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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 759

DEMURRAGE BILLING REQUIREMENTS

COMMENTS OF CANADIAN PACIFIC ON SUPPLEMENTAL NPRM

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Canadian Pacific¹ (“CP”) submits these Comments pursuant to the Board’s Supplemental Notice of Proposed Rulemaking (“SNPRM”) served April 30, 2020, in the above-captioned proceeding. The initial Notice of Proposed Rulemaking (“NPRM”) served October 7, 2019, proposed rules to prescribe the data that carriers must provide with demurrage invoices, among other things. The SNPRM proposes to require, in addition to the data identified in the NPRM, additional types of information that carriers must provide with demurrage invoices. CP submitted Opening Comments on November 6, 2019, opposing the proposed regulatory action as, among other things, contravening the Rail Transportation Policy, including Congress’s directive “to minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2). The concerns expressed in those comments are also applicable to the SNPRM, and CP incorporates its Opening Comments herein by reference.

¹Canadian Pacific is a trade name under which Canadian Pacific Railway Company and its United States subsidiaries Soo Line Railroad Company; Dakota, Minnesota & Eastern Railroad Corporation; Delaware and Hudson Railway Company, Inc.; and the Central Maine & Quebec Railway US Inc. operate.

The SNPRM seeks comments on, among other things, whether the Board should require carriers to include on or with demurrage invoices each car's "original ETA." The Board's proposal to include "original ETA" responds to commenters that contend that "rail users could compare [the original] ETA to the car placement information in order to better recognize if carrier-caused problems, including bunching may have impacted the timing of a car's placement." SNPRM at 6. CP believes that imposing such a regulatory burden inappropriately places the emphasis on challenging demurrage rather than encouraging customers to utilize such information in real time to avoid incurring demurrage in the first place. Further, CP believes that the proposed regulatory action is unnecessary and would have significant negative unintended consequences.

I. THE PROPOSED RULEMAKING IS INCONSISTANT WITH THE PURPOSE OF DEMURRAGE.

Providing information to customers while shipments are in transit empowers and encourages customers to continually monitor and actively manage their incoming pipeline and allocate resources efficiently to the benefit of the customer, CP, and the rail network generally. CP customers utilizing this timely information have the ability to log a concern, including concerns that railroad-caused delays are causing bunching, on CP's web-based Customer Station 'Log-An-Issue' tool. CP and its customers can use this information to help ensure that customers receive appropriate credits for railroad-caused issues. Notably, customers who log issues while a shipment is in transit have no need to review historical information to identify improper demurrage charges due to railroad-caused bunching. Customers may also be able to reduce further demurrage through corrective actions. Customers have the opportunity to adjust to input, ensuring that cars are loaded and unloaded timely to avoid unnecessary congestion on rail lines and in rail service yards which benefits all stakeholders in the supply chain. No such opportunity exists when the customer is reacting to invoices.

This rule making, however, places the emphasis on empowering customers in their ability to challenge invoiced demurrage charges. The proposed mandate that carriers provide additional information, on or with invoices for use as an after-the-fact tool for disputing demurrage sends the wrong message to customers and undermines the very goals for which CP makes this data available to its customers. Rather than encourage customers to remain actively engaged in monitoring and managing their supply chains to, among other things, avoid incurring demurrage charges in the first place, the regulatory action would encourage customers instead to view information that the STB mandates carriers provide, as a forensic tool for disputing demurrage charges. In this sense, the proposed regulatory action is at cross purposes with the reason that Congress requires carriers to charge demurrage; namely, to encourage efficient use of rail cars.²

CP also believes that customers should have reasonable access to information in order to be able to review demurrage invoices. CP already makes a substantial amount of the information identified in the NPRM available on line and downloadable in a spreadsheet. To the extent historical information is not readily available on line, CP provides such information upon reasonable request. However, CP stands by its view that this information is best accessed and utilized by the customer while goods are in transit and before a demurrage invoice is issued.

II. ORIGINAL ETA IS NOT AN APPROPRIATE BASIS ON WHICH TO DISPUTE DEMURRAGE.

Further, CP is concerned that the proposed regulatory action will result in some customers simply disputing demurrage charges related to a car that did not adhere precisely to its original ETA. Such customer behavior would make it far more burdensome and difficult for carriers to administer an effective demurrage program as required by statute.

² Demurrage also compensates railroads for use of rail assets.

A customer's refusal to pay demurrage charges because the car did not adhere to its original ETA would effectively and improperly treat the "estimated" time of arrival as a guaranteed transit time, which it is not. As part of an agreement, CP may provide transit time assurances however, this premium service is priced accordingly, includes bi-lateral requirements such as minimum volume commitments, and is subject to network and operational considerations. As part of its standard product, CP does not guarantee a specific transit time and with good reason. Some variation in rail transit times are normal and beyond the reasonable control of the railway. While CP will consider extreme transit variability within its control when assessing demurrage relief, Customers also have an obligation to take into account a reasonable transit range in its planning and loading/unloading processes. The fact that a rail car departs from its original ETA does not, and should not, relieve a rail customer from paying demurrage charges, and more importantly, from ensuring that the car is timely loaded and unloaded.

Given the fact that currently original ETA is information that is readily available to CP's customers, the proposed regulatory action is unnecessary. As noted above, CP customers have access to a car's ETAs and the ability to log concerns in real time. Additionally, CP voluntarily provides historical data, including transit time to customers upon reasonable request. Accordingly, if CP were to receive enough requests for such incremental data, then market forces and manual effort would likely drive it to invest in reprogramming to provide the data automatically. As of yet, however, CP has not encountered significant demand from customers for some of the data elements noted, such as original ETAs, and therefore broad-scale investment in automating the data is not justified.

Amongst other data elements, a car's original ETA is information that CP voluntary makes available to customers in real-time, not because the government requires it but because carriers

such as CP believe it could help them operate more efficiently and better compete, and contributes to the health of the rail system. Converting a voluntary undertaking into a regulatory burden penalizes and discourages innovation and is therefore unsound policy.

III. CARRIERS SHOULD BE AFFORDED REASONABLE TIME TO ADAPT SYSTEMS TO COMPLY WITH ANY RULES CHANGES.

If the Board nevertheless mandates that carriers provide original ETAs on or with invoices, CP asks that the Board provide reasonable and sufficient time to implement the mandate. CP systems are not currently designed to generate such information in the format that would be required. Accordingly, to provide such information will require an investment in time and resources to reprogram CP systems. This will require that CP divert resources away from current projects, including work on a mobile demurrage app intended to improve a customer's ability to manage its pipeline and demurrage. CP expects that it could implement such a mandate within approximately 6 months from the effective date of an STB decision, but asks that the Board provide at least a year to implement in order to minimize disruption to existing projects and allow CP to prioritize its use of its resources appropriately.

CONCLUSION

For the reasons discussed above, CP opposes the proposed changes to the STB's demurrage rules with respect to billing requirements. Instead of regulatory action, the Board should defer to market forces. If the Board moves forward with the proposed rules, however, it should clarify that a railroad can satisfy the information requirements by making the data available to the customer via a web-based customer portal.

Respectfully submitted,

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