

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 759

DEMURRAGE BILLING REQUIREMENTS

**REPLY COMMENTS ON BEHALF OF CN ON
SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING**

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The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter “CN”) respectfully submit these reply comments on the Supplemental Notice of Proposed Rulemaking (“SNPRM”) served on April 30, 2020 in the above-captioned proceeding. As CN has explained in its prior comments in this proceeding and in the Board’s other recent proceedings focused on demurrage, CN agrees that it is important to invoice its customers for demurrage in a way that helps them to understand the basis for the charges and challenge charges that they believe are inappropriate, and that creates clear incentives to encourage efficient loading and unloading. CN has demonstrated its commitment to those principles by already providing its customers with detailed invoices, by making ample information about the basis for any charges available in accessible formats, and by developing a suite of information tools to allow customers to manage their supply chains so they can load and unload cars efficiently and thus avoid demurrage-causing railcar delays in the first place.

CN recognizes that a number of rail customers and shipper organizations have expressed general concern about demurrage billing (although the vast majority of these customers did not mention any concerns involving CN). But CN believes that the best way for the Board to respond to these concerns is to adopt a performance-based standard requiring railroads to ensure that recipients of demurrage invoices have access to sufficient information to understand and dispute charges—not for the Board to regulate the exact contours of that information or the manner in which it is provided.

CN is increasingly concerned that the goal of certain shipper organizations is less to help customers challenge inappropriate charges, and more to create a complex paperwork regime rife with technical hurdles that would make it more difficult for a railroad to collect charges that are appropriate. If these shipper organizations had their way, an invoice for the most straightforward, clear-cut instance of demurrage could be challenged and rendered potentially uncollectible unless it included over a dozen separate data elements; was provided with a data file in comma-separated-value format; and was accompanied by proof of “statistically significant” audits and pre-invoice consultation with each shipper. Such a regime could undermine the purpose of demurrage in the statute and precedent and be unfair to the vast majority of customers who take appropriate actions to load and unload cars efficiently and thereby avoid demurrage charges in a way that that benefits car utilization and network fluidity. Congress has specifically authorized and recognized demurrage as an important way for railroads to promote efficient asset utilization, and top-down regulation of individual invoice requirements by the Board in 2020 is not consistent with that purpose.

CN urges the Board to consider a different approach and adopt a performance-based standard like that CN outlined in its comments on the initial NPRM. If the Board does proceed with its proposal to specify individual invoice elements, it should not include “original ETA” in that proposal, because that would encourage misuse of the real-time estimates that many railroads provide customers to assist them with supply chain management. And the Board should not adopt the

proposal to require carriers to take “appropriate action” to ensure the accuracy of invoices. There is no evidence that CN is not already taking reasonable actions to ensure invoice accuracy, and the few “appropriate actions” that were suggested in opening SNPRM comments would be counterproductive.

I. THE OPENING COMMENTS SHOW THAT THE BOARD SHOULD ADOPT A PERFORMANCE-BASED STANDARD.

In its Opening Comments on the initial NPRM, CN proposed that, rather than prescribing individual elements of demurrage invoices, the Board should adopt a performance-based standard requiring Class I railroads to “ensure that recipients of demurrage invoices have access to sufficient information to be able to understand the basis for the charges and to dispute charges believed to be unwarranted.” CN Opening NPRM Comments at 10; CN Opening SNPRM Comments at 4-6. Thus far in this proceeding, no commenter has explained why it thinks it is better for the Board to prescribe individual invoice line items than for it to adopt a basic standard of conduct and allow each carrier to determine the best way to provide sufficient information to its customers. No commenter explained in Reply Comments on the initial NPRM why CN’s standard would not be preferable, and no commenter did so in the Opening Comments on the SNPRM. Indeed, CN’s proposal has attracted support from another commenter. *See* CSXT SNPRM Comments at 5 (“This standard accomplishes the laudable goal of ensuring railroads provide sufficient information to customers, but stops short of prescribing the exact elements of each and every demurrage invoice.”).

CN's proposal is particularly appropriate because no commenter has yet provided actual documentary evidence of demurrage invoices that fail to advise the recipient of the basis for charges. Through this proceeding and the Ex Parte 754 proceeding before it, the Board has heard anecdotes and general complaints about demurrage invoicing, but it has been presented with virtually no concrete examples of deficient invoices or unclear billing (and certainly none involving CN). In contrast, CN showed it provides ample information to customers, backed up by screenshots and specific descriptions of the information that is available.¹ Other carriers have similarly provided evidence of the detailed information that they actually provide to customers.² No commenter has disputed that evidence or provided contrary examples—instead commenters have offered unsupported anecdotes that some invoices somewhere are deficient in some unspecified way.

