

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 754

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OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

**WRITTEN TESTIMONY OF THE
AMERICAN CHEMISTRY COUNCIL**

The American Chemistry Council (“ACC”) is pleased to submit testimony before the Surface Transportation Board (“STB”) in the above-captioned proceeding. Jeff Sloan, ACC’s Senior Director of Regulatory and Technical Affairs, will present this testimony at the May 22, 2019, hearing. ACC thanks the Board for holding this hearing to give shippers the opportunity to express their concerns with the recent changes in railroad practices on demurrage, storage and accessorial charges.

ACC represents the leading companies in the business of chemistry. Our members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier and safer. As a \$526 billion enterprise, the business of chemistry is a key element in the nation's economy and one of the largest customers of the U.S. freight rail system. Thanks to the shale gas revolution, our industry is growing significantly. With more than \$200 billion in announced new capital investments and an estimated 60 million metric tons of additional production capacity expected to come online by 2022, chemical shippers are increasingly reliant on the U.S. freight rail system.

ACC members are very concerned with the litany of recent changes to Class I railroads’ demurrage, storage and accessorial charges. Their concerns span a number of railroads and a broad range of practices. While some concerns are common across most ACC members, many are dependent upon the nature and location of their operations and available plant infrastructure. My

comments focus upon three specific railroad practices that have affected the broadest cross-section of ACC members:

1. Reductions in free time before demurrage and storage charges.
2. The so-called “congestion” charge imposed by NS.
3. UP’s Not-Prepared-for-Service Charge.

After detailing these matters, I will outline key principles of commercial fairness that ACC asks the Board to consider when assessing the reasonableness of these railroad practices. I will conclude by proposing potential Board follow-up actions to this hearing.

I. Specific Railroad Practices

A. Reductions in Free Time

ACC members have expressed the greatest concerns over the reductions in free time before demurrage and storage charges accrue. Because ACC members primarily, if not exclusively, use private rail cars, their focus is on storage charges in particular. Railroads assess storage charges on private cars held on the railroad’s track until delivery to a customer’s facility. Most Class I railroads no longer allow any free-days before storage charges begin to accrue.

ACC member concerns with storage charges vary by whether they operate open- or closed-gate facilities. At open gate facilities, railroads deliver rail cars to the facility upon arrival in the terminal without the shipper having to request delivery of the car. Open gate facilities are typically larger facilities that operate 24/7 and have more extensive infrastructure. Under the zero free-time rule, an open-gate customer will incur storage charges primarily if and when its plant delivery tracks are full, preventing the railroad from delivering a rail car.

At closed-gate facilities, the railroad notifies a customer when cars arrive at the local yard and holds the car until the customer requests delivery. Closed-gate facilities typically have very limited storage track and/or operating hours. A closed-gate customer will incur storage charges if

it does not submit a request for delivery by midnight of the same day the railroad notifies the customer that the car is available for delivery. Depending upon when the railroad provides that notice, spanning from 12:01 a.m. to 11:59 p.m., a closed-gate customer will have no more than 24 hours and as little as one minute to request delivery before storage charges begin to accrue. The very tight window can make it especially difficult, and sometimes impossible, to avoid at least one day of storage charges. This is particularly true when the railroad notifies the customer of a car's arrival outside of normal business hours or on weekends.

Both open- and closed-gate customers are affected by railroad service inconsistencies that can overwhelm a facility with too many cars, and prevent the facility from accepting delivery when it is convenient for the railroad. This phenomenon, referred to as “bunching,” can occur for different reasons.

- First, despite the best efforts of ACC members to regulate the tender of rail cars to arrive over a defined time period, those cars may be delayed or held for the railroad's own convenience, resulting in a single mass of cars delivered all at once. For example, a chemical supplier may tender two cars of raw material per day from its production plant to match the consumption rate at its customer's plant. Somewhere along the route, however, 10 cars may be bunched together by the railroad and delivered all at once.
- A second bunching scenario occurs when a railroad misses its local switch at a facility or fails to complete its switch. A missed switch can result in the railroad delivering twice as many cars to a facility on the next switch. An incomplete switch can result in the railroad delivering cars but not picking up cars, creating congestion within the plant.

- A third reason for bunching concerns the way railroads handle empty cars returning to a plant. Shippers typically have no control over the pace and timing of empty car returns, which may be a low priority for the railroad. Consequently, empty cars often are bunched, requiring storage until they are needed for loading.

