



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 759

DEMURRAGE BILLING REQUIREMENTS

**REPLY COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Supplemental Notice of Proposed Rulemaking (“SNPRM”) served in this docket on April 30, 2020, the National Grain and Feed Association (“NGFA”) respectfully submits these Reply Comments on the Surface Transportation Board’s (“Board” or “Agency”) request for comments on certain modifications and additions to the minimum information that Class I rail carriers should be required to include in or accompanying demurrage invoices sent to freight rail customers.

NGFA also respectfully requests that its Opening Comments in this proceeding be incorporated into this Reply.

NGFA again commends the Board for its multi-pronged effort to address long-festering egregious demurrage and accessorial practices and charges imposed by Class I railroads that are neither commercially fair, commercially achievable nor reciprocal. This includes Class I railroads’ practices for invoicing their customers for demurrage and accessorial charges, which frequently

are inaccurate and impose burdensome, tedious, time-consuming and costly efforts on rail customers to investigate and challenge.

I. Identity and Interest of NGFA

Established in 1896, NGFA consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 75 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, NGFA has a strategic alliance and is co-located with the North American Export Grain Association and has a strategic alliance with the Pet Food Institute.

II. General Comments

In this Reply, NGFA reiterates its Opening Comments in urging the Board to proceed in finalizing demurrage billing requirements for Class I railroads that the Agency proposed in its initial notice of proposed rulemaking, as well as those proposed in its SNPRM.

NGFA also urges the Board to modify its proposed regulations at 49 C.F.R. §1333.4 to require Class I railroads to include the additional information fields contained in the SNPRM, namely: (1) the date range (billing cycle) covered by the demurrage invoice so the customer can better determine the basis for the invoiced charges; (2) The date and time of each car ordered in (if applicable); and (3) the original estimated date and time of arrival of each car (as established by the invoicing carrier), as well as the date and time each car was received at interchange (if applicable) either on or with each invoice. As part of this latter requirement, NGFA reiterates the

recommendation in its Opening Comments that the Board go further by also requiring carriers to provide the following additional information:

- The date and time car orders are placed with the carrier, including information on any verified notifications of changes to the original order dates, which is useful information to determine order identification;
- The date and time of actual placement (e.g., “spotting”) of the train (cars) for loading or unloading, as well as the time of the release of the cars, at the loading or receiving facility, including information on whether individual cars were spotted or pulled within the relevant service window. This is crucial information, given that railcars are assessed demurrage on both ends of a waybill – loading and unloading. (NGFA is informed that some carriers already provide this information); and
- Any missed switch dates and scheduled non-switch dates.

NGFA believes all of this information is relevant and needed by rail customers to verify the accuracy and validity of demurrage and accessorial invoices, which as noted in its Opening Comments and previous statements filed in response to the Agency’s May 2019 oversight hearing on demurrage and accessorial charges (Docket No. EP 754) and subsequently in its “Notice of Proposed Rulemaking on Demurrage Billing Requirements” (Docket No. EP 759) is a burden that Class I railroads generally have placed totally on their customers. Further, the railroads have given themselves sole discretion to reject or modify an invoice that is subject to a rail-customer challenge. For these reasons, NGFA reiterates its Opening Comments’ recommendation that the Board follow its path in Docket No. EP 757, “Policy Statement on Demurrage and Accessorial Rules and Charges,” and also make the final rules in this proceeding applicable to invoices for

accessorial charges “insofar as the purpose of an accessorial charge is to enhance the efficient use of rail assets in the same way as demurrage.” See Docket No. EP 757 (served April 30, 2020) at 14.

Nothing in the Opening Comments submitted by six Class I railroads has dissuaded NGFA from strongly supporting the STB taking action to require this additional information; in fact, the carrier comments only have reinforced the importance of doing so, as explained subsequently.

Pervasive throughout the Opening Comments of the Class I railroads is the argument that their existing web-based systems allegedly provide the all the information needed for rail customers to challenge erroneous demurrage charges. Union Pacific Railroad Co. (UP) at 2. BNSF Railway Co. (BNSF) at 3. Norfolk Southern Railway Co. (NS) at 1-2. Canadian Pacific Railway Co. (CP) at 4. They erroneously contend that their customers should be satisfied with just having the ability to **search** for such information – with varying degrees of difficulty depending upon the individual carrier’s system – **each and every time** there is a potential billing error. CP even posits the incredulous notion that merely by requiring the reporting of additional information, the Board somehow will dissuade rail customers from “remain(ing) actively engaged in monitoring and managing their supply chains to, among other things, avoid incurring demurrage charges in the first place....,” as if rail customers somehow relish the considerable resource burden in terms of time and personnel and computer costs involved in challenging erroneous demurrage charges. CP at 4. Message to CP: They do not!

