

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

**WRITTEN SUBMISSION OF THE
AMERICAN FOREST & PAPER ASSOCIATION**

The American Forest & Paper Association (“AF&PA”) hereby provides its written submission for the oversight hearing on demurrage and accessorial charges, pursuant to the Surface Transportation Board’s (“Board” or “STB”) Notice served on April 8, 2019. The Board initiated this proceeding in response to rail customers’ complaints about recent changes to railroad tariffs governing demurrage and similar charges, and its collection of railroad quarterly revenue from demurrage and accessorial charges in 2018 and 2019. AF&PA strongly commends the Board for providing a forum for rail customers to share their experiences regarding railroad practices concerning demurrage, storage, and accessorial charges. We agree with the Board that it should examine matters such as reciprocity, commercial fairness, the impact of operational changes on such charges, and the effects on network fluidity.

In this submission, we provide information collected from our members about these issues and identify actions that the Board should take to ensure that demurrage and accessorial charges and practices are commercially fair and reasonable.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative — *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures nearly \$300 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$55 billion annually and is among the top 10 manufacturing sector employers in 45 states.

Freight rail shipping is a vital part of the transportation network for our industry to move raw materials to mills, and finished products to customers. In 2014, paper and wood product manufacturers relied on the railroad industry to move about 33 million tons of pulp, paper, and converted products. Despite our members' dependency on the railroad industry, our companies suffer from the lack of competition, as nearly one-third of forest products facilities have access to only one rail carrier. AF&PA members have also incurred significant demurrage and accessorial charges during recent years, thus, AF&PA has a strong interest in this proceeding.

I. AF&PA Member Experiences and Concerns with Rail Demurrage and Related Practices

Class-I railroads have adopted many operational changes, as well as tariff changes, during the recent years as part of their implementation of Precision Scheduled Railroading ("PSR"). Specifically, railroads have reduced the free time allowed for loading and unloading of

railroad owned cars or storage,¹ increased their demurrage and storage charges,² and introduced new charges,³ among others.

In response to the Board's Notice regarding this hearing, we collected information from our member companies about the impact of the railroads' demurrage rules and related charges. Our members reported that they have significant concerns with a broad range of railroad practices, however, they were mainly concerned with the reduction of free time, increase in demurrage and storage charges, railroad service inconsistencies and increased occurrences of bunched car deliveries (and their effects on demurrage and storage charges), CSX cancellation fees, CSX intra-plant switching fees, and NS adverse loading fees.

A. Free Time Reductions and Increases in the Levels of Demurrage and Related Charges

Recently, railroads have reduced the free time allowed for loading and unloading railroad-owned cars and for holding private cars in constructive placement on railroad tracks. The current industry-wide practice generally provides 24 hours of free time for loading and unloading system cars, and zero days before storage charges accrue on private cars. This practice has created operational difficulties for our members, and resulted in far greater assessments of demurrage/storage charges. For some of our members, their manufacturing process is not consistent with loading/unloading railroad-owned cars within 24 hours, especially when the carriers' performance in delivering cars and providing switches varies greatly.

The zero free time rule for private cars creates similar concerns, since the railroad can deliver cars after hours at our members' facilities, yet the storage clock starts after midnight once cars are constructively placed. One member reported that the lack of consistent rail service

¹ See, e.g., NS 6004-D Items 200, 350, 600 and 650.

² See, e.g., Data Submission of CSX Transportation, Inc., EP 754 (May 1, 2019) at Appendix A.

³ See, e.g., NS 8002-A Item 6265.

makes production planning to ensure that product is ready to load in railcars a serious challenge, particularly if there is limited space to stage product.

As a result of the reduced free time coupled with wide-ranging service, our members are incurring significant increases in demurrage and storage charges. It is commercially unfair that the railroads fail to adhere to any service level, yet they hold their customers to an extremely strict standard that provides virtually no margin for any error at the receiving end, and results in punitive charges. One member summarized it best, “railroads impose just in time charges [on their customers] but they are not a just in time industry.”

At the same time they have eliminated virtually any flexibility for receiving cars, the Class-I railroads have increased significantly their rates for demurrage and accessorial charges. For instance, CSX increased its rates for demurrage charges from \$105 to \$150 on January 1, 2018, among other charges.⁴ Effective January 1, 2019, UP increased the private empty car storage from \$100 to \$140.⁵ Similarly, NS increased daily demurrage charges per car from \$100 to \$150 on January 1, 2019.⁶ Our members believe that the charges have become unduly punitive, and are not commercially reasonable, as they are required to keep paying the railroads more but get nothing in return.

B. Bunching and Other Railroad-Caused Service Problems

Other railroad service issues have caused problems for our members, such as the increased frequency of bunched car deliveries. Bunching occurs when cars accumulate in the rail

⁴ See Data Submission of CSX Transportation, Inc., EP 754 (May 1, 2019) at Appendix A.

⁵ See Letter from Union Pacific Railroad Company to the Board, “Oversight Hearing on Demurrage and Accessorial Charges” EP 754 (May 1, 2019), Appendix “Union Pacific - Responses To Board Ep-754 Data Request” at 2.

⁶ See Letter from Norfolk Southern Corporation to the Board, “STB Ex Parte No. 754. Oversight Hearing on Demurrage and Accessorial Charges” EP 754 (May 1, 2019), Appendix “All Demurrage and Accessorial Tariff Changes 2016 to 2019” at 1.

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. In other cases, the bunching may occur upstream on another carrier due to a buildup of cars at an interchange. As a result, our members incur additional demurrage or storage charges, without regard to the fact that it was the railroad's variable service that caused the problem.

Some railroads may provide credits when their service or error results in a charge. However, there is no clear standard for when and how credits should apply, and the customer sometimes lacks the necessary data or information needed to justify the credit, since it is in the possession of the rail carrier. Credits also expire in some cases too early, and before they can be used to offset a charge incurred in a different situation if the incident occurred in a different month. The Board should require railroads to apply more reasonable credit rules and practices when their own service is the cause of rail car detention, bunching, or other problems resulting in demurrage and accessorial charges.

C. Concerns About Other Charges

Our members reported that CSX assesses cancellation fees of \$300 per car even when our members must cancel the delivery of the ordered cars due to CSX's failure to timely deliver the cars. Late delivery of the cars disrupts our members' operations because products are typically loaded directly from the finishing line into railcars. When the railroad fails to deliver the car on time, our members are sometimes forced to either ship with an alternative railway (if that is even

possible), or switch to trucking—in either case at a higher transportation cost to meet customer requirements. Thus, cars not delivered on time disrupt operations and often result in demurrage while the mill must wait for the next production to be available for loading. Commercial fairness and reciprocity should allow rail customers to cancel cars that do not arrive on time without any extra charge or at least be subject to extended free time.

Additionally, our members reported that NS assesses a punitive \$3,000 fee when the shipper routes NS owned cars via routes in which NS does not participate. Since CSX withdrew from the National Pool box car program, this has become a significant concern for our members particularly those fortunate to have dual-served yards.⁷

D. Operational Changes to Mitigate Demurrage and Related Charges

Some members reported that there are limited options available to mitigate the effects of the recent changes and minimize the assessment of charges, whereas others have undertaken various measures, including the following actions:

- Tightened control on car orders, and tracking inbound car supply to avoid increased demurrage charges;
- Increased work shifts to clear the plant due to congestion created by reduced free time or railroad service inconsistencies; and
- Created reports and processes to challenge invoices received from railroads that appear inaccurate or unfair when charges result from poor railroad service.

II. Key Principles That the Board Should Consider

AF&PA agrees that demurrage and storage charges are necessary for a fluid transportation system. However, the statute dictates the railroads must establish reasonable rates

⁷ NS 8002-A Item 6530.

and transportation-related rules and practices.⁸ AF&PA urges the Board to draw a clear line between reasonable and unreasonable practices in demurrage and storage charges. Although we acknowledge that the reasonableness standard requires a fact-specific inquiry, we believe that the Board should take the following key principles into account while evaluating the railroad practices in demurrage and storage charges:

1. Whether the underlying purpose of demurrage and related charges is being met

Demurrage charges are imposed to compensate “rail carriers for the use of railroad equipment and assets; and, ... [to encourage] prompt return of rail cars into the transportation network.”⁹ Changes in railroad practices should not be deemed reasonable unless they serve these two essential functions. Although the Board has recognized that there is a penal aspect to demurrage-type charges to incentivize shippers not to detain the cars longer than what is necessary, most of the railroad tariffs permit rail customers to be “penalized” without regard to the cause of the detention (*e.g.*, late deliveries, and bunching) or even in cases where additional efficiencies cannot be achieved.

2. Whether the changes are intended to generate a new revenue stream

The Board’s precedent for demurrage charges is clear. Railroads should not utilize demurrage or storage charges as a revenue stream.¹⁰ AF&PA has serious questions about whether the recent changes are primarily designed to increase Class-I Railroads’ net revenue. Indeed, recent filings in this docket show the magnitude of the increases. CSX has increased its

⁸ 49 U.S.C. § 10702.

