

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

**WRITTEN TESTIMONY OF
THE FERTILIZER INSTITUTE**

Pursuant to the Board's notice served on April 8, 2019, The Fertilizer Institute ("TFI") hereby submits its written testimony for the hearing before the Surface Transportation Board ("STB") on May 22, 2019. Justin Louchheim, TFI's Director of Government Affairs, will present this testimony. TFI thanks the Board for holding this hearing to give shippers the opportunity to express their concerns with the recent changes in railroad practices concerning demurrage, storage and accessorial charges.

TFI represents the nation's fertilizer industry, which includes companies that are engaged in all aspects of the fertilizer supply chain. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information and public communication programs. TFI's members play a key role in producing and distributing vital crop nutrients, such as nitrogen, phosphorus and potassium. These products are used to replenish soils throughout the United States and elsewhere to facilitate the production of healthy and abundant supplies of food, fiber and fuel. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible through the use of fertilizer.

Overall, the U.S. fertilizer industry generates more than \$154 billion in economic benefit annually and provides approximately 89,000 direct jobs and 406,000 indirect jobs for a total of 495,000 U.S. jobs. A reliable transportation network is vital to moving fertilizer around the

nation, as a majority of all fertilizers (56 percent) move by rail at some point in the supply chain throughout the year.

In anticipation of this hearing, TFI surveyed its members to gain insight into which railroad practices surrounding demurrage, storage and accessorial charges have had the most significant impacts upon them; the degree of railroad reciprocity; and actions they would like to see emerge from this hearing. This testimony will address each of these subjects.

Although no Class I railroad completely escaped mention in the survey responses, UP and CP were the subject of the most concerns and BNSF was deemed the most reasonable. To UP's credit, in recent months, TFI was able to successfully work with UP and one of TFI's members to resolve a serious service-oriented matter that appears related to implementation of precision scheduled railroading ("PSR"). Almost uniformly, the single most significant complaint across all Class I railroads was their recent reductions to free time for demurrage and storage charges. In most instances, free time is now just 24 hours for demurrage and zero hours for private car storage.

The ability of TFI members to comply with the new free time rules varies by member and even by individual member locations. Compliance, however, takes time and comes at a substantial cost. Most railroads previously granted 48 hours of free time. Our members designed their operations and infrastructure around that standard and suddenly have been forced to redesign everything with less than 45 days' notice in most cases. Moreover, the railroads' one-size-fits-all approach fails to consider the specific circumstances of individual locations. This was less of a concern under the previous free time standard because 48 hours was generally sufficient for all locations so long as railroad service was consistent; but zero hours absolutely is not sufficient because it leaves no buffer at all for the inherent variations and inconsistencies of

railroad performance. Also, facilities located in more rural areas or that do not have 24 hour, seven days a week coverage have found compliance to be most difficult.

By far, the most significant obstacle to compliance with the reduced free time standards is inconsistent railroad service. Bunching, in particular, is the most common reason why a facility cannot receive rail cars upon arrival at a terminal. Due to limited storage track capacity within a plant, TFI members must carefully monitor and regulate the flow of inbound and outbound traffic. At many locations there are inbound loaded cars with raw material and inbound empty cars for loading of finished product, and then there are outbound empty cars from which raw materials have been unloaded and outbound loaded cars of finished product. TFI members must perform a delicate balancing act between inbound and outbound cars both to keep their facilities running at capacity and to avoid track congestion within those facilities. Too many of one or the other can congest a plant and throw its operations off balance. This happens far too often when railroads deliver cars in bunches that overwhelm a plant's track infrastructure, in spite of our members' best efforts to regulate this traffic flow.

Bunching also makes compliance with the reduced free time standards more difficult because, when cars are bunched, that means a customer is receiving some cars later than they are needed for plant operations. Consequently, TFI members often must keep more rail cars at their plants, as buffer capacity, than would be needed if railroads provided regular and consistent service. More consistent rail service would allow those members to free up track for receiving cars within the shorter free time window before demurrage and storage charges begin to accrue.

Most Class I railroads offer demurrage and storage credits for bunching caused by them. But CP does not. Moreover, no Class I offers credits when they receive the cars already bunched by an upstream carrier in the route, even though the rail customer is not at fault. Also, to the extent railroads do offer credits for their own bunching, their claims processes are not always

straight-forward, they impose short deadlines for filing such claims, and some carriers charge an administrative fee of up to \$500. Granting credits also does nothing to eliminate a shipper's need to maintain a buffer capacity of rail cars, which consumes valuable track space within their facilities. Furthermore, these credits expire at the end of each month, which means that credits caused by bunching near the end of the month have an expiration date of just a few days.

TFI members have taken the following actions to cope with the free time reductions, at significant expense to themselves:

- **Build more storage track at their facilities.** This obviously costs money and is not an option at all for some locations where there is simply no place to construct new tracks. The planning and financing of this infrastructure investment also requires more time than the railroads have allowed before imposing their free time reductions.
- **Lease storage track at remote locations.** When building new track is not an option, or until such track can be constructed, TFI members have attempted to lease additional storage track. That expense will be greater for some locations than others, depending upon the availability of storage tracks nearby and the increased demand for those tracks when multiple rail customers are searching for additional storage track simultaneously in response to free time reductions. In addition to the track lease costs, TFI members also must pay transportation costs to switch cars to and from remote storage locations; the more remote the location, the greater that cost.
- **Additional worker shifts.** Some TFI member locations that do not operate 24/7 have added shifts, which means more labor costs, to move rail cars through their facilities faster and to be able to more promptly request delivery of cars after receiving notice of arrival from the delivering railroad.

