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OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

COMMENTS

Submitted by

AGRICULTURAL RETAILERS ASSOCIATION

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May 8, 2019

On behalf of the Agricultural Retailers Association (ARA), I would like to thank Chairman Begeman, Vice Chairman Fuchs, and Board Member Oberman for holding this important oversight hearing on demurrage and accessorial charges. My name is Richard Gupton and I serve as Senior Vice President of Public Policy & Counsel for ARA.

ARA is a not-for-profit national trade association that represents America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include: fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

Agricultural retailers use the railroads to transport crop input materials such as fertilizers and pesticides because it is generally the safest, most secure, and efficient way to move these agricultural chemicals. Assuring that rail service is dependable and provides consistent delivery to agricultural retail operations plays a critical role in an efficient and complex distribution system due to the large volume of product, the distance it must travel to get to a location, and the restricted seasonal time frame this must occur. For example, in the Midwest nearly all regional dry and liquid product fertilizer warehouses are primarily filled by train. Other means of shipping anhydrous ammonia (NH₃), an efficient and widely used source of nitrogen fertilizer, is by pipeline, truck or barge. However, these other modes of transportation have limitations due to existing pipelines being at capacity and lack of available trucks or qualified drivers and would be unable to distribute the tons currently moving by rail in the time required for it to be used in agriculture. Barge service is limited to the radius around maintained river ports which have lost some funding.

As previously mentioned, the trucking industry already has strained capacity. The driver shortage is real and peaked to 50,000 in 2017 – the highest level on record, according to the American Trucking Associations. This data has also been included in half of the nation's Federal Reserve Districts official reports. In addition, there are fewer qualified drivers that have the required commercial driver's license with a HAZMAT endorsement following U.S. Department of Transportation (DOT) regulations that have been implemented over the years, including the new Electronic Logging Device (ELD) requirements. Even if there were enough qualified drivers and trucks to handle the additional freight, the idea of transporting the material by truck rather than rail flies in the face of the goal of lower carbon emissions that the United States is working hard to achieve.

The cost of rail service for agricultural retail operations has increased at a rate that forces the industry to look at alternatives, but few realistic, economically viable options remain available. According to a survey completed by The Fertilizer Institute (TFI), from 2005 to 2017 the railroad's increased rates on anhydrous ammonia at a per rail car expense of 206% compared to a system wide average revenue per car of 65%. The TFI study points out that inflation during that time frame only increased by 26%.

In April 2014, the STB issued final demurrage liability final regulations (Docket # 707) that established that "Any person receiving rail cars from a carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars." However, the STB rule did not address problems related to constructive placement or bunching issues which are a significant cause of demurrage liability. In declining to address those issues in the rule, the STB indicated it did not believe any adjustment was necessary and any bunching issues should best be addressed in the context of individual disputes. The fact the STB is holding this oversight hearing today that includes a very long list of shipper organizations and other witnesses shows the urgent needs to revise demurrage liability regulations to prevent

any further unfair practices and abuse by the railroads that would not be solved through the STB's dispute resolution process.

ARA appreciates the STB's efforts to examine Class 1 railroads demurrage and accessorial charges as it relates to commercial fairness and appropriate reciprocity. The reports that have been submitted for 2018 clearly show Class 1 railroads generated significant revenue through demurrage and accessorial charges – more than \$1 billion above and beyond their freight rates – from rail customers. This type of reporting to the STB brings about necessary transparency and should be continued as part of a regular quarterly reporting process.

ARA and its members believe the excessive charges being imposed by the Class 1 railroads are commercially unfair and lack appropriate reciprocity as it relates to non-performance by the railroads. The charges are well above and beyond the intent of the STB demurrage liability regulations that are designed to encourage efficient loading and unloading of product in a timely manner to ensure rail cars are not held for too long and allowed for their prompt return into the transportation network.

ARA recently surveyed our members to obtain additional information to determine whether there are concerns about railroad demurrage, storage and accessorial charges. The responses received indicated concerns with Class 1 railroads as imposing demurrage and accessorial charges that are commercially unreasonable and inequitable to shippers and receivers. The railroads primarily mentioned are CSX, Union Pacific, BNSF, and NS. The 24-hour constructive placement is totally unreasonable as an agricultural retail operation needs a minimum of 48 hours and potentially up to 96 hours depending on the circumstances. The 24-hours from the short line interchange to the agricultural retail facility then back to the short line interchange in that allotted time is not enough. That short time frame effectively leaves the agricultural retailer with 15 to 16 hours to load or unload after constructive placement with little time to align crews and inspectors within that window. In another example, an ARA member indicated they loaded a rail car, notified the rail road it was

ready and billed a unit train within the 24-hour window. The Class 1 railroad left that same rail car remained in place for several days, preventing the railroad from placing additional single cars in the agricultural retailer's yard. The railroad then begins demurrage charges against the agricultural retailer for the single cars that the railroad could not place because the tracks were full. During this same time frame the retailer may have single cars sitting outside the yard, not able to deliver product that is needed by customers.

The additional allotted time (minimum 48 hours up to 96 hours) being recommend by ARA should be enough if the railroads used the shipping schedules created by the agricultural retailer and manufacturer. Instead the railroads hold shipments up (i.e. bunching) until they have more cars and then expect them all to be unloaded in the very narrow time allotted. The shippers / receivers should not be charged anything extra as the railroad seems responsible for nothing. For example, the overall transit time for the product can be anywhere from 14 days to 21 days, but an agricultural retailer gets only a 24-hour window to unload or be subject to an excessive demurrage charge regardless of whether the railroad even delivers the product on time. In addition, agricultural retailers are dealing with a lack of trucks and labor shortages. During the peak season there are not enough hours during the day to get everything unloaded under the current rules. Agricultural retailers need to employ more people to unload cars after regular business hours, which requires overtime pay as well as additional help. Safety becomes an issue when required to unload after dark, which adds risk and cost.

ARA members have been required to build additional tracks at their expense to receive cars quicker and more efficiently. ARA members estimated the adding shipping investment could cost roughly \$800,000 or significantly more per facility. Many ARA member facilities do not have the physical room to expand in-house storage track installation to minimize demurrage costs. An ARA member informed us that in the first month of the new demurrage rules they experienced railroad charges from yard storage exceeding \$130,000 and forcing them to try to source materials in subsequent months utilizing barge and truck transportation which increased product costs. The railroads do

not provide the sources of the fixed or variable costs of the demurrage charges or how they were determined, including free time. In addition, the railroads have closed local yards to be more efficient so agricultural retail facilities in many instances may be serviced by more distant yards and at a cost of demurrage charges.

The STB should require the railroads to provide daily progress reports to the shipper and receiver, so they know the exact location of their rail cars to increase compliance. Providing a normal schedule based on when the product is released from the manufacturer, the railroads will have more reasonable expectations on the number of rail cars being delivered at one time and realistic expectations on getting them unloaded will give receivers the ability to properly plan and manage car turnaround. Providing more reliable service and ratable cars will help decrease congestion for both the railroads and receivers. For example, if the rail cars were shipped five at a time an ARA member could easily unload those in a day. However, the railroad bunches the cars resulting in as many as 20 cars at a time, making it difficult to nearly impossible to unload in the required timeframe.

A shipper / receiver should get credit when the cars are unloaded ahead of time. The STB should require similar accountability and demurrage charges be placed on the railroads. For example, if the railroads miss their estimated delivery date and time they should be penalized as it costs ARA members that have plans and people in place to take an expected delivery. There have been situations where the railroad missed the delivery date and time by days and then rail cars show up randomly which causes poor employee morale and additional financial costs requiring people and inspectors to be on call.

From ARA's perspective, it appears the railroads are trying to generate income by any means possible. The largest driver of the demurrage charges relates to bunching as some cars sit in the yard for several days while additional cars arrive, and railroads try to deliver them all at once. There needs to be consistent enroute transit times coupled with interfacing with the railroad's IT service reports. Accurate terminal service

schedules are necessary to plan efficient production schedules based on planned and actual car placement. There is also a need to accurately interface with raw material suppliers to schedule release of cars required for production. The railroads need to be precise with the estimated time of arrival to origins and destinations and allow for a large window for loading and unloading rail cars. Reciprocal obligations imposed on the railroads should also be required.

The railroad industry has changed dramatically over the past three decades. If the railroads are left to continue to operate in their present state and impose excessive freight rates and demurrage charges, the nation's agricultural productivity will be negatively impacted, and consumers will be impacted by higher food costs. Thank you for holding this important hearing as oversight of rail demurrage and accessorial fees is long overdue. ARA looks forward to working with the STB and railroads to provide a more efficient rail system, commercial fairness, foster increased competition and accountability.