

Before the Surface Transportation Board

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STB Docket No. EP 759

Demurrage Billing Requirements

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**Reply Comments of Dow, Inc.
on the Supplemental Notice of Proposed Rulemaking**

Dow, Inc., submits these reply comments in response to comments submitted by railroad parties on the Supplemental Notice of Proposed Rulemaking the Surface Transportation Board served in the above-captioned proceeding on April 30, 2020 (the “SNPRM”).

Railroad commenters raise two main objections to the SNPRM, which the Board should reject. First, they assert that original ETA and date and time of interchange are not appropriate indicators of carrier-caused bunching. Yet these are the only metrics that rail users would have to readily identify the prospect of carrier-caused bunching and delays. Failing to provide these metrics would facilitate the ability of rail carriers to mask demurrage¹ charges resulting from carrier-caused bunching. Second, railroads claim that they should not be required to make the information necessary to understand demurrage charges readily accessible in a single location because they otherwise already make sufficient information available and this type of requirement is too prescriptive. This claim conflicts with Dow’s own experience that obtaining even basic information about demurrage charges is burdensome. It also conflicts with the nature of the Board’s proposed requirement, which sets a minimum standard and allows railroads to determine the means for achieving that standard. Moreover, there is no reason why, in this day and age, Dow should not be able to access minimum information to understand a demurrage

¹ Dow uses the Board’s definition of demurrage, which includes private car storage. SNPRM at 1-2 n.2.

invoice in one place. Providing this information in a single location is common-sense and would promote the transparency necessary to ensure that railroads are not holding Dow and other rail users accountable for railroad service issues.

Few railroads raise other objections, and Dow has addressed the substance of those objections in its prior comments in this proceeding. Thus, the Board should also reject those objections.

I. The Board should reject railroad objections to providing original ETA and date and time of interchange.

Railroad criticisms of original ETA and date and time of interchange are misplaced. The primary railroad objection to providing these metrics is that they are not perfectly accurate indicators of carrier-caused bunching or other delay issues. Yet these metrics are the most reliable indicators of these issues that can be made readily available to all rail users. Without these metrics, Dow and other users would have no way to readily identify demurrage that potentially resulted from carrier-caused bunching or delays. Railroads also claim that providing this information will have adverse consequences, but these consequences are either unlikely or grossly overstated, and they do not outweigh the transparency that these metrics provide.

A. Original ETA and date and time of interchange are necessary to identify demurrage charges that potentially result from carrier-caused bunching and delay.

Original ETA and date and time of interchange are the only and most reliable indicators of car bunching and other delay-related events that should not result in demurrage charges. According to the Board's demurrage policy, shippers and receivers should not be responsible for demurrage arising from circumstances beyond their reasonable control.² Since Dow and other

² Policy Statement on Demurrage and Accessorial Rules and Charges, EP 757, slip op. at 21 (STB served Apr. 30, 2020).

shippers and receivers have little control over how carriers move their cars, demurrage generally should not arise from bunching and other events that result from transit delays. Original ETA enables Dow to spot these delays because it identifies when cars should be delivered assuming normal transit. Dow thus can use original ETA to identify demurrage charges that potentially result from bunching caused by the carrier or circumstances beyond Dow's control.

For joint-line movements, Dow also needs date and time of interchange to effectively capture bunching that occurs before cars reach the delivering carrier. Original ETA would not cover this bunching since it applies only to the movement by the delivering carrier. But date and time of interchange would indicate that bunching may have occurred upstream because it shows whether cars shipped separately were delivered at the same time to the delivering carrier.

Without original ETA and date and time of interchange, Dow would not be able to identify delays or bunching caused by a carrier or circumstances outside Dow's reasonable control. Dow requires this information to ascertain whether a carrier awarded enough demurrage credits for a bunching or delay event. Although shipment and delivery dates could indicate when multiple cars tendered between the same origin and destination are delivered bunched, they are not helpful when Dow ships cars from multiple origins to a single destination. In multiple-origin scenarios, cars from each origin will likely have different transit times and may be shipped on the same date with the understanding that they will arrive on different dates. If they arrive on the same date due to bunching, comparing their shipment date to their delivery date will falsely indicate that Dow tendered them bunched.

