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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 759

DEMURRAGE BILLING REQUIREMENTS

**REPLY COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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Dated: July 6, 2020

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The National Industrial Transportation League (“NITL” or “League”) hereby submits its reply comments to the comments filed by various railroads¹ on June 5, 2020 in response to the Surface Transportation Board’s (“STB” or the “Board”) supplemental notice of proposed rulemaking (“SNPRM”) issued on April 30, 2020.²

I. Reply Comments

The League reiterates its support for the Board’s efforts to address the very important issues related to the accuracy and clarity of demurrage invoices. The League continues to believe that confusing and erroneous demurrage invoices is a major concern for rail customers across the nation. It commends the Board for taking steps to address these issues by requiring railroads to provide specific data elements that are relevant to auditing demurrage charges.

¹ Railroads that submitted comments in response to the SNPRM are as follows: BNSF Railway Company (“BNSF”), Norfolk Southern Railway Company (“NS”), Union Pacific Railroad Company (“UP”), Canadian Pacific (“CP”) Canadian National Railway Company (“CN”), and CSX Transportation Inc. (“CSX”) (collectively referred to as “Railroad Commenters”).

² Demurrage Billing Requirements, STB Docket No. EP 759 (served April 30, 2020) (“SNPRM”).

A. Minimum Billing Requirements are Necessary

One common concern raised by the Railroad Commenters is that the billing requirements proposed by the Board are unnecessary and counterproductive.³ Specifically, Railroad Commenters contend that they currently provide all information that is needed to support their demurrage charges by making the information available on-demand through their web platforms or, if not on the platforms, upon customer request.⁴ Instead of adopting new demurrage billing requirements, Railroad Commenters argue that the Board should encourage carrier innovation and the development of tools that would enable shippers to better manage their railcar pipelines and demurrage.⁵ Railroad Commenters also contend that the information proposed to be required by the Board in demurrage invoices would overcrowd invoices and render them “cluttered and unreadable.”⁶

³ See *e.g.*, Comments of Union Pacific Railroad Company to Supplemental Notice of Proposed Rulemaking, STB Docket No. EP 759 (June 5, 2020) at 2 (“UP Comments”) (“Union Pacific customers already have access to the information needed to understand, verify, and dispute demurrage charges. Union Pacific respectfully submits that Board action is simply not required in this proceeding.”), Comments of Canadian Pacific on Supplemental NPRM, STB Docket No. EP 759 (June 5, 2020) at 2 (“CP Comments”) (“CP believes that the proposed regulatory action is unnecessary and would have significant negative unintended consequences.”).

⁴ See *e.g.*, Comments of CSX Transportation, Inc., STB Docket No. EP 759 (June 5, 2020) at 3-4 (“CSX Comments”), CP Comments at 4 (“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.”).

⁵ See *e.g.*, Norfolk Southern Railway Company Comments, STB Docket No. EP 759 (June 5, 2020) at 2 (“NS Comments”) (“The Board should not require carriers to provide additional, detailed information on paper invoices. Instead, the Board should encourage carriers to continue to innovate and develop platforms that enable customers to receive real-time information about their shipments, thereby providing those customers with advanced tools to manage their rail pipelines.”), CP Comments at 6 (“[Mandating demurrage billing requirements] 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.”).

⁶ UP Comments at 5.

Railroad Commenters paint an inaccurate picture as it pertains to demurrage bills. It is the League members' experience that demurrage invoices, in fact, are very difficult to verify and that the information needed for verification is not readily accessible. Existing online platforms touted by the Railroad Commenters as containing the data needed to confirm demurrage charges are not sufficiently user-friendly because the information is not always centralized in one location on the platform or data may not be provided in a format that can be readily downloaded and analyzed. As explained previously, auditing demurrage invoices is extremely burdensome for the League's members, as they are forced to spend inordinate time and resources to validate the charges.⁷ Validating demurrage charges often sends the customer on a "wild goose chase" as they lack the data needed to track car histories or such data is not self-contained within the web platform.

The Board's proposals will help to ensure that rail customers have the *minimum* data elements needed to more efficiently audit demurrage charges or to ask for additional information when necessary, thereby, reducing the time and resources spent on this administrative task. As the Board noted in the SNPRM, this information will enable rail users to have access to "sufficient information to readily assess the validity of [demurrage] charges without having to undertake an unreasonable effort to gather information."⁸ In addition to the proposed minimum information provided on demurrage invoices, the League also believes that the Board should require the railroads to promptly respond to customer requests for additional information needed to verify the charges.

