

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
May 8, 2019
Part of
Public Record

STB Ex Parte No. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

TESTIMONY OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

My name is Bruce Ridley and I am Senior Vice President, Environmental, Health & Safety and Operational Services for Packaging Corporation of America. I am also Chairman of the Board of Directors of the National Industrial Transportation League. I have 40 years of experience in the transportation and supply chain arena, and was previously a member of the Surface Transportation Board's Railroad-Shipper Transportation Advisory Council. This testimony is being provided in my role as the NITL Chairman.

The League represents a broad cross-section of American business, united in their need for reliable, efficient and competitive transportation services. Our rail members ship chemicals, petroleum, agricultural products, paper and forest products, and many other commodities. Our members have developed complex supply chains to support their operations. Efficient rail service, and fair rules and practices related to such service, is critical to maintaining the supply of goods required to meet the demand of American businesses and consumers and to compete effectively with producers around the world.

The League thanks the Surface Transportation Board for holding this hearing and collecting data from the nation's railroads on their demurrage and accessorial charges. The

League and its members have serious concerns about the changes that the nation's Class I railroads have recently implemented in their demurrage and related tariffs, and the effect of those changes on rail customer operations and costs, and ultimately the nation's consumers and economy at large.

The League agrees with the Board that when analyzing the railroads' demurrage practices it is appropriate to evaluate reciprocity and commercial fairness, the impact that operational changes are having on such charges, and the effects on network fluidity. The issues of reciprocity and fairness are particularly important in situations where the railroads are being compensated when their own conduct causes delays and inefficiencies. It is also important to evaluate whether the implementation of PSR (Precision Scheduled Railroading) by most Class I railroads underlies the new demurrage rules, and whether those rules are actually increasing network efficiency—which is what demurrage is supposed to do—or do they serve primarily as a new revenue stream for the railroads.

I. Key Principles Governing Demurrage and Related Charges

In its Notice announcing this hearing, the Board noted that railroads are required to establish “reasonable” rules and practices for demurrage and related charges, and that demurrage rules and charges should be designed to fulfill national rail car hire needs and usage. The Board clarified that demurrage and similar charges have a dual purpose: first, they compensate the railroad for the use of its equipment and infrastructure, and second, they incentivize the efficient use of rail cars and encourage network fluidity. The Board has properly asked whether current demurrage and accessorial tariffs “have created balanced and appropriate incentives.”

Based on these principles, demurrage or similar charges cannot solely or even principally be aimed to increase a carrier's revenue, since that would be inconsistent with the purpose of

promoting the efficient use of rail resources. Thus, if a demurrage or related charge does not promote efficient use of rail resources, then it would not be “reasonable.” For example, if a charge to address an efficiency problem is levied on a party who is not responsible for the problem, the charge would not accomplish its purpose. In the rail context, if a charge is levied by a carrier on a shipper/receiver to prevent delays in loading or unloading, but the delays are actually caused by a carrier who misses a scheduled service and/or bunches the delivery of cars, then that charge cannot incentivize the shipper or receiver to utilize rail resources more efficiently. In such a case, the charge would not be consistent with the purpose of demurrage and should be considered “unreasonable.” The League asks the Board to analyze the railroads’ recent changes to their demurrage and related tariffs in light of these principles.

II. Problems Related to Recent Changes in Demurrage and Related Charges

NITL members have been adversely affected by changes in railroad demurrage and related charges in a wide variety of ways, depending on the operations of the shipper or receiver. However, to simplify this testimony, I will highlight the most common concerns, which include the following:

A. Free Time Reductions

Over the past three years, all Class I carriers have reduced free time from two days to between zero days and twenty-four hours, depending on the railroad, car ownership and the commodity being carried. This reduction in free time has created substantial problems for NITL members for a variety of reasons. The reduction in free time has been particularly difficult for shippers and receivers at closed-gate sites or at remote sites that do not have 24-hour coverage.

The railroads generally make no commitment to meet a shipper’s or receiver’s schedule or service needs, and a missed delivery by the railroad disrupts operations by preventing the

shipper and receiver from timely loading product destined to customers or receiving needed product. When free time is eliminated or extremely restricted, a missed delivery by the railroad often leads directly to a charge to the shipper or receiver, since they cannot immediately “rewind” their operations or easily find additional track capacity to hold loaded cars or empties that may be “backed up”. It is not uncommon for carriers to have variation in their deliveries of more than twenty-four hours: in other words, railroads are consistently inconsistent. Thus, allowing free time of at least two days was a more reasonable rule that better comported with the carriers’ own operations. A free time window of 24 hours or less is too limited due to the railroads’ own service variability.

In addition, the operational challenges and costs caused by reductions in free time were aggravated by the lack of sufficient notice and coordination that would have allowed rail customers to plan for the change. Given the complexity of rail operations and the time, money and difficulty in constructing new facilities or otherwise acquiring additional track capacity to account for the reduction in free time, 45 days of notice was insufficient for many shippers and receivers.

B. Bunching and Demurrage

Intensifying the effect of free time reductions is the issue of bunching, a problem that appears to be increasing. Bunching occurs when cars accumulate in the rail system and then are delivered all at once to a shipper or receiver’s facility regardless of their actual delivery orders, overwhelming the customer’s ability to handle the cars. Bunching can occur for a wide variety of reasons; virtually none of these reasons are the fault of, or in the control of, the shipper or receiver. For example, many railroads charge demurrage even when they miss a service call, resulting in cars accumulating in the railroad’s yard for delivery on the next service day. If the

missed service involves private cars, there is no free time and storage charges begin to accrue immediately if the railroad provides notice that the cars are available but the receiver is not able to order in all of the cars by midnight on the same day. This is true even if the railroad provides notice at 11:59 PM. If system cars are involved and the number of cars overwhelm the receiver's ability to handle them, then charges start within 24 hours when the free time is exceeded, even though it was the railroads' actions—and not the shippers' or receivers' operations—that actually caused the problem. Even if the railroad provides relief for their own errors, which could encompass bunching, they often bill for the charge and require the shipper or receiver to apply for a credit or dispute the charge.

Bunching also occurs as a result of erratic transit times, other railroad operations, or for the railroad's own convenience. Sometimes, the problem is caused by the origin carrier who transfers an excessive number of cars to the delivering carrier, which then delivers them all at once to the receiver. Again, the receiver has no control over such events, and yet is charged if it lacks adequate capacity to accept the cars upon arrival or the labor to load/unload, based on the unduly restrictive free time. In other cases, third-party plant switching is involved, where again the receiver has no control over the number of cars delivered. In all such cases, the shipper or receiver should not be responsible for the demurrage or storage charges since it is not the cause of the bunching that resulted in the charge.

As noted, sometimes, railroads offer credits for bunching so that the shipper and receiver are not penalized for the railroad's service. But these credits are often limited in time and scope. For example, they do not apply when bunching is caused by the origin or other upstream carrier, and they expire too quickly.

In its 2014 decision in Ex Parte 707, Demurrage Liability, the Board declined a request by the League to amend its proposed demurrage rules to account for rail car detention that was caused by the rail carrier. In its decision, the Board indicated that the receiver could “solve” the problem by pursuing a complaint with the Board. But the option of filing a complaint to dispute what might be a single demurrage or storage charge is not realistic given the time and cost involved with STB litigation. It also is not a reasonable solution since the bunching problem which resulted in the charge was not caused by, and cannot be prevented by, the receiver. The League believes that the Board should revisit its decision in Ex Parte 707 and consider adopting a rule prohibiting the receiver from being charged, or requiring an extension of free time, when bunching or other railroad conduct prevents the receiver from avoiding the charge. This would better represent “commercial fairness.”

C. NS Congestion Charge

Another concern of NITL members is the NS congestion charge, which appears arbitrary and may result in double-dipping by the railroad. The NS tariff states that the railroad can charge the consignee \$100 per car per day for all cars destined to a location that, in the “sole judgment of Norfolk Southern,” is an “excessive quantity of cars” that “congests” NS’ facilities, causing “material” operating problems. NS may hold these excess cars at “various” locations and assess the charge for cars that exceed two times the average number of cars that the consignee has received at that location during the previous two weeks.¹

This tariff rule appears arbitrary because the consignee has no way of knowing the basis for this charge since its application is solely within the judgement of the railroad. There are no standards for what constitutes a “congested facility” and “material” operating problems; and

¹ NS Tariff 6004-D/NS 8002-A, Item 6265.

there is no standard for determining whether the exercise of the railroad's sole judgement is rational.

Additionally, the congestion charge is applied on top of the usual storage charge—but the storage charge already includes a “penal” incentive to the receiver to encourage the prompt removal of cars held in railroad yards. Thus, the purpose underlying both the congestion and storage charges appears to be the same, such that the railroad is penalizing the consignee twice to incentivize the same conduct, resulting in a double-recovery.

The League believes that there are legitimate questions as to the “reasonableness” of this congestion charge, and its continued existence will likely encourage other carriers to adopt similar arbitrary charges.

