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July 6, 2020

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

300849
ENTERED
Office of Proceedings
July 6, 2020
Part of Public Record

Re: Docket No. EP 759 – Demurrage Billing Requirements
Supplemental Notice of Proposed Rulemaking

Dear Ms. Brown:

Enclosed please find Reply Comments of BNSF Railway Company in Response to the Board's Supplemental Notice of Proposed Rulemaking decided on April 30, 2020 in the above-referenced docket.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jill Mulligan". Below the signature, the name "Jill Mulligan" is printed in a small, black, sans-serif font.

Jill Mulligan

Enclosure

FILED
July 6, 2020
SURFACE TRANSPORTATION BOARD

**Before the
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 759

DEMURRAGE BILLING REQUIREMENTS

**REPLY COMMENTS OF BNSF RAILWAY COMPANY IN RESPONSE
TO THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING**

Jill K. Mulligan
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Dated: July 6, 2020

Attorneys for BNSF Railway Company

BNSF Railway Company (“BNSF”) submits these Reply Comments in response to the Supplemental Notice of Proposed Rulemaking (“SNPRM”) served in this proceeding by the Surface Transportation Board (“STB”) on April 30, 2020. BNSF’s Opening Comments provided the STB with detailed information about our systems for sharing shipment and demurrage-related data with our customers, and the measures BNSF takes to ensure that demurrage charges are assessed when appropriate and in furtherance of the legitimate goals of BNSF’s demurrage program. In addition, BNSF’s Opening Comments addressed the STB’s proposal that an original ETA and date and time of interchange be included on or with demurrage invoices. BNSF explained why we believe that such a requirement would be inappropriate and confusing by creating the incorrect appearance that the data has a core role in assessing the validity of a demurrage charge.

Several shippers and shipper organizations submitted comments that, among other things, supported the STB’s proposal regarding the original ETA and interchange data. These shipper comments confirm BNSF’s concern that some shippers mistakenly view the original ETA data as having a role in the assessment of demurrage charges that is inconsistent with the law governing the reasonableness of demurrage charges. BNSF reiterates the position explained in its Opening Comments that it would not be in the interest of the STB or its stakeholders to encourage shipper reliance on a single data point like original ETA in assessing the validity of demurrage charges.

As BNSF explained in our Opening Comments, we work extensively with our customers to manage the flow of their freight across our network precisely to avoid demurrage and to improve the efficiency of our overall service. An important part of that effort involves transparency about the movement of particular carloads of freight, including the sharing of carload-specific delivery estimates with our customers in real time. Those estimates are updated as traffic flows across our

network, because those real-time estimates become more meaningful as carloads approach their destination. The programs that we use to manage and track freight movements have been developed in a cooperative, market-based context, and they benefit both our customers and the overall network. We work hard to maintain our positive customer relationships with efforts such as these, and we urge the STB not to put these efforts into an adversarial, litigation-oriented context by imposing new regulatory requirements.

Moreover, shipper comments stating that original ETA and “transit delay” are relevant to assessing the validity of demurrage charges reflect a false premise that shippers are entitled to a form of scheduled service based on ETAs. For example, the Joint Comments of the American Chemistry Council, Corn Refiners Association, The Chlorine Institute, and The Fertilizer Institute (“Shipper Joint Comments”) state that “rail users rely on carriers to transport cars in an efficient and timely fashion” and that “Original ETA provides a clear standard for identifying transit delays on the delivering carrier’s line.” Shipper Joint Comments, No. 300712, at 3 (June 5, 2020). The Freight Rail Alliance claims that ETA can be used “for freight rail shippers to be able to determine if they or the carriers bear responsibility for delay. . . .” Comments of the Freight Rail Customer Alliance, No. 300703, at 1 (June 5, 2020).

These comments mischaracterize the nature of a common carrier’s service obligation, which has long been determined by the STB and the courts as limited to a requirement to provide “adequate” service based on all of the facts and circumstances that affect freight rail transportation. Shippers may enter into contracts providing for a more scheduled rail service, but the law makes it clear that shippers requesting common carrier transportation are not entitled to a defined or guaranteed timeline for service. See *Granite State Concrete Co., Inc. v. STB*, 417 F.3d 85, 92 n. 10 (1st Cir. 2005) (explaining that the phrase “adequate service” is not used in the statute, “but it

is a part of the general definition of common carrier obligations”); *see also Penn. R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915) (“The law exacts only what is reasonable from” a rail carrier.).

This principle is also reflected in the Uniform Bill of Lading’s service requirement of “reasonable dispatch.” 49 C.F.R. pt. 1035, app. B, § 2(a) (“No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch.”). In analyzing the “reasonable dispatch” standard, the Interstate Commerce Commission (“ICC”) explained: “Under the standard bill of lading provisions, the railroad need only transport a shipment with reasonable dispatch and not on any particular schedule or train.” *Experimental Piggyback Train Service—Declaratory Order*, 356 I.C.C. 893, 904 (1978); *see also Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 213 (1931) (explaining that the “reasonable dispatch” standard is “such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and the conditions surrounding the transaction”) (citations omitted).