Dow understands that original ETA is not dispositive of whether bunching renders a demurrage charge inappropriate. Other facts may be relevant to this issue and need to be considered. But many of those other facts typically are known only to the carrier involved. And

without Original ETA and date and time of interchange, Dow will not be able to readily identify circumstances that may warrant a deeper inquiry into whether demurrage charges arise from carrier-caused bunching and delays beyond Dow's reasonable control.

Even if original ETA and date and time of interchange were irrelevant for identifying bunching events that should not lead to demurrage (which they are not), these metrics would still be helpful for addressing demurrage issues. Dow can compare original ETA to actual arrival times to determine transit variability. With accurate transit variability data, Dow can fine tune its shipments and the number of cars at a destination to better prevent demurrage. Dow also can use original ETA and interchange information to identify where bunching occurs so it can address the cause of the bunching with the carrier. In Dow's experience, carriers are not willing to address the root causes of bunching events with Dow unless Dow can pinpoint where the events occurred.

B. Requiring carriers to provide original ETA and date and time of interchange will not have the consequences carriers allege.

Carriers allege that providing original ETA and date and time of interchange will create a transit-time guarantee,³ increase the incidence of invalid claims,⁴ and cause rail users to shift their focus from avoiding demurrage charges to challenging them.⁵ These allegations are inaccurate and exaggerated.

First, original ETA will not be a transit-time guarantee. Railroads make clear to Dow in their contracts that they do not guarantee transit time for Dow's traffic. Moreover, a transit-time guarantee implies that a rail user would be entitled to damages whenever the carrier fails to meet

³ BNSF Opening 16-17; CN Opening 2; CP Opening 5; UP Opening 4.

⁴ CN Opening 9-10; CP Opening 4.

⁵ CP Opening 4.

the original ETA. But a damage award to the rail user would never result from failing to meet an original ETA. Instead, failing to meet an original ETA would at most result in the carrier not being entitled to demurrage charges that are forced upon the shipper or receiver by factors beyond their control. Nevertheless, if the Board is concerned that original ETA would effectively operate as a transit-time guarantee, it could prevent this by stating in its rule that original ETA is required for demurrage purposes only and not to create a transit-time guarantee. Carriers could insert similar language in their tariffs and contracts.

Second, providing original ETA and date and time of interchange will not result in needless demurrage challenges by rail users. To the contrary, this information would enable rail users to identify carrier-caused bunching and other delay issues that should not result in demurrage but otherwise may go undetected. To the extent that carriers experience a greater incidence of claims, those claims are likely to be valid claims that previously went undetected due to the present challenges to assessing the validity of demurrage charges.

Third, requiring railroads to provide original ETA and date and time of interchange will not cause rail users to focus on challenging demurrage instead of avoiding it. Dow cannot avoid demurrage resulting from carrier-caused bunching and should not be deprived of information necessary to challenge demurrage charges resulting from it. Also, the notion that rail users would prefer to incur demurrage so they can then spend time fighting it is ludicrous.

At the very least, requiring railroads to provide original ETA and date and time of interchange will focus *railroads* on doing their part to reduce demurrage. By providing highly variable service, railroads force rail users to choose between risking a supply disruption and risking demurrage by increasing shipments and on-site storage in railcars to prevent a supply disruption. Railroads instead should have some accountability for how their own actions

contribute to the inefficiencies on their networks. Original ETA and date and time of interchange will enable rail users to hold railroads accountable in more instances where railroad inefficiencies result in use of rail assets.

II. Requiring railroads to provide certain minimum information in one place is sound policy.

Requiring railroads to make certain minimum information necessary to understand and determine the accuracy of demurrage invoices readily accessible in one location would reduce the burden that Dow currently incurs.

A. Railroads do not make information for auditing demurrage readily accessible

Obtaining data necessary to understand and determine the accuracy of demurrage invoices is burdensome. Dow's reply comments to the notice of proposed rulemaking in this proceeding provided railroad-specific examples of how obtaining necessary data to audit demurrage invoices is a time-consuming multi-step process that involves obtaining data from multiple locations on a carrier's website on a car-specific basis.⁶ Those comments also explained that some websites only make three-months of data available, which effectively acts as a time bar on claims and deprives Dow of needed information in prolonged demurrage disputes. No railroad has disputed these examples or updated their websites to address them.

Railroad comments also show that information is not readily available. For example, many railroads claim that they provide an estimated time of arrival that would satisfy the proposed original ETA requirement, but it is only available if the rail user searches through multiple reports to find it or makes a special request for it.⁷ Also, CSXT states that rail users

⁶ Dow NPRM Reply 3-6.

⁷ CN Opening 2 n.1, 8; CP Opening 5; CSXT Opening 3 n.8; BNSF Opening 16-17; UP Opening 4 n.9.

must gather critical invoice data that would be required under the Board's proposed billing rule from multiple locations on its website.⁸

Training offered by railroads does not fix these issues. While training can identify the necessary steps to obtain data, it does not eliminate those steps or the need to repeat those steps for each railcar in an invoice.

B. Requiring railroads to make information necessary to understand a demurrage invoice readily accessible in machine-readable format in one location is a common-sense minimum performance standard.

The Board's proposal to require railroads to make certain minimum information necessary to understand and determine the accuracy of their demurrage charges readily-accessible in a single-machine readable file will help substantially reduce the excessive burden rail users currently face to review demurrage charges. That railroads generally object to this common-sense, transparent invoicing standard is alarming.

Certain minimum information is necessary for Dow to understand a demurrage invoice. Demurrage is a charge for use of railroad assets where such use was in the reasonable control of a shipper or receiver. Thus, Dow cannot readily understand demurrage charges unless the demurrage invoice at least shows what assets were used, when they were used, what demurrage rules apply, and whether the use may have arisen because of transportation irregularities.

The Board's proposed demurrage billing requirements provide this minimum information necessary to understand demurrage invoices. They require railroads to identify asset use by showing the dates demurrage begins to accrue (e.g., placement date and time) and stops accruing (e.g., ordered-in date and time). They require information about the asset that was used and basis for the use (e.g., car reporting mark and certain basic information about the shipment for which

⁸ CSXT Opening 6.

the use arose). They require information necessary to identify the applicable demurrage rules (e.g., the loaded or empty status of each car; the commodity being shipped). They also require basic information about whether the use may have risen because of transportation irregularities (e.g., original ETA; date and time of interchange; waybill date).

To facilitate understanding of invoiced charges and transparency, railroads also must enable Dow to access this information in a single machine-readable file. Today, Dow must piece this information together from multiple locations, when it is available at all, and in formats that are not always machine-readable. This makes understanding a demurrage assessment difficult and time consuming. It also discourages legitimate invoice challenges and reduces pressure on railroads to provide accurate invoices by effectively limiting Dow to spot audits of demurrage invoices.

If railroads provide the minimum invoice data proposed by the Board in a single machine-readable file, Dow does not object to railroads making this file available for download on their website. Making this information available on a website should have little impact on the burden of auditing a demurrage invoice if the information is available in an easily accessible location and a single machine-readable file.

Moreover, the Board's proposed requirement balances rail users' need for information to understand demurrage charges and railroads' desire for flexibility. The requirement would not stifle railroad innovation. In fact, Dow believes it would promote innovation considering that the general approach of railroads is to provide demurrage information in a manner that requires Dow to gather it from multiple locations, which is not innovative by today's standards. Moreover, the requirement does not limit railroads from devising innovative ways to display demurrage data or innovative metrics that will help rail users better understand their use of rail assets or identify

situations where demurrage is not appropriate. The requirement merely establishes a sensible *minimum* performance standard.

III. Conclusion.

Dow supports the adoption of demurrage billing requirements that ensure rail users have ready access to information necessary to understand and verify the accuracy of demurrage charges. Dow respectfully asks the Board to adopt a final rule consistent with its comments in this proceeding.

Respectfully submitted,

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