⁷ NITL SNPRM Comments at 7.

⁸ SNPRM at 4.

The League also disagrees with the Railroad Commenters' point that the minimum billing requirements would inhibit innovation to improve shipment management tools. Improving innovation and complying with the demurrage billing requirements set forth in the SNPRM is not a binary choice for the railroads. In fact, railroads can and should be able to readily comply with the proposed requirements by simply adding the information they already house in their current online systems to their demurrage bills. Improving tools that facilitate shipment tracking and transparency should remain an important objective of the rail industry. This objective will assist both railroads and rail users with identifying continuous improvement actions that can increase efficiencies. Accordingly, the League strongly believes that the Board should promulgate the minimum information requirements as set forth in the NPRM and SNPRM.

B. Original ETA and Interchange Information Are Relevant to Investigations of Demurrage Charges

As to the Board's proposal to require railroads to provide original estimated time of arrival ("ETA") and interchange information on demurrage bills, UP asserts that such information is not relevant to calculating demurrage.⁹ This position, however, ignores the importance of such information when evaluating causes for car delays resulting in demurrage. As previously explained, providing original ETA information together with car delivery information will help rail customers understand if rail service issues may have contributed to delays leading to demurrage charges, including possible bunching of rail cars.¹⁰ By requiring railroads to provide this information, rail customers will have greater visibility as to the root cause of car delays which will assist them with their internal investigations. Hence, it will

⁹ See *e.g.*, UP Comments at 4 ("A car's original estimated time of arrival (ETA) and the car interchange date and time are not utilized in calculating demurrage.")

¹⁰ See NITL SNPRM Comments at 4.

facilitate discussion and mutual accountability which has been identified by the Board as an important consideration “in the establishment and administration of reasonable rules and charges for demurrage.”¹¹

Furthermore, the Railroad Commenters erroneously assert that the original ETA information creates a transit time guarantee.¹² Original ETA information, as the name suggests, is an *estimate* that does not provide any guarantee to shippers as to when a given car will be delivered. In fact, as the Railroad Commenters acknowledge, this information is already available to customers in various platforms provided by the carriers.¹³ Similar practices are widely adopted in other transportation modes, such as the airline industry, which regularly provides ETA information to its customers. None of these practices, however, create a guaranteed arrival time for the airlines. Inherent to their common carrier obligation, railroads have a duty to transport goods with reasonable dispatch and simply providing ETA data with demurrage invoices would not alter that obligation.¹⁴

Railroad Commenters also assert that ETA and interchange information would not assist rail users in identifying the causes of bunching. For example, UP commented that the proposed requirements would not help customers “identify when bunching has occurred or why it occurred” and that the cause can be identified only when “railroad and customer [work] cooperatively.”¹⁵ Similarly, CN contends that such information would not be helpful in

¹¹ Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. 757 (served April 30, 2020) at 15 (“Policy Statement”).

¹² NS Comments at 8. *See also* UP Comments at 4 (“Including [original ETA] on the invoice could mislead customers into thinking that demurrage is only reasonable when delivery is made at the original ETA or that the ETA is utilized in calculating the invoice.”).

¹³ *See e.g.*, NS Comments at 7.

¹⁴ 49 C.F.R. § 1035, App. B, sec. 2(a).

¹⁵ UP Comments at 4.

identifying bunching, and argues that the only relevant data for bunching is the actual arrival time of shipments.¹⁶ BNSF argues that the information would not provide “any meaningful information about the possible causes of demurrage” because various circumstances can cause changes to the original ETA information.¹⁷

The League disagrees. As established in its previous comments, the League believes that the original ETA information is important because deliveries well outside the ETA could indicate that rail service was a factor in the delays leading to the demurrage charges.¹⁸ Interchange information is also relevant to gaining a better understanding of the causes of delays, especially “if the delay leading to demurrage charges was caused by upstream bunching.”¹⁹ In reality, there can be multiple factors causing car delays that result in demurrage and ETA and interchange information would assist rail customers and railroads in their investigations of invoiced charges.