Moreover, the STB has recognized specifically in demurrage cases that transit delays inherent in rail operations do not, on their own, excuse a shipper from demurrage. For example, in rejecting a shipper’s claims regarding carrier-caused bunching in a demurrage dispute, the STB noted that “given the many variables outside a railroad’s control that may affect delivery—NS, for example, cites delays at any point in the rail network, including points in Canada—a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.” *Capitol Materials Inc.—Petition for Declaratory Order*, NOR 42068, slip op. at 7 (STB served April 12, 2004); *see also Savannah Port Terminal R.R. Inc.—Petition for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc.*, FD 34920, slip op. at 9 (STB served May 30, 2008)

("[C]ommon carriers serve the public generally, and the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.").

It would therefore be misleading and potentially confusing to elevate the importance of original ETA by requiring it to be included on or with demurrage invoices. BNSF gave an example in our Opening Comments of a common scenario in which the original ETA given to particular carloads of freight provides no meaningful information to assess the validity of a demurrage charge. BNSF Opening Comments at 17. It would not advance the interests of any of the STB's stakeholders to create the misimpression, through a regulatory obligation to identify the original ETA or the date and time of an interchange, that such data can be used to assess the validity of demurrage charges. And the shippers' comments make it clear that they would use the original ETA data for such an inappropriate purpose. *See* Comments of the Nat'l Indus. Transp. L., No. 300709, at 3-4 (June 5, 2020) ("The League strongly believes that the original ETA information will assist its members with verifying demurrage charges because it will help them identify whether potential service problems contributed to delays in car deliveries and determine if demurrage credits should be applied."); Shipper Joint Comments, No. 300712, at 3-4 (June 5, 2020) ("Thus, rail users can use original ETA and the date and time of a car's interchange to dispute demurrage charges arising from transit delays and to address delays with the specific carrier on whose line the delay occurred."); Comments of the Int'l Liquid Terminals Ass'n, No. 300694, at 2 (June 4, 2020) (Original ETA and date and time cars are received at interchange "would allow shippers to know when to dispute unsupported demurrage charges and verify credits that may be due.").

Moreover, it could be counterproductive and detrimental to rail system efficiency to create the mistaken impression that shippers should rely on an original ETA. It could lead shippers to

reduce their efforts to handle cars efficiently by implying that, if shippers rely on an estimate of delivery time made at the beginning of a movement to set up their internal car handling protocols, they will not be liable for demurrage. It could also lead rail carriers to change the way they estimate ETA to avoid potential conflicts or litigation with shippers. ETA estimates can be a valuable tool for shippers, which is why BNSF makes the data available online and updates it as a shipment moves through the network. The Board should leave that data as a practical business tool and not turn it into a meaningless, and potentially harmful, regulatory requirement.

BNSF similarly has concerns about suggestions that a whole host of other information be required to be provided on or with a demurrage invoice. *See, e.g.,* Comments of the Int'l Liquid Terminals Ass'n, No. 300694, at 3-4 (requesting that additional information be required, such as date/time waybill created, status of car as loaded or empty, origin station and state of shipment, description of commodity from bill of lading, pickup date/time, identities of parties for demurrage at origin and destination, and date/time railcar released). BNSF does not believe inclusion of these data on a demurrage invoice would inform a customer as to the validity of a particular demurrage charge. That said, these data are already accessible to BNSF customers who themselves create and submit the billing instructions on which their shipments move, and, as noted, our customers have the ability to track their shipments as they move across the BNSF network.

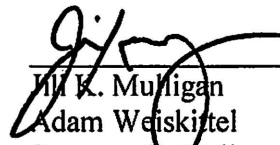
Carriers likewise should not be required to "include signed and certified documents, photos and original trip plans attesting to the accuracy of the invoice," as suggested by the National Grain and Feed Association. Opening Comments of the Nat'l Grain and Feed Ass'n, No. 300716, at 8 (June 5, 2020). This suggested requirement assumes that an original trip plan, like original ETA, has relevance when assessing the validity of a demurrage charge. But a shipment's trip plan can change as a shipment moves across our network for various reasons, including instruction by a

customer to divert a car to a different destination. BNSF is also unclear how requiring a carrier to include a photo of a shipment would demonstrate that a particular demurrage charge is accurate or not. As set forth in our Opening Comments, BNSF has developed robust internal processes consisting of several interconnected elements to ensure that demurrage invoices are accurate, including pre-bill analyses to determine whether railroad performance contributed to particular demurrage charges.

In closing, BNSF reiterates its appreciation to the STB for providing the opportunity to share how our tools already provide our customers with all of the information proposed in the *NPRM* and the *SNPRM*. We continue to have significant concerns about shipper comments stating that original ETA and “transit delay” have central relevance to assessing the validity of demurrage charges as such statements reflect a false premise that common carrier shippers are entitled to a form of service guarantee based on ETAs. The law is clear that a common carrier’s service obligation is limited to a requirement to provide “adequate” service based on all of the facts and circumstances that affect freight rail transportation. And the STB has recognized specifically in demurrage cases that transit delays inherent in rail operations do not, on their own, excuse a shipper from demurrage.

For all of the reasons stated herein and in our Opening Comments, BNSF does not believe it would be a productive or appropriate exercise for the STB to manage individual demurrage invoices and prescribe a new and different format that BNSF must use to provide data duplicative of what we already provide across our customer tools.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Adam Weiskittel', is written over a horizontal line.

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Dated: July 6, 2020

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