

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

SUBMISSION OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

Pursuant to the Surface Transportation Board's ("Board" or "STB") Notice served on April 8, 2019, the Institute of Scrap Recycling Industries, Inc. ("ISRI") hereby provides its written submission regarding Class-I railroad demurrage and accessorial charges. ISRI appreciates the opportunity to voice its comments and concerns regarding recent changes to demurrage and accessorial charges and their impact on the scrap recycling industry.

The U.S. scrap recycling industry is heavily dependent on a reliable and cost-effective transportation network of rail, trucks, barges, and ships to receive and deliver scrap materials. Rail transportation is a critical mode for shipments of ferrous and nonferrous scrap, especially at longer distances beyond 200 miles, and many of our members are captive customers who are served by only one Class I rail carrier. ISRI's rail shippers are subject to the railroads' demurrage and accessorial tariffs and, thus, ISRI has a significant interest in this proceeding.

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated \$117 billion in

domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

I. BACKGROUND TO THIS PROCEEDING

Recently, several Class I railroads have made significant changes to their demurrage and accessorial rules tariffs to reduce free time for railcar unloading/loading or storage,¹ assess charges for “congestion,”² increase the level of demurrage and switching fees,³ and assess new charges for activities that previously were included in line haul or other charges,⁴ among other changes. The tariff changes generally coincide with operational changes to implement aspects of Precision Scheduled Railroading, which has resulted in service variability, reduced or missed switches, an increased frequency in railcar bunching, and reduced storage options. Rail customers, including ISRI members, have expressed concerns to the Board about the lack of sufficient notice and ability to adequately plan for the changes, and about the substantial and unanticipated cost impacts that are adversely affecting their businesses. This proceeding was

¹ See, e.g., NS 6004-D Items 200, 350, 600 and 650, and CSXT 8100 Items 2.1.1 and 2.5.

² See, NS 8002-A Item 6265.

³ See, e.g., CSXT 8100 Item 2.5.

⁴ See, UP 6004-C Item 9055-D.

initiated in response to rail customers' concerns, and follows the letters from Chairman Begeman to each Class I railroad on December 17, 2018 requesting information on the carriers' quarterly revenue from demurrage and accessorial charges for 2018 and 2019.

ISRI commends the Board for providing a forum for industry stakeholders to express their experiences and concerns in connection with demurrage and accessorial charges and practices. Based on the outcry from our members about these issues, ISRI believes that it is proper for the Board to evaluate the commercial fairness of the railroads' demurrage tariffs and practices, including reciprocal commitments by railroads when their own conduct causes detention and delays. ISRI also supports the Board's collection and analysis of railroad data pertaining to demurrage and accessorial charges. Collectively, this information will enable the Board to make an informed decision on appropriate actions it should take to ensure that railroad demurrage and accessorial charges properly and fairly incentivize rail network efficiencies rather than serving primarily as an additional profit center.

II. ISRI MEMBER EXPERIENCES AND CONCERNS WITH RAIL DEMURRAGE AND ACCESSORIAL PRACTICES

Beginning in late 2018 and increasing in the first quarter of 2019, ISRI began hearing concerns from many of its members regarding changes to demurrage rules and accessorial charges that were difficult to manage or avoid and that were resulting in substantial unanticipated cost increases. Following the Board's April Notice, ISRI conducted an informal survey of its members regarding their experiences with railroad demurrage, storage and accessorial rules and charges; whether the charges could be mitigated or avoided by making operational changes at a reasonable cost; and fairness concerns. Following is a summary of the information collected from our members.

ISRI members expressed widespread concerns with the recent changes in the practices of Class I railroads in connection with demurrage, storage, and accessorial charges. Although our members deal with many railroads, Norfolk Southern Corporation (“NS”), CSX Corporation (“CSX”), Union Pacific Corporation (“UP”), and BNSF Railway Company (“BNSF”) are the primary serving railroads for many of our members. Our members’ concerns cover a broad range of practices of these railroads. However, the most common complaints involve: (1) reductions in free time for rail car loading/unloading and storage during constructive placement; (2) service inconsistencies affecting the demurrage and storage charges and facility operations (*e.g.*, bunched cars, or missed switches); (3) the introduction of “not prepared for service” charge by UP; and, (4) the congestion charge assessed by NS.

