI echoes the Board’s observations that having billing cycle information on demurrage invoices will assist rail customers with identifying the specific time period covered by the invoice, without adding any unreasonable burden on railroads. This information should be easily accessible by the railroads and rail customers would benefit from the increased transparency.

B. Original ETA and Interchange Information.

ISRI also commends the Board for addressing in the SNPRM its members’ concerns related to original ETAs.⁶ In its opening comments, ISRI urged the Board to require railroads to include original ETAs in their demurrage invoices. This comment stemmed from concerns that at least one Class I railroad regularly replaces “the original ETA for a given car with a new date,

³ SNPRM at 4-5.

⁴ *Id.*

⁵ *Id.* at 10.

⁶ ISRI Opening Comments at 9.

if any delays occur with respect to that car,” which can impact whether the railroad is required to provide credits for early or late arrivals of railcars.⁷ Changes to the ETA often work to the benefit of the railroad, create confusion, and makes validating demurrage charges and credits more difficult. Similar concerns related to changes to original ETAs were echoed by other parties in this proceeding.⁸

ISRI believes that the original ETA information would improve the ability of receivers to identify carrier-caused delays in delivering railcars. Specifically, requiring Class I railroads to include the ETA information that existed at the time of shipment will allow rail customers to have full visibility as to the number of days between the ETA and the date and time of the actual arrival of the railcars.

Another issue involving ETAs concerns railroad pipeline reports which detail the cars in the system for future deliveries to receivers’ facilities. At least one Class I railroad that provides its customers with a pipeline report fails to consistently include an ETA for the cars listed. For cars lacking an ETA, the railroad typically updates the report to include the ETA at a later point in time. Thus, instead of changing the ETA as noted above, the railroad simply delays its publication. In either case, the railroad’s practice can obfuscate its own service deficiencies and responsibility for carrier-caused delays. This adversely impacts the receiver’s ability to obtain all credits to which it may be rightfully owed. Thus, ISRI believes that the Board should require Class I railroads to provide an ETA for each railcar listed in a pipeline report.

Relatedly, the Board’s original NPRM contains a requirement for demurrage invoices to include “[t]he number of credits and debits attributable to each car (if applicable).”⁹ Reading this proposed requirement together with the Original ETA requirements in the SNPRM, ISRI

⁷ Id.

⁸ SNPRM at 6-7.

⁹ NPRM at 10.

understands that the Board's proposals would obligate the Class I railroads to determine in advance for each car included in an invoice whether credits apply. ISRI strongly supports this interpretation of the Board's proposal. Nonetheless, ISRI believes that the invoicing requirement as to credits may also be interpreted as not necessarily requiring Class-I railroads to identify and apply such credits with the original demurrage invoice, but rather receivers may be required to apply for credits and, if granted, those credits could appear on a future invoice.

Due to this ambiguity as to the Board's intended meaning of the requirement to include credits in demurrage invoices, ISRI requests the Board to clarify this issue in the final rule. Additionally, if the Board did not intend to require all Class I railroads to initially determine whether credits apply (absent any application by the receiver), then ISRI believes that the Board should clarify that credits should be carried over for 30 or 60 days before they expire. This would be especially justified when the railroads change or fail to provide an original ETA as described above, since those practices undermine the ability of receivers to accurately forecast and plan for car deliveries. As the Board set forth in the demurrage Policy Statement, it is concerned about "the lack of reciprocity between demurrage credits and charges, particularly where the expiration date of a credit, in effect, undermines the value of credits allocated for a problem or delay that was not within the reasonable control of a rail user."¹⁰

Similar to the requirement for inclusion of the Original ETA, requiring Class Is to provide interchange date and time information with demurrage invoices would also help rail customers evaluate whether the railroad's service was a factor leading to demurrage charges, including impacts related to the potential bunching of railcars by the delivering or an upstream carrier. In its recent Policy Statement on demurrage, the Board stated that the purpose of

¹⁰ *Policy Statement on Demurrage and Accessorial Rules and Charges*, STB Docket No. EP 757 (served April 30, 2020) ("Policy Statement") at 19.

demurrage is not fulfilled where actions by the carrier(s) cause bunched deliveries that make demurrage charges unavoidable.¹¹ Thus, both of these proposals would benefit the Board's ultimate purpose of providing rail customers greater access to information in order to determine the validity of demurrage charges, and allow customers to modify their behaviors, as appropriate.¹² ISRI also believes that requiring this information would not be unreasonably burdensome for Class I railroads, given that the information is readily available to them in the ordinary course of business.¹³

The Board is seeking comments on two additional issues regarding original ETAs and interchange information. Specifically, the Board has asked (i) whether the requirement that Class I railroads provide the date and time at which each car was received at interchange should be limited to the last interchange with the invoicing carrier, and (ii) whether Class I railroads should instead be required to provide original ETA and interchange time information only upon reasonable request to the invoiced party.¹⁴

As to the first proposal, ISRI believes that the Board should, at a minimum, require Class I railroads to provide information regarding the last interchange. Nonetheless, a new rule that would require Class I railroads to provide information regarding all interchanges would be helpful for rail customers to identify other causes of the delays and have more insight as to where the bottleneck occurs along the entire route. The more visibility the rail customer has the easier it will be to verify the demurrage charges which, in turn, should help resolve demurrage disputes.

As to the latter proposal, ISRI believes that the Board should require Class I railroads to provide original ETA and interchange time information on their demurrage invoices for all rail

¹¹ Id. at 12-13.

¹² SNPRM at 4.

¹³ Id. at 7.

¹⁴ Id at 7-8.

customers, rather than to provide this information only upon request. As the Board pointed out, this information will help rail customers in identifying “sources of delay and carrier-caused bunching and assess the validity of any resulting demurrage charges.”¹⁵ Furthermore, as noted, this information is readily available to Class I railroads and including them on demurrage invoices will not be unreasonably burdensome.

C. Ordered-In Date and Time.

ISRI strongly supports the Board’s proposal to require Class I invoices for demurrage to provide the date and time that cars were ordered into a rail user’s facility. As the Board recognized, this information is crucial in calculating demurrage incurred at closed-gate facilities, for both demurrage accrual and verification purposes.

This information is essential for accrual of demurrage because the ordered-in date and time stops the accrual of demurrage at closed-gate facilities under Class I railroad tariffs.¹⁶ Furthermore, although ISRI members may have this information in their own records, requiring Class I railroads to provide this information on invoices will help to identify discrepancies and ascertain the accuracy of the demurrage charges.

ISRI also echoes the Board’s findings that providing this information would not be burdensome for Class I railroads, given that they already generate and use this information in the ordinary course of business. Thus, ISRI strongly supports the Board’s proposal regarding ordered-in date and time information.

D. Machine-Readable Data.

In its earlier comments in response to the NPRM, ISRI suggested the Board to require railroads to provide demurrage invoices “in a format that would enable their customers to

¹⁵ Id. at 7.

¹⁶ Id. at 8.

process and manipulate the data provided.”¹⁷ ISRI was particularly concerned with the practice by some railroads whose invoices are contained in a PDF file, which “impedes the customers’ ability to review and analyze the data and adds additional costs to railroad customers in the form of overtime payments or additional staffing to transfer the data into Excel or another workable format.”¹⁸

As the Board found, most Class I railroads provide their invoices in a PDF or paper format, which makes the verifying process difficult and burdensome for rail customers.¹⁹ Some of the other commenters echoed ISRI’s concerns that the invoices provided in a PDF or paper format create additional burdens for rail customers and makes it difficult to detect erroneous charges.²⁰

In order to alleviate these concerns, the Board 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.”²¹ The Board also noted that its intention is not to make this information available only in a machine-readable format, which “would render it inaccessible to rail users without resources for coding or new upfront costs.”²²

ISRI strongly supports the Board’s proposal regarding machine-readable data. ISRI believes that this will enable rail customers to manipulate and process this data without incurring significant costs. Consequently, it will simplify the process of verifying demurrage charges and reduce the current burdens and resources associated with such processes.

¹⁷ ISRI Reply Comments at 13.

¹⁸ Id.

¹⁹ SNPRM at 10.

²⁰ Id. at 9.

²¹ Id. at 10.

²² Id.