- **Switch transportation modes.** A few members, who are fortunate to have barge and truck options, have simply shifted their traffic away from rail at those locations. This is an example of how competition can be the most effective discipline for market behavior.

In the past when railroads have sought to reduce free time, they have demonstrated that (1) the reductions were necessary to address inefficient shipper behavior; (2) changes across the industry over time had rendered compliance with the shorter time frames reasonable; and (3) service improvements resulting from more efficient use of rail assets would facilitate the ability of shippers to adjust to the reduced free time. There have been no such showings surrounding these most recent changes. What we do know is that these changes have accompanied the implementation of PSR by nearly every Class I railroad and thus appear to be linked in some unexplained manner. But that does not explain why the Canadian railroads, which long ago adopted PSR, or BNSF, which is the only Class I that has not adopted PSR, also have reduced their free time standards. Furthermore, although PSR already appears to have benefitted railroad operating ratios, there is no evidence of any benefits to shippers, much less benefits that will allow them to comply with the reduced free time absent significant new investments and operating changes. Indeed, as previously noted, inconsistent rail service remains their greatest obstacle to compliance. Rather than targeting inefficient behavior, these free time reductions appear to shift certain costs associated with PSR from railroads to shippers and/or to create new revenue streams for railroads. These are not legitimate objectives.

TFI members also have noted increasing concerns over rail industry OT-5 practices. All private cars must have OT-5 approval from the carrier serving a private car's origin, or "home," facility. If a shipper tenders a private car without OT-5 authority, the railroad will assess a fine. Recently, several TFI members have been hit with charges on cars for not having OT-5 authority

from the destination railroad, which in fact is not required. We believe those are in error and our members have contested those charges, some of which are quite significant. Despite the passage of some time, however, there is still no resolution. This is but another example of the administrative burdens that these new rules and charges are placing on rail customers to monitor and police a growing number of separate charges. Moreover, TFI also has heard that railroads are considering adding a charge merely to apply for OT-5 authority on private cars, despite the fact that private cars absolve the railroad of having to supply a rail car.

The Board also has requested testimony about reciprocal measures and commercial fairness surrounding the recent changes in railroad practices. According to TFI member survey responses, when it comes to reciprocity, there simply is none. The railroads themselves have identified only one form of alleged reciprocity, which is the provision of credits for bunching that is the delivering railroad's fault. That is not reciprocity; credits merely acknowledge that the customer should not have been responsible for those charges in the first instance. True reciprocity and commercial fairness means that, when railroads charge shippers for actions that disrupt rail operations, railroads also should compensate shippers for railroad actions that disrupt shipper operations.

TFI members have offered the following examples of true reciprocity that would hold railroads accountable for the impacts of their service failures:

- Railroads impose strict requirements on shippers as to how and when cars must be prepared and ready for pick-up. When a shipper has not met those requirements, they must pay a charge. But if the railroad is early, late, or fails to show up at all, it has no accountability to the shipper. Railroads should pay charges at the same rates they charge shippers.

- Railroads do not always deliver loaded or empty cars to a shipper when ordered. Often, the shipper does not discover this fact until the railroad services their plant. This disrupts the shipper's operations because it cannot load the empty car or use the material in the loaded car. Railroads have no accountability for such failures. This should change.
- Just as railroads assess demurrage and storage charges when shippers detain railroad cars or occupy railroad storage track for an unreasonable time, railroads should pay shippers a comparable charge when the railroad service delays detain a shipper's private car for an unreasonable time.
- Bunching, missed switches and other railroad service failures that congest a plant sometimes require shippers to request special switches to clear up the congestion. Railroads should not charge for such special switching service which is necessitated by the railroad's own failures.
- Railroads should delay their free time reductions for a reasonable transition period to allow shippers to construct or acquire additional track storage.
- Railroads should waive or discount charges to switch cars to and from remote storage locations that are needed to comply with free time reductions.

TFI urges the Board to use this hearing as a stepping stone to provide clarity and guidance for rail and shipper stakeholders alike on appropriate practices for demurrage and storage charges. In particular, TFI seeks a policy statement that sets forth standards the Board will consider when evaluating the reasonableness of demurrage and accessorial practices. Key elements of that policy, guided by market fairness and reciprocity, should include the following principles:

- The benefits of demurrage and storage rules to rail operations must outweigh the costs to customers of complying with those rules.
- Demurrage and storage practices are not reasonable if their principal objective or result is to generate revenue, either from demurrage and storage charges themselves or from other charges that rail customers must pay a railroad to avoid demurrage and storage charges.
- Railroads may not assess charges that allow them to profit from their own service deficiencies.
- Railroads may only charge shippers for behavior that disrupts rail operations if the railroads reciprocally must pay comparable charges to shippers for behavior that disrupts shipper operations.
- The ability of a shipper to avoid demurrage and storage charges through behavior adjustments without incurring unreasonable costs to do so shall inform the reasonableness of such railroad practices.
- Railroads must allow customers a sufficient time to comply with changes to demurrage and storage practices that would subject the customer to such charges in circumstances where they previously did not apply.

Finally, TFI asks the Board to exercise its authority to investigate railroad practices, without complaint, to initiate an investigation into the recent free time reductions by the Class I railroads and ultimately to declare those reduced time frames unreasonable.

TFI and our members deeply appreciate the Board's oversight of rail demurrage and accessorial fees. These charges continue to increase in scope and cost as railroads implement PSR. There's a growing list of emerging fairness issues with the numerous charges facing our

members. As such, TFI and our members look forward to continuing to work with STB and rail carriers to foster better responsiveness and commercial fairness in the rail marketplace.

May 8, 2019