⁹ See Demurrage Liability (Demurrage Liability 2014), EP 707 at 2 (STB served Apr. 11, 2014)

¹⁰ See Reduced Free Time at Points on Long Island Rail Road, 325 I.C.C. 714, 720 (1965). (finding that reduction of free time intended to increase railroad’s revenue is not just and reasonable).

revenue from demurrage charges from \$99.8 million in 2016 to \$246.7 million in 2018.¹¹ UP has almost doubled its first quarter revenue from demurrage charges between 2016 and 2019.¹² These figures are strong indicators that the main purpose behind these recent changes is to increase the railroad net revenue, instead of serving the fluidity of the railroad system.

3. Whether railroad customers are given sufficient notice to adjust their operation

Railroads have effectuated the recent changes with minimal notice to customers. For months, railroads have made preparations to adjust their operations to implement PSR. On the other hand, railroad customers were given 45 days to comply with the new rules and practices, which is not sufficient to secure alternative storage track, assess potential added infrastructure options, etc. Railroad customers should have been given enough notice to adjust their operations in order to comply with the changes.

III. STB Actions to Ensure Fair Demurrage Practices

Below are our recommendations to help ensure that railroad demurrage practices are commercially fair and reasonable.

First, the Board should exercise its power to investigate whether recent changes to demurrage and accessorial practices, including the reduction or elimination of free time for system and private cars, are adequately tailored to (i) serve the purpose of demurrage and storage charges (*i.e.*, incentivizing the efficient utilization of the railroad system, and compensating the railroad for the use of its equipment and infrastructure), and (ii) satisfy the reasonableness requirement under 49 U.S.C. § 10702. As detailed in the previous section, the reasonableness inquiry should take into consideration whether the recent changes are unduly punitive for the

¹¹ See Data Submission of CSX Transportation, Inc., EP 754 (May 1, 2019) at Appendix B.

¹² See Letter from Union Pacific Corporation to the Board, EP 754 (May 1, 2019).

railroad customers, and whether they are intended to generate a revenue stream for the railroads. The Board's investigative powers extend to railroad practices of national or regional significance and, based on the broad application of the demurrage and accessorial rules and charges by all Class I rail carriers, this standard is clearly satisfied.¹³

Second, AF&PA requests the Board initiate a rulemaking proceeding to adopt rules that would apply when railroads cause inefficiencies and supply chain disruption for their customers and provide fair processes for billing and dispute resolution.

AF&PA believes that reciprocity is an essential element to ensuring commercial fairness in demurrage and accessorial charges and practices. Railroad customers are being penalized for detaining railroad owned cars or storing private cars on railroad owned tracks beyond a certain period of time. In contrast, railroads do not have any incentive to return the private cars to railroad customers promptly. The Board should recognize that railroad customers incur significant opportunity costs when railroads detain their private cars beyond a certain period. The Board should adopt rules that require railroads to compensate shippers when railroads detain private rail cars beyond a reasonable period.

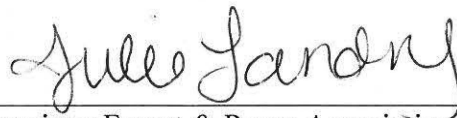
The Board should take a clear position against demurrage/storage charges caused by railroad service failures or inconsistencies, including bunching and missed switches that are beyond the control of the shipper or receiver. It is not commercially fair and reasonable for railroads to penalize shippers for detentions caused by the railroads. In this regard, the Board should develop rules on the scope and standards for applying demurrage credits, or could require the extension of free time. Currently, there is no uniform standard for when and how demurrage credits apply, as each railroad has adopted its own set of rules or none at all.

¹³ See 49 U.S.C. § 11701(d).

The Board should consider requiring railroads to provide additional credits for car deliveries made earlier or later than the customer's order date, or for missed switches. For instance, CN credits its customers for cars that are supplied earlier or later than the date the customer requested a specified number of railcars to be placed for loading. This is also true for cars that are supplied on the same date but after the customer's switch window. We believe that the Board can take this as a model and require all railroads to provide additional credits when the cars are not delivered on time, or railroads miss their scheduled switches.

Finally, 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. The Board can enhance the fair resolution of disputes by establishing processes with clear deadlines that would enable their timely and efficient resolution.

Respectfully submitted,

A handwritten signature in cursive script, reading "Julie Landry". The signature is written in dark ink and is positioned above a horizontal line.

American Forest & Paper Association
1101 K Street, N.W.
Washington, D.C. 20005

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