D. Substantial Increases in Demurrage and Storage Charges

Finally, many League members have complained about the substantial increases in demurrage and storage charges imposed over recent years by all of the Class I carriers. These increased demurrage and storage charges are sometimes as high as \$250/car per day. NS has also imposed a 50% increase in an intra-terminal switching charge. This particularly impacts facilities that use remote storage locations, which have become more necessary to avoid or mitigate demurrage/storage charges under the reduced free time rules. Thus, the railroads are going to get you “coming or going,” as it is nearly impossible for some shippers and receivers to avoid paying more to the railroad as either increased demurrage/storage or increased switching fees. Moreover, not only are shippers and receivers being charged more frequently in light of the reduction in free time, but the charges themselves have been increasing at a pace that far exceeds any rational cost increase or any fair incentive for the efficient use of rail resources.

E. Billing and Dispute Resolution

Other challenges involve dispute resolution. With implementation of PSR, there have been reductions in railroad customer service personnel, which has made disputing railroad invoices even more difficult and time-consuming. Additionally, some railroads have failed to include both the date and time that a car was constructively placed in demurrage or storage invoices, which also hinders efficient dispute resolution. The Board should require the railroads to identify and make available knowledgeable personnel who can help address demurrage or similar disputes. Additionally, shippers and receivers should have the information and data they need to dispute a charge that they believe has been assessed improperly.

III. STB Actions to Ensure Fair Demurrage Practices

The League believes that the Board should take a variety of actions to ensure that demurrage, storage and accessorial charges are reasonable and commercially fair:

First, the concerns about the carriers' demurrage and related charges and practices are an issue of national and regional significance and the Board should initiate an investigation to determine if they are reasonable; consistent with the purposes of demurrage and related charges; and commercially fair to shippers, receivers and carriers. This investigation should include an examination of carriers' charges and practices, and the actual performance of individual carriers in their operations affecting demurrage and related charges. The investigation should also consider if some of the charges and conduct are primarily designed to generate a revenue stream rather than fulfill national car hire needs and usage.

Second, the Board should initiate rulemakings in three key areas that the League believes are particularly suitable for the implementation of administrative rules:

a) The Board should initiate a rulemaking that would require an extension of free time or appropriate credits when the cause of the detention is beyond the shipper's/receiver's control, including bunching of railcars caused by the railroads. In such situations, given the fact that the shipper/receiver is not at fault, it is unfair to require the shipper or receiver to bring a complaint against the carrier, with the burden and cost of such a complaint placed on the party not responsible for the problem. The existence of an affirmative rule requiring the extension of free time or the application of credits when the cause of the detention is beyond the shipper's/receiver's control would properly place the burden on the carrier to show why the rule should not apply in a particular circumstance. The rulemaking should develop appropriate standards for the extension of free time or the application of credits by the carrier.

b) The Board should initiate a rulemaking to forbid Class I carriers from publishing a demurrage or storage rule that would provide for zero (or extremely limited) free time. The League believes that, while parties may differ on the reasonableness of a free time period given the wide variety of circumstances that may apply to a particular situation, there is no justification for permitting no free time whatsoever.

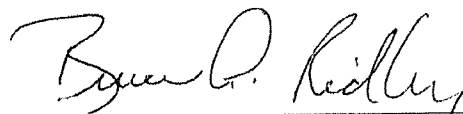
c) The Board should initiate a rulemaking to require Class I carriers to publish clear, prompt and fair processes for billing and dispute resolution, to insure that all parties involved have the necessary information required to assess and pay a charge, and know how a charge might be challenged. The Board should require that the railroads furnish the invoiced party with both the date and time that a car is constructively placed. It should also establish the timelines and data needed for submitting a claim; the processes for resolving and deciding a disputed charge; and the deadlines for deciding a claim.

Third, the Board should, as a result of its investigation into the carriers' demurrage and related practices noted above, initiate a proceeding to develop a policy statement that would set out principles to ensure that such charges and practices are reasonable and commercially fair, including but not limited to the following:

- a) The need for objective standards in demurrage and storage rules that would prevent or at least discourage the application of arbitrary and duplicative charges that are designed to serve the same purpose such as the NS' "congestion charge";
- b) The principles applicable to the establishment of minimum reasonable intervals of free time in various circumstances;
- c) Principles and procedures that would apply to challenges to the amount of demurrage or storage that is reasonable under the statute; and,
- d) Principles that would apply to the notice required for changes to carriers' demurrage, storage and accessorial charges.

The League appreciates the opportunity to make its views known to the Board. The League would be pleased to respond to any questions from the Board and to provide any assistance to the Board or its staff, as it evaluates the issues developed at this hearing and in this proceeding.

Respectfully submitted,



The National Industrial Transportation League

Dated: May 8, 2019