The Board should not adopt sweeping, prescriptive regulations in the absence of compelling evidence that such regulations are actually required to address a real and continuing problem. If the Board is to act, it would be far more appropriate for it to put a standard in place clearly delineating railroads' obligation to provide adequate information than it would be for the Board to attempt to delineate the contents of individual invoices.

¹ See CN Opening NPRM Comments at 4-5, Attachment 1.

² See, e.g., BNSF Opening SNPRM Comments at 3-14; CSXT NPRM Opening Comments at 5-10; NS SNPRM Comments at 2-6; UP NPRM Comments, Verified Statement of Bradley Stock.

II. THE BOARD SHOULD NOT ADOPT THE PROPOSED ORIGINAL ETA REQUIREMENT.

If the Board nonetheless wishes to adopt a rule that regulates individual invoice elements, it should not adopt the requirement that railroads preserve the “original ETA” of shipments and include that on demurrage bills. *See* CN SNPRM Comments at 8-10.³ This requirement would not provide useful information for assessing the reasonableness of demurrage charges, and it would discourage a railroad from sharing estimates of anticipated arrival information with customers.

As CN explained in its opening comments, it provides real-time ETA information to its customers as a tool to assist customers in planning, so that customers will always have access to CN’s best estimate of when cars will arrive. CN SNPRM Comments at 8. The ETA that CN provides is based on the current trip plan for the car.⁴ Trip plans plot out the plan for a car to arrive at destination and presume that each block and train in which the car is expected to be transported can travel in the most efficient and feasible conditions. Trip plans reflect CN’s assessment of arrival time assuming the most favorable circumstances for a car in light of current conditions in the interconnected rail network in North America. As

³ CN maintains its objections to the Board mandating the other newly proposed requirements. CN SNPRM Comments at 10-12.

⁴ Because the ETA provided to customers is a function of the trip plan, it is not available to customers until a trip plan is created. Typically a trip plan is created in the ordinary course of business promptly after a railcar is received by CN or released to CN. The Board should not adopt any definition of “original ETA” that would require that railroads provide an ETA before a trip plan is created in the ordinary course of business.

such, trip plans are commonly adjusted to account for changing conditions or new information. For example, the time for a car to be switched in a yard or to traverse a segment of track in its route might be shorter than originally anticipated, making a different train available for the next leg of its journey. Or congestion at an interlocking controlled by a foreign railroad or other delay could mean a car does not make its next train as anticipated. Sometimes these trip plan changes result in a similar ETA to the original trip plan, and sometimes the ETA is changed. But this sort of change to trip plans and ETA is not evidence of a service failure; it is expected in real-world railroading. And the ETAs that CN provides are plainly not a guarantee of delivery by that date or particular level of service. While trip plans often change and while sometimes these changes affect the ETA, CN believes that its customers benefit from receiving CN's best estimate of when cars will arrive.

Some shipper organizations argue that railroads should be required to preserve the "original" ETA, arguing that shippers could use any difference between original ETA and actual arrival time to demonstrate "bunching" and thus avoid paying demurrage. But the Opening Comments make clear that a difference between the original ETA and arrival time is not evidence of bunching.⁵ Moreover, no railcar receiver who is actually experiencing "bunching" would need "original ETA" to recognize that fact. As the Board defines it, "bunching" may occur when "rail cars that are not reasonably timed or spaced" such that the shipper cannot

⁵ CN Opening SNPRM Comments at 8-10.

reasonably load or unload cars without incurring demurrage.⁶ The relevant information is thus the actual arrival date of cars at a facility or constructive placement and whether that arrival is “bunched” in a way that prevents the receiver from processing the cars without incurring demurrage. A receiver should be aware of those situations without needing to sift through historical ETA records for the cars. Whether cars were delivered at their original ETA (or before or after that ETA) is irrelevant to whether “bunching” occurred.

Moreover, suggesting that a railcar’s delivery after the original ETA would be relevant to whether demurrage on that railcar is reasonable would disincentivize railroads from communicating their best current estimates of ETA. A railroad should not be discouraged from providing transparency regarding its estimated time of arrival because of concerns that the information could be weaponized in a future effort to avoid demurrage charges.

CN notes that CN customers have the ability to track historical ETAs for their shipments by ordering regular data reports through CN’s web interfaces. For example, CN customers can order daily data reports, which allow the customer to monitor any changes to the ETA of particular cars. Even if some subset of rail customers believes that “original ETA” is relevant to some purpose, they can obtain that information from CN in a daily report, and there is no cause for the Board to mandate a nationwide requirement that every invoice include this information for every car.

⁶ SNPRM at 5 n.8.

III. THE BOARD SHOULD NOT ADOPT AN “APPROPRIATE ACTION” STANDARD.

As CN explained in its opening SNPRM comments, its robust customer-service efforts easily satisfy any reasonable definition of “appropriate action.” CN SNPRM Comments at 12-14. CN already engages in a collaborative problem-solving process with customers, targeting resources where there are actual problems or recurring disputes. *Id.* CN urges the Board to not adopt a separate “appropriate action” requirement, and instead to adopt CN’s performance-based standard. If the Board nonetheless were to adopt this requirement, the Board should adhere to its statement in the SNPRM that “[w]hether a carrier has taken appropriate action to ensure that demurrage charges are accurate and warranted depends on the particular facts and circumstances of a situation.”⁷ CN believes that its current approach to demurrage billing easily surpasses any reasonable definition of “appropriate action.”

Certain opening comments suggest that the Board should require certain actions be taken by railroads to meet the “appropriate action” standard. Without exception, these suggestions would be counterproductive and would not make any meaningful improvement to demurrage billing.

First, a few commenters argue that railroads should be required to conduct regular audits of “a statistically significant sample of each rail user’s invoices,” as well as audits of “the inputs to [a railroad’s] billing systems.” *See ACC Joint*

⁷ SNPRM at 11.

SNPRM Comments at 9; Dow SNPRM Comments at 7; ILTA SNPRM Comments at 3. This proposal would be wasteful and unwarranted. As a practical matter, CN's pre-invoice review goes above and beyond an "audit" requirement. While an audit by definition would only focus on a subset of invoices selected for an audit review, CN's team is responsible for ensuring that all invoices that CN issues are accurate. *See* CN SNPRM Comments at 12-13. It would be wasteful to require CN to duplicate its pre-invoice review by having an audit again double-check some invoices for "each rail user." Nor is there cause for the Board to require any railroad to devote its internal audit resources to an all-encompassing focus on reviewing demurrage invoices.

Second, other commenters propose that a railroad consult with its customers before issuing demurrage invoices. *See* NGFA SNPRM Comments at 3. This would be highly inefficient and could inhibit timely invoicing that benefits customers. As CN has explained to the Board, it commits to bill customers for demurrage within 18 business days of when service is performed. *See* CN NPRM Opening Comments at 8-9 & n.2. CN believes that its customers appreciate this commitment to timely invoicing. But that timely invoicing would be difficult to maintain if CN were required to discuss forthcoming demurrage charges with every customer before issuing a demurrage invoice. Indeed, it is not clear that many customers would welcome a practice in which railroads were required to discuss every demurrage charge with the shippers in advance of issuing an invoice.

CN notes that it does speak with customers, when necessary, about demurrage charges before invoices are issued. Many of these conversations are focused on exploring solutions for customers to address recurring demurrage issues and avoid future demurrage charges in the first instance. But a requirement that a railroad speak to every customer about every invoice item before the invoice is issued would not be productive, and would unnecessarily burden both the railroad and its customers.

Finally, some parties suggest that railroads be required to provide additional “supporting documentation demonstrating that charges are accurate” and “a concise explanation” for each demurrage charge. *See* AFPM SNPRM Comments at 9-10. It is not fully clear what additional information this proposal would ask railroads to provide. CN’s electronic dashboards already provide documentation and information that demonstrate charges are accurate; if a customer disagreed, they already have all the information they could possibly need to dispute demurrage. And no party has demonstrated that customers are in need of additional “explanation” of the basis of demurrage charges or identified what additional “documentation” ought to be required.

IV. CONCLUSION

For these reasons and those expressed in CN’s opening SNPRM comments plus CN’s previous comments in this proceeding, the Board should adopt the flexible performance-based standard proposed by CN. No commenter has suggested this alternative standard would be an ineffective

regulatory step to accomplish the Board's legitimate goals in this proceeding. Indeed, the performance-based standard would be more workable, avoid unintended consequences, and be more consistent with the Board's long-standing approach to demurrage regulation.

Respectfully submitted,

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