Railroad Commenters give examples as to other customer-related causes that may change the Original ETA information. For example, UP asserts that congestion in a yard caused by a customer may change the Original ETA information of a movement.²⁰ Similarly, BNSF states that cars picked up from a customer yard in the same movement may have different Original ETAs.²¹ Nevertheless, the Railroad Commenters overlook the value of this information when the delays and bunching are actually caused by the railroad itself, and the rail customers do not have data to identify the cause of these delays. Thus, the League reiterates its strong support for

¹⁶ CN Comments at 9.

¹⁷ BNSF Comments at 17.

¹⁸ NITL SNPRM Comments at 3-4.

¹⁹ *Id.* at 4.

²⁰ UP Comments at 4.

²¹ BNSF Comments at 17.

requiring railroads to provide both original ETA information and interchange information as support for demurrage charges.²²

C. Machine Readable Demurrage Data Must Be Readily Accessible

Railroad Commenters contend that they should be allowed flexibility to choose the method to communicate data supporting demurrage charges, including the format for machine-readable data.²³ Additionally, CN opposes the proposed requirement and states that the Board should not devise “prescriptive regulations.”²⁴

As the League stated in its previous comments, it is very important for rail customers to have access to machine-readable data in order to increase efficiency in auditing demurrage invoices.²⁵ Access to machine-readable data would enable customers to analyze and compare railroad records with their own records in a more automated, rather than manual, manner. Thus, the League believes that the Board should require railroads to provide invoice information in this format, as proposed.

Furthermore, if the Board decides that railroads can furnish the required demurrage billing data on web platforms rather than in paper invoices, then it is critical that all such information be readily accessible in a single centralized location. As the Board noted in the SNPRM, many customers are concerned about the lack of access to machine-readable data on railroads’ web-based platforms, and even if railroads allow such access, the data is not “easily accessible, is cumbersome to download, or is available only for a limited time period.”²⁶

²² NITL SNPRM Comments at 4.

²³ NS Comments at 6. See also CSX Comments at 2.

²⁴ CN Comments at 11.

²⁵ NITL SNPRM Comments at 6.

²⁶ NITL Reply Comments at 3-4. See also SNPRM at 9.

D. Railroads Must Bear the Burden to Ensure that their Demurrage Charges Are Accurate and Warranted

The Railroad Commenters generally assert that they already have mechanisms in place to ensure that demurrage charges are accurate and warranted.²⁷ Others oppose adoption of a minimum standard for the proposed “appropriate action” by railroads to ensure accuracy.²⁸

It is vital for the rail industry to bear the burden of ensuring the accuracy of demurrage invoices that are issued to their customers. Railroads must bear the burden of auditing and verifying charges before issuing the invoice and fairly accounting for circumstances in which their performance contributed to the delays resulting in the charges. Rail customers too frequently must painstakingly try to track car histories with limited data and cumbersome systems, which undoubtedly leads to over-payments of demurrage. By establishing a minimum standard that properly places the burden of accuracy onto the party issuing the invoice, the rule will incentivize the carriers to take appropriate steps to improve their demurrage invoicing processes. If railroads are able to track all rail cars on their systems, they should have the ability to properly account for demurrage debits and credits. A rule of this sort is consistent with the Board’s intent to hold the parties accountable for actions within their control and will hopefully help customers develop increased confidence in the accuracy of the invoices they receive.

The League acknowledges that each railroad may adopt different procedures to ensure the accuracy of their invoices and that a one size fits all rule is not necessarily required. Nonetheless, the League believes that requiring railroads to take “appropriate action” to ensure invoice accuracy is necessary to ensure that the Board’s regulations have an enforceable

²⁷ See *e.g.*, UP Comments at 6, BNSF Comments at 14-15.

²⁸ See *e.g.*, CN Comments at 13, CSX Comments at 9.

mechanism to address the substantial concerns that rail customers currently are forced to bear the primary burden of validating the railroads' charges.²⁹

II. Conclusion

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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²⁹ See NPRM at n. 14 (explaining the rail customers' "concerns about demurrage charges that are difficult, time-consuming, and costly to dispute; invoices that include inaccurate information; and erroneous invoices that are issued even when the tariff expressly provides for relief or the rail carrier has acknowledged its responsibility for the problem.")