Each form of bunching can overwhelm a plant with more cars than it can handle, resulting in the railroad assessing storage charges, despite the customer's inability to control, and thus prevent, such situations.

ACC acknowledges that several railroads do offer storage credits for bunching so that the customer is not penalized for the railroad's service. But there are limits to the effectiveness of those credits. First, the delivering railroad does not offer storage credits when an upstream railroad in the route is responsible for the bunching. Second, the credits are not always automatic; a shipper often must request credits and the information the railroads provide often is insufficient to determine when credits are warranted. Third, the window for disputing charges often is narrow and some railroads charge for the privilege of disputing a charge. For example, NS allows up to 30 days to dispute a charge, but after the 5th day, NS assesses a \$500 handling charge, and NS will automatically reject any claim after the 30th day (Tariff NS 6004-D, Item 950(9)).

When railroads previously granted at least 24 hours of free time, shippers had some buffer to mitigate the impact of bunching. The new zero free-time rules eliminate even that small buffer. For some members, compliance with the new rules is difficult or nearly impossible, leaving them unable to avoid certain charges no matter what they do. Other members ultimately can comply with the new rules, but only with significant operational changes and/or investments in additional infrastructure. Such actions include:

1. Constructing additional storage track and/or fixed storage facilities within their plants, if space restrictions permit.

2. Leasing storage track at remote locations and incur switching charges to and from the storage track.
3. Operating with just-in-time inventory and hope that inconsistent rail service doesn't force a plant shutdown or production curtailment.
4. Acquiring more rail cars when the additional time to switch cars to and from remote storage locations creates inefficiencies that render the member's existing fleet insufficient for its transportation volumes.
5. Altering plant shift schedules and production processes to accommodate the new railroad processes.
6. Hiring more personnel to manage the flow of rail cars to and from facilities to mitigate the adverse effects of the new rail practices.

B. NS Congestion Charge

In addition to free-time reductions, ACC members are uniformly troubled by the NS practice of assessing a so-called "Congestion Charge." (Tariff NS 8002-A, Item 6265) This is a charge that NS can impose upon a shipper when NS determines, within its "sole" discretion, that an excessive quantity of cars for a particular customer is congesting NS facilities and causing material operating problems. The fact that NS can assess this charge based entirely on its own subjective judgment and without recourse for the shipper is the very essence of an arbitrary and unreasonable practice. Moreover, despite being a per-car charge, NS does not appear to identify the cars upon which the charges have been assessed. Nor does NS offer credits when the congestion is due to bunching, even when NS itself is the cause. Lastly, this charge appears to be double-dipping because it serves much the same purpose as demurrage and storage charges to which the same traffic also is subject.

C. UP's Not-Prepared-for-Service Charge

ACC is pleased that UP recently modified its charges for rail cars that are not prepared for service when UP arrives at a facility. UP previously assessed a \$400 charge on each rail car. UP Tariff 6004-C, Item 9055-D. On May 8, UP announced that the charge will now apply per-occurrence rather than per-car, and established a threshold of 3 occurrences per month. This reduces, but does not eliminate the negative impact on ACC members.

A car may not be prepared for service for various reasons such as it is on the wrong track or the car is still being loaded. A charge is understandable when unprepared cars impose actual costs upon UP, such as requiring UP to make an unnecessary trip to the shipper's location, but that is seldom the case at large facilities where UP is picking-up and/or delivering multiple rail cars. In such circumstances, UP's charge is nothing more than an added revenue source.

Furthermore, there is no reciprocity associated with this UP charge. UP has strict requirements for how shippers must prepare their rail cars for pick-up by UP and when those cars must be ready. If shippers fail to comply with those requirements, UP charges them. In contrast, if UP fails to deliver a loaded or empty car to the shipper's facility, or spots cars on the wrong tracks, UP does not pay the shipper a similar penalty for the operating inconvenience that UP's service deficiency has imposed on the shipper.

II. Key Principles

ACC appreciates that Chairman Begeman, in correspondence to the Class I railroads last fall, raised concerns over the "commercial fairness" of these new railroad practices. We believe that the railroads' responses to Chairman Begeman's concerns have been incomplete and inadequate. The concept of "commercial fairness" is critically important for ACC members and other shippers that lack access to competitive transportation options. Without effective competition, railroads can impose rules and charges with little regard to the impacts on their

customers. Lacking recourse in the marketplace, rail customers look to the STB to ensure that such practices are reasonable.