But in so arguing, the Class I railroads are conflating and attempting to obfuscate the mere existence of their web-based tools – which have varying degrees of capability and utility for customers to access real-time information on shipments – with the carriers’ responsibility to

actually send customers adequate information and documentation to justify the charges assessed in demurrage invoices. The rail carriers apparently are attempting to convince the Board that it should allow them to continue to take a “passive approach” that again places the onus on the customer to take action to access and hunt, often after-the-fact, ***each and every time*** for the necessary information to contest an erroneous demurrage charge, incurring the significant time and financial resources such actions require. That is unacceptable. Just as no reasonable person would expect a consumer to pay a credit card bill based upon an incomplete or deficient invoice itemizing individual charges, neither should rail carriers expect their customers to pay what cumulatively amounts to billions of dollars annually in demurrage and accessorial charges without providing sufficient information with their invoices to verify the accuracy and validity of such charges.

As demonstrated repeatedly in evidence provided in EP 754 and EP 759 by NGFA and other rail customer organizations, the accounting and collection departments of Class I rail carriers overwhelmingly issue computer-generated invoices based solely on train-movement data – often predicated on a simple code that reads car- placement and release times and other simple binary data – without sufficient internal review by railroad personnel before the invoice is issued for accuracy or extenuating circumstances, including delays caused by the carrier. This places upon railroad customers virtually the entire burden of verifying the applicability and accuracy of such charges (as well as finding actual railroad personnel with whom to communicate to resolve the matter). As the Board heard from many shippers, this burden can be substantial and costly.

In preparing these Reply Comments, NGFA surveyed members of its Rail Shipper/Receiver Committee (comprised of 33 senior-level rail transportation executives whose facility operations are reflective of NGFA’s diverse membership) and was advised that each of the Class

I railroads have unique challenges and shortfalls with their web-based platforms in providing accurate information. One member reported that “all railroads are guilty of supplying demurrage invoices with incorrect (invoice) data” – attributable mostly to incorrect manual reporting by crews who at times report cars being constructively or actually placed sooner than they actually are to avoid being reprimanded or penalized by upper (railroad) management. This same member reported that the prevalent attitude of the Class I carriers is that, “the customer is guilty until proven innocent.” Several other NGFA-member companies also noted that rail carriers’ existing web platforms at times do not detect the “nuances” that occur at more complex grain handling and processing facilities, including constructive and actual placement of cars, which require the exchange of manual email data to resolve. Further, several NGFA-member companies have reported that it typically requires extensive research and multiple rejections or conversations with the Class I carrier before or if the railroad agrees to correct its demurrage charges. As one NGFA member stated, “computer-generated bills may or may not be accurate when considered in the context of such things as the original trip plan versus actual estimated time of arrival (ETA), actual performance, bunching or railroad actions beyond the rail customers’ control.”

The railroads then control the process and timing for determining whether such invoices are valid – from reporting of performance by their crews (a potentially inherent conflict-of-interest) to overreliance on railroad computer systems to determine when charges should apply, with minimal human intervention.

Thus, the Board is correct and fully justified in seeking comments on additional information that carriers should be required to include with or accompanying invoices for demurrage (which NGFA respectfully submits also should apply to accessorial charges) to facilitate rail customers’ ability to verify and substantiate the accuracy of such charges. As one

NGFA member remarked, “the railroads want to be able to deliver cars whenever they want and charge the customer when the customer cannot accommodate the railroad; they have taken the (demurrage) statutory language of efficient utilization of rail assets and weaponized it.”

III. NGFA Responses to Major Issues Raised by Class I Railroads in Their Opening Comments on SNPRM

NGFA takes this opportunity to address and refute the arguments presented by multiple Class I railroads opposing specific demurrage billing requirements proposed by or contained within the Board’s proposed rule and SNPRM. NGFA later in this statement also provides comments on other contentions made by individual Class I carriers in their Opening Comments on the SNPRM.

Original Trip Plan ETA and Interchange Information: With the notable exceptions of the NS and CSX Transportation Inc. (CSXT), which state they already provide this information on their websites, most other Class I carriers vociferously object to being required to provide demurrage billing information on the original estimated date and time of arrival of each car (as established by the invoicing carrier) as well as the date and time each car was received at interchange (although CSXT also argues against requiring that such information be included in billing invoices). For instance, BNSF opposes conveying the original trip plan ETA and date and time of interchange, alleging that such information “would be misleading and confusing to include...on demurrage invoices because it would create the incorrect appearance that the data have outsized significance in assessing the validity of a demurrage charge and represents a departure from the core principles of common carrier service...which are based on a broad and flexible reasonableness standard.” BNSF at 2 and 17. BNSF later contends “such a requirement

would create confusion over the relevance of such data and potentially encourage unnecessary disputes over appropriate demurrage charges.” Id. at 16. Meanwhile, UP states that a “car’s original estimated time of arrival (ETA) and the car interchange date and time are not utilized in calculating demurrage.” UP further asserts that the original ETA is nothing more than an “initial estimate” and is “updated throughout transit,” and that requiring that it be included on the billing 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.” UP also alleges that such information “will not identify when bunching has occurred.” UP at 4. In addition, CP has the audacity to fault the Board’s rulemaking for “empowering customers in their ability to challenge invoiced demurrage charges.” CP at 4. CP further states that “imposing a requirement to provide original ETA information would somehow “place the emphasis on challenging demurrage rather than encouraging customers to utilize such information in real time to avoid demurrage in the first place” and is “unnecessary and would have significant unintended consequences” (without citing what those allegedly would be). CP at 3.

To the contrary, NGFA members state that providing original trip plan ETA and interchange information with billing invoices is one of the “core ways” that customers can track railroad performance and “bunching” incidents, and thus is critically important to auditing efficiently the validity and accuracy of demurrage and accessorial charges. Several NGFA-member companies said they believe Class I carriers should provide two trip plans side-by-side in their web tools – the original trip plan ETA with projected time stamps from origin to destination and the then-current “actual” trip plan with its projected forward time stamps and ETA to destination.

In any event, NGFA believes the ability of rail customers to compare the original and updated trip plans is an important indicator of slippage in adherence to the trip plan. So, too, is information on missed switches and scheduled non-switch dates, which NGFA members report are becoming increasingly prevalent. If cars arrive a day or more later or earlier than indicated by the original trip plan, it would trigger an investigation by the customer. If there are multiple unique original ETA dates for cars that all arrive on the same date, it is an indication that bunching or railroad performance issues likely have occurred created by a surplus of cars arriving on the same day even though originally they had been spread out over a longer time period. In other cases, cars may be offered or delivered at interchanges daily; but the receiving carrier may not pull the cars daily, thereby creating the potential for bunching. Carriers also are reducing interchange days and changing the number of days they service customer facilities across their networks, creating additional car-bunching, almost by design. Also pertinent to this discussion is the fact that many, if not most, Class I railroads do not start their trip plans until they actually pull the cars; so, a car could sit idle at origin for days or a week or more due to missed pulls with the original trip plan never generated, creating bunching issues at the origin shipper that are not documented by the carrier. Class I railroads generally reject bunching claims filed by their customers, maintaining that the cars moved in accordance with their trip plans, even though the shipper released the cars from origin spread out multiple days or a week or more apart, yet having the cars arrive at destination all at once because the trip plans converged because the carrier did not release the cars on a daily basis from rail yards across their network, creating a snowball effect.

Also concerning bunching, NGFA has been informed by several member companies that CSXT possesses an internal “bunching analyzer program,” but allegedly utilizes it ***only if and after*** the rail customer challenges the demurrage invoice over a bunching issue.

Yet another NGFA member noted that railroads' trip plan times can change gradually over the course of the shipment, which will not normally receive the attention of either the carrier or shipper. Such changes may occur in increments of eight to 24 hours over multiple rail yards that may not raise red flags at the individual yard level but still adds up to significant time changes – sometimes amounting to days or weeks – over the course of the entire trip. In each of these instances, being provided invoice information on the original ETA and interchange moves would provide rail customers with evidence they shipped cars in an acceptable fashion, and if the original ETAs all converge at an upstream offline carrier – at interchange or at destination – it would be an indicator of a lack of carrier, not shipper, performance. As one NGFA member company put it, “the original trip plan ETA compared to actual trip plan variance, particularly when tied to individual car numbers on the invoice, helps provide the full story of the shipment and provides clarity on potential bunching.”

Further, railroads begin charging accessorial charges (e.g., demurrage, storage charges) very quickly upon the cars' arrival at a serving yard or destination. When a trip plan changes, it is the rail customer, not the carrier, that is held accountable if it cannot accommodate the railroads' deviation from the original trip plan unless the customer has adequate information – including that provided by the original trip plan ETA and relevant switching and interchange data – to capture and dispute charges attributable to bunching and other railroad-caused incidents that undermine the efficient utilization of rail assets.

Information Provided in Machine-Readable Formats: Several of the Class I railroads also allege that having the Board require demurrage invoice information be provided in a machine-readable format is an anathema and could even “stifle innovation” in their web-based customer-

facing tools. This, on its face, is a red herring and is not what the Board is proposing nor what NGFA and other shipper organizations are advocating.

NGFA reiterates its support for the Board requiring that Class I railroads provide demurrage and accessorial invoice data in a machine-readable format to make verification by customers of such charges less burdensome, in lieu of railroads providing such information in paper or PDF files unless the latter formats expressly are requested by the rail customer. Acceptable machine-readable formats should include: (1) Excel spreadsheets or formats readily capable of being converted to an Excel spreadsheet using a customized link that a rail customer could access to directly download carrier data; (2) Office Open XML; and (3) Open Document spreadsheets.

In this regard, NGFA generally continues to support the definition of “machine-readable format” proposed in the Joint Opening Comments of the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute and National Industrial Transportation League on the SNPRM, but suggests that it be amended to include the following additional language (new language boldfaced and underscored; deleted language stricken through): “*A structured data file format that is open and capable of being easily processed by a computer. A format is open if it is not limited to a specific software platform, ~~and~~ **is** not subject to restrictions on re-use, **and can be read and interpreted automatically by a computer program without the need for manual intervention.**”*

IV. NGFA Comments on other Issues Raised by Individual Class I Railroads in Their Opening Comments on SNPRM

Finally, NGFA wishes to address other arguments posed by several of the Class I railroads in their Opening Comments on the SNPRM that have not been discussed previously in this statement:

- **BNSF:** BNSF appears to indicate that the required information proposed by the Board in its original proposal and SNPRM already is collected within its various tools, including the “demurrage invoice tab” within its “Customer Dwell Management Tool” and is provided in machine-readable format, including Excel spreadsheets. If so, then it should not be difficult for BNSF to generate these data as part of or accompanying invoices it sends to customers for demurrage and accessorial charges.
- **CN:** NGFA strongly opposes CN’s proposal, also endorsed by CSXT, that the Board drop the specific information elements contained in its proposed rule and SNPRM and replace it with a “flexible” standard ostensibly 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. This information can be provided either on or with the demurrage invoice or through other electronic means, including through a software platform or portal.*” CN maintains that rail customers then could bring a complaint to the Board or file suit in a federal court if the carrier’s invoicing practices “did not satisfy that standard on a case-by-case basis in a particular demurrage dispute.” CN at 4-5. CN’s proposed standard is highly subjective and tantamount to asking the Board to abdicate its responsibility to ensure that rail customers have sufficient information to challenge inaccurate demurrage invoices directly with the carrier on a business-to-business basis. By requiring that individual cases be brought to the Board or be litigated in court, it would have a totally chilling

effect on rail customers' ability to challenge erroneous invoices, given the time, complexity and expense involved.

In addition, for reasons previously cited, NGFA opposes CN's recommendation that railroads be allowed to meet the invoice information requirements merely by providing a "software platform or portal." CN at 7. NGFA also objects to CN's contention that railroads should "only (be) required to provide information that is available to it." CN at 7. That would create an inviting loophole for carriers to avoid collecting information, either through benign neglect (not collecting needed information required by the Board) or by stopping collection of currently gathered information needed by customers to challenge inaccurate invoices.

- **CP:** CP repeatedly disparages the need for customers to access historical information on demurrage, saying they have "no need to review historical information to identify improper demurrage charges due to railroad-caused bunching." CP at 3. CP further states that it only makes such information available "upon reasonable request." *Id.* at 4. NGFA already amply has demonstrated the need for carriers to send such information to allow customers to verify demurrage and accessorial charges, and previously cited other incredulous CP arguments that have no basis in fact.
- **CSXT:** CSXT and CN both complain vociferously about the alleged changes to their software systems that might be required to provide the additional information proposed by the Board in what the CSXT terms a "line-by-line invoice information protocol." CSXT at 4 and 6. Yet these carriers disregard and fail to mention the countless time and costs incurred by their customers in reviewing and correcting carrier errors on invoices for demurrage and accessorial charges; in many cases, rail customers have had to invest considerable funds in their own computer systems to do so. Having CSXT

and other carriers being able to collect and provide this information to rail customers as part of or accompanying invoices for such charges is not an undue burden, but rather a reasonable business expectation to justify payment. Further, NGFA is informed by member companies that while CSXT's TripPlan does provide useful information to measure variances between actual and initial trip plan ETA, it does not yet provide such information on shuttle grain train movements; further, it still requires customers to search for other information in instances where it does exist.