ISRI commends the Board for considering the additional difficulties that smaller rail customers may experience in accessing such machine-readable data. As ISRI explained in its previous comments, the main concern of ISRI members is to have this information in a format that would be easily transferrable “into Excel or another workable format.”²³ ISRI supports any file format that would enable its members achieve this object.

E. Appropriate Action to Ensure Demurrage Charges Are Accurate and Warranted.

The Board is seeking additional comments on its proposal contained in the NPRM, which would require Class I carriers to “take appropriate action to ensure that the demurrage charges are accurate and warranted prior to sending demurrage invoices.”²⁴ Specifically, the Board invited further comments “from the Class I carriers regarding what actions they currently take, and from all stakeholders on what actions Class I carriers reasonably should be required to take, to ensure that demurrage invoices are accurate and warranted.”²⁵

In its comments in response to the NPRM, ISRI invited the Board “to ask the railroads to clarify what specific actions they are currently taking to ensure that the invoices are accurate and warranted.”²⁶ ISRI commends the Board for taking this approach.

Furthermore, ISRI strongly believes that this proposed requirement is essential for demurrage charges to serve their overarching purpose. The Board explains the purpose of demurrage as “[encouraging] 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.”²⁷ Incorrect invoices fail to achieve this purpose. Thus, it is critical for

²³ ISRI Reply Comments at 14.

²⁴ SNPRM at 10-11 (internal quotation marks omitted).

²⁵ Id. at 11.

²⁶ ISRI Reply Comments at 13.

²⁷ NPRM at 8.

demurrage invoices to be accurate and warranted to ensure that demurrage responsibility is properly allocated and to assist customers “to modify their behavior if their actions led to the demurrage charges.”²⁸

In ISRI members’ experience, many railroads provide inaccurate demurrage invoices. Members have reported inaccuracies of all types of information, including misidentified rail cars, misapplication of data used in demurrage calculations, and the misapplication of credits. This creates confusion and forces rail customers to incur unnecessary burdens and to allocate significant resources to review and audit the invoices. Overall, ISRI strongly believes that its members would greatly benefit from the proposed requirement that would mandate railroads to ensure the accuracy of these invoices. Thus, ISRI strongly believes that the railroads should be held more accountable and should audit the invoices in advance before sending them to their customers.

F. Application of the Proposed Rules to Class II and III Railroads.

Finally, ISRI reiterates its belief that Class II and III railroads should be subject to the demurrage invoicing rules proposed in the NPRM and SNPRM. In the NPRM, the Board explained that it will not “require Class II or Class III carriers to comply with the requirements for demurrage invoices ... as the issues identified before, during, and after the hearing predominantly pertained to Class I carriers, and given that any compliance costs may be more difficult for some smaller rail carriers.”²⁹ Nonetheless, the Board also encouraged these carriers “to comply with these requirements to the extent they are capable of doing so.”³⁰ Similarly in the SNPRM, the Board did not change its position on limiting the proposed rules to Class I

²⁸ Id.

²⁹ NPRM at 10.

³⁰ Id.

railroads.³¹ The Board also noted that it will address arguments for expanding the rules to cover Class II and Class III railroads in a future decision.³²

Nonetheless, ISRI explained in its previous comments that “many Class II and III railroads mimic the rules adopted by the Class Is and ISRI does not believe that the compliance costs would too burdensome, especially for Class II carriers.”³³ ISRI also raised the point that applying a uniform standard for all railroads would promote efficiency in demurrage payments and dispute resolution.³⁴ ISRI continues to believe that the Board should reconsider its decision to exclude Class II and Class III railroads from the proposed rules set forth in the NPRM and the SNPRM.

III. CONCLUSION

ISRI appreciates the Board’s bold steps to address the important issues related to demurrage billing requirements set forth in the SNPRM. ISRI strongly believes that the proposals will greatly assist rail customers by ensuring that they receive adequate information to assess the validity of demurrage charges without having to undertake unreasonable efforts. ISRI respectfully urges the Board to proceed with finalizing the demurrage billing rules.

Respectfully submitted,

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June 5, 2020

³¹ SNPRM at 12.

³² Id. at fn. 22.

³³ ISRI Opening Comments at 10.

³⁴ Id.