ACC has developed six key principles of “commercial fairness” that we believe should inform the Board’s thinking on the reasonableness of railroad demurrage, storage and accessorial charges.

1. There must be a reasonable justification for changes in railroad practices. The rail industry has imposed rules and charges that support railroad operating efficiency and convenience. However, the benefits realized by the railroad are only one side of the equation. To be economically justified, new or changed practices must produce benefits to rail operations that outweigh the cost to shippers to comply with those practices. Such practices are not reasonable if their principal objective or result is to generate revenue from, or shift costs to, shippers. Although most Class I railroads have adopted many of their recent tariff changes as part of their implementation of Precision Scheduled Railroading (“PSR”), it is not clear how shippers will benefit from this and whether any such benefits outweigh the costs that shippers are incurring to comply with these new practices.

2. There must be a direct relationship between a change in railroad practices and the desired effect on rail operations. Charges should apply only to actions that are within a shipper’s control and that actually impair rail operations. To date, the rail industry has not articulated a clear connection between their new rules and inefficient shipper practices. Indeed, many shippers are finding it difficult to avoid the new charges by changing their practices. For example, there is no justification for imposing storage charges for delays triggered by bunching that is caused by either the delivering railroad or an upstream carrier.

3. Railroads must allow a reasonable time for shippers to take actions necessary to comply with new or changed practices. Although the rail industry has had many months to

adjust their operations to implement PSR, they are expecting their customers to comply with associated new rules and practices in 45 days or less. Actions such as building or acquiring new infrastructure to avoid storage charges require far more time. It is unreasonable to impose charges while a facility is acting in good faith to implement necessary operational changes.

4. There must be transparency in implementation of the new or changed practice. Rules must be based on clear and objective criteria. Charges like the NS congestion charge, imposed on the railroad's sole discretion, utterly fail to satisfy this principle. In addition, railroads must provide well-defined standards for disputing charges and obtaining credits.

5. There must be true reciprocity. The railroads' responses give reciprocity an unduly narrow meaning by focusing on demurrage and storage credits offered when the railroad causes bunching. Those credits merely mitigate charges when the delivering railroad is at fault; it does nothing to compensate shippers for the inefficiencies that railroad service failures cause to shipper operations. Reciprocity should mean that a railroad may not impose charges upon shippers for actions that adversely affect rail operations, unless that railroad also compensates its customers for the railroad's actions that adversely affect the customer's operations. For example, railroads assess demurrage charges upon shippers for the inefficient use of railroad-supplied rail cars. When delays occur to the transportation of a private car, the railroad should pay a shipper a comparable charge for the lost use of that car.

6. No double dipping. Railroads should not impose multiple charges that serve the same purpose. The NS congestion charge is a glaring example of such double dipping. In addition, charges for railroad services that customers use to comply with storage rules also warrant scrutiny. For example, as the elimination of free days forced shippers to move more cars to storage track, the NS increased its fee for intra terminal switching by 50%. The fact that a railroad is receiving

additional revenue regardless of whether a shipper pays storage charges or takes the actions to avoid them raises serious questions as to the railroad's motives underlying the rule changes.

IV. Post-Hearing STB Actions

ACC proposes three potential Board actions as follow-up to this hearing.

First, ACC asks the Board to develop a policy statement, based on the key principles I have just outlined, establishing standards for evaluating the reasonableness of railroad practices with respect to demurrage and storage charges, and similar tariff provisions. A policy statement would provide badly needed guidance to both railroads and shippers and help to minimize the number of disputes the Board may have to resolve. By staking out the boundaries of permissible railroad action in tariffs, the Board also may facilitate the negotiation of contracts that are better tailored to the circumstances of individual shippers and their facilities, instead of the one-size-fits-all approach that exists under the current regime.

Second, ACC asks the Board to initiate a rulemaking proceeding to adopt rules for billing and disputing demurrage and storage charges. The Board has a model for such rules at 49 CFR Part 1005, which establishes principles and practices for processing cargo loss and damage claims. Analogous rules should establish minimum information requirements that enable shippers to audit demurrage and storage charges, as well as clear deadlines for railroads' to respond to disputes.

Finally, the Board should exercise its investigative authority granted in the Surface Transportation Board Reauthorization Act of 2015 to review and determine the lawfulness of problematic tariffs, particularly the nearly uniform railroad practice of granting zero free days on private cars and the NS congestion charge.

DATED: May 8, 2019