- **NS:** While disagreeing with its opposition to the Board's proposals to implement minimum demurrage billing information requirements, NGFA commends NS for already providing much of the proposed information in a machine-readable format in a relatively user-friendly and customizable format through its AccessNS system. NGFA's disagreement with NS pertains to NGFA's view that such information should be made available routinely with or accompanying the demurrage invoice, rather than customers being required to access it on their own.
- **UP:** NGFA strongly objects to UP's contention that this proceeding arose from the "informal complaints of only a *handful* of industry customers." Many NGFA-member companies, including those served by UP, have concerns similar to those raised by other shipper organizations. NGFA also disagrees – contrary to UP's contention – that action by the Board "is neither warranted nor proportionate." UP at 2. Several NGFA-member companies also disagree with UP's contention that its demurrage pre-invoicing procedures have a 95 percent accuracy rate; they report that has not been their experience. Finally, NGFA strongly opposes UP's request that the Board provide Class I carriers with the opportunity to obtain a "waiver" from the Agency's invoice requirements by submitting verified statements that their web-based tools purportedly

provide sufficient data. UP at 7. As noted repeatedly in this statement, NGFA believes carriers need to be responsible for proactively providing sufficient information when sending invoices to their customers to verify the accuracy of demurrage and accessorial charges – not the reverse by requiring customers to bear the brunt of hunting-and-pecking through carrier websites to obtain such information after-the-fact. Further, NGFA believes that UP and other carriers’ web-based tools for which “waivers” have been granted could change in the future and not contain the required information.

V. Appropriate Action to Ensure Demurrage Charges are Accurate and Warranted

In closing, NGFA reiterates several of its Opening Comments submitted to this SNPRM regarding actions to help ensure demurrage charges are accurate and warranted.

First, NGFA generally supports the previously submitted proposal of the North American Freight Car Association to revise 49 C.F.R. §1333.4(b) to require Class I carriers to provide “a concise explanation of how the charge was calculated and the carrier’s reasons for the charge being assessed” to help rail customers verify the accuracy of demurrage invoices. NGFA believes such “explanations” of charges should be substantiated by requiring the Class I railroad to include signed and verified statements, photos and original trip plans attesting to the accuracy of the invoice. In this regard, the Board may wish to consider stipulating that if a dispute involving a demurrage or accessorial invoice is not resolved within 45 days because of inadequate information or carrier delays in providing needed information, the invoice is considered null and void.

Second, NGFA continues to recommend that Class I railroads be required to inform the Board in writing of the specific steps each one takes to ensure the accuracy of its respective demurrage invoices, with the Agency subsequently making such carrier statements publicly available on its website. That should not be a difficult task, given the Opening Comments submitted by the carriers in the SNPRM in which they profess to outline their pre-invoice verification procedures.

Finally, to facilitate transparency and the Board's monitoring function, NGFA again requests that the Board's Rail Customer and Public Assistance Office create a portal on its website to collect reports submitted by rail customers of erroneous invoices generated by individual Class I railroads so the Agency can track trends in carrier performance. NGFA believes the Board should communicate directly with senior management of any Class I carrier that exhibits a pattern of repeatedly generating inaccurate billings to discuss and determine corrective actions that should be taken. In this regard, NGFA again encourages the Board at some point to consider amending its Policy Statement on Demurrage and Accessorial Rules and Charges to recommend that rail carriers – particularly repeat offenders – provide offsetting credits (that do not expire) to rail customers that successfully challenge erroneous invoices to partially compensate them for the time, effort and cost expended in challenging inaccurate billings. See Docket No. EP 757 (served April 30, 2020) at 15-16.

Conclusion

NGFA again commends the Board for its proactive actions to address demurrage and accessorial practices and charges, and for issuing the SPRMN and providing this opportunity for stakeholders to submit additional comments and recommendations concerning Class I railroad

demurrage billing requirements. NGFA underscores its overarching belief that given the “track record” of several Class I carriers of repeatedly submitting erroneous demurrage and accessorial invoices to their customers – and foisting upon those customers the responsibility for verifying and challenging the accuracy of carrier-generated invoices – it is incumbent upon the Board to proceed to finalize regulations requiring additional information from carriers to enable rail customers to perform these tasks as efficiently as possible.

NGFA believes the additional information requirements and other recommendations it proposes herein are reasonable and achievable by Class I carriers, and are justified based upon their current demurrage billing practices and processes. Further, NGFA believes their adoption by the Board could contribute to more internal review and verification activities by the railroads themselves before they disseminate such invoices to customers.

NGFA respectfully requests that the Board give due consideration to NGFA’s comments and recommendations in expeditiously crafting a final rule.

Respectfully submitted,



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