A. Reductions in Free Time

One of the chief concerns among our members pertains to the reduction of free time allowed for loading/unloading railroad owned cars and the holding of private cars in constructive placement on railroad tracks, combined with increases in the level of demurrage/storage charges. Most Class I railroads currently allow only one day of free time for railroad owned cars and do not allow any free time for private cars. One of our members reported that the demurrage/storage charges it incurred per month increased by 669% in the first two months of 2019, compared to the 2018 average. Another stated that it paid 1000% more demurrage/storage charges per month in 2019, compared to 2017.

Reduction of free time to zero days for private cars effectively means that, depending on when the railroad notifies the customer that the car is available for delivery, which can take place between 12:01 am, and 11:59 pm, our members have a minimal amount of time (or effectively no time if the notice occurs after hours) before incurring storage charges, since storage charges

begin to accrue at 12:00 A.M. on the day after the railroad notifies the customer that the car is available for delivery. This situation is aggravated for our closed-gate members and/or members with limited storage track and operating hours. The zero-day rule makes it impossible for our members not to incur storage charges.

On top of the unreasonable amount of free time allowed, railroads' service inconsistencies often cause an accumulation of cars either at the railroads' yards or at company facilities, which increases the difficulties for our members to avoid the demurrage and storage charges.

B. Bunching of Rail Cars

Bunching of rail cars is a recurring service problem resulting in increased demurrage/storage charges. Bunching occurs when the railroad fails to deliver the number of cars ordered by the customer for delivery on a particular day but rather under-delivers on some days and then delivers the cars in bunches (*i.e.*, rail car deliveries that are not reasonably timed or spaced).⁵ Bunching can take place for various reasons (*e.g.*, cars delayed or held for the railroad's own convenience or missed switches).

Regardless of the cause, bunching often increases the demurrage/storage charges incurred because it overwhelms our members' facilities by the delivery of more cars than the plant has the ability to process. One member explained that their facility can only accommodate an 18-car switch but the railroad will pool cars at various stations along the route and deliver a string of 30-40 cars, regardless of the manner in which they were ordered. To try and mitigate the demurrage/storage expense caused by bunching, facilities must employ a second crew or require employees to work overtime due to the overload, resulting in higher operating costs than

⁵ See Demurrage Liability (Demurrage Liability 2014), EP 707, slip op. at 23 (STB served Apr. 11, 2014).

anticipated. More importantly, railroad customers do not have any control over bunched deliveries and thus are not able to avoid these types of service inconsistencies. In response, our members either pay the increased demurrage/storage charges or request an extra switch to clear their plants at an additional charge. In either case, the railroads profit from their own service deficiencies. Although the NS may offer a credit due to bunching, this does not apply when bunching is caused by an upstream carrier.⁶ Also, there is no clear or consistent standard as to when credits or other demurrage relief should be provided. For example, while UP and BNSF offer relief in the event of an error by the railroad, the scope of potential errors is not clearly defined in the BNSF tariff. *See* BNSF 6004 – Section I and UP 6004 – Item 9870). NS provides two additional credits for each loaded railcar that arrives earlier or later than the original ETA (NS 6004-Item 950). CSX only grants relief for force majeure type events, such as weather interference, frozen or congealed lading, and strike interferences. *See* CSXT 8100–Item 1.1.4. The lack of any clear standards regarding such credits or other relief when the shipper is not at fault results in unnecessary confusion, inefficiencies and disputes.

C. Other Commercial Fairness Concerns

Another concern of our members pertains to the introduction of a new charge by UP, namely a “not prepared for service” charge. *See* Tariff UP 6004, Item 9055). UP assesses a fee in the amount of \$400 when it determines, in its sole discretion that it is unable to pull or spot the cars due to the customer’s actions. The tariff item lists a number of causes (*e.g.*, cars released empty but not completely unloaded, or cars released and placed at a location that is inaccessible by the railroad) for which the railroad claims that it may not be able to service the cars. Our members reported that UP abuses the discretion granted by the tariff item, and there is no

⁶ See NS 6004-D Item 950 (additional credits are only provided for arrivals earlier or later than NS Original ETA).

consistency in its application. The language of the provision gives UP the sole discretion to determine whether the car is ready for service. To the extent that this charge is applied when UP can service some but perhaps not all cars included in the customer's instructions, it raises "reasonableness" questions.

The NS "congestion charge" also raises a commercial fairness issue. *See* Tariff NS 8002-A, Item 6265. This charge is assessed on a shipper when NS determines, within its sole judgment, that an excessive quantity of cars congests NS's facilities causing material operating problems. NS assesses \$100 per car per day for all cars destined for the location identified as "congested" in NS's sole discretion. There is no clear or published standard for how "congestion" is determined. More importantly, this charge principally serves the same purpose as demurrage and storage charges (i.e. to incentivize a more efficient and fluid network), and raises double-dipping and fairness concerns, since it is assessed *in addition to* demurrage/storage for cars in constructive placement.⁷

III. KEY PRINCIPLES FOR EVALUATING "REASONABLENESS"

ISRI acknowledges and supports the underlying purpose of demurrage/storage charges, to compensate the railroads for the use of their equipment and infrastructure, and to incentivize an efficient rail network.⁸ However, the railroads have a statutory obligation to establish reasonable rules and practices.⁹ Although, under Board precedent, the reasonableness of demurrage and storage tariff rules involves a fact-specific inquiry,¹⁰ ISRI believes that, at a minimum, the

⁷ *See* NS 8002-A Item 6265 ("[f]or railcars that are constructively placed, the provisions in NS 6004- Series will apply in addition to the [congestion charge]").

⁸ *See Demurrage Liability (Demurrage Liability 2014)*, EP 707, at 2 (STB served Apr. 11, 2014).

⁹ *See* 49 U.S.C. § 10702.

¹⁰ *See, e.g., North America Freight Car Association, Et. Al. v. BNSF Railway Company*, 2007 STB 38 at 8 (explaining that the Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable).

following key principles should govern the Board's evaluation of reasonableness of railroad demurrage practices:

A. Demurrage Practices Must Serve their Underlying Purpose of Incentivizing an Efficient Rail Network and Must Not Be Designed to Generate Additional Revenue for the Railroads

There must be a clear relationship between demurrage rules and practices with the long-standing purpose of such charges. In its decisions dealing with the reasonableness of changed demurrage/storage charges, the Board has analyzed whether the charges serve their intended purpose (*i.e.*, compensation and efficiency).¹¹ This analysis included an assessment as to (i) whether shippers are able to adjust their operations to comply with the changes,¹² and, (ii) whether the changes have resulted in the intended efficiency in the system.¹³

The recent reduction in free time to 24 hours for system cars and zero days for private cars has made it virtually impossible for some ISRI members to avoid demurrage/storage charges. Thus, additional efficiencies cannot be achieved. Even for those who can make an adjustment, it is not reasonable to force rail customers to reconfigure their operations at a significantly higher cost to add more work shifts, pay overtime on a regular basis, construct new track, all at substantially higher operating costs, when the railroads own service is unreliable. Our members are already doing their best to manage inconsistent rail service. Compounding service reliability problems with only a 24-hour buffer for delivery and loading/unloading (or no

¹¹ See North America Freight Car Association, Et. Al. v. BNSF Railway Company, 2007 STB 38 at 9 (finding that the 2001 charges meet both purposes for which such charges are applied).

¹² See North America Freight Car Association, Et. Al. v. BNSF Railway Company, 2007 STB 38 at 10 (BNSF showing that the billings for empty private cars sitting on railroad track have decreased over time); Car Demurrage Rules, Nationwide, 350 I.C.C. 777, 783 (1975) (explaining that the studies show that the shippers are able to release cars within 24 hours).

¹³ North America Freight Car Association, Et. Al. v. BNSF Railway Company, 2007 STB 38 at 10 (BNSF showing that the number of cars sitting on its tracks substantially decreased after the introduction of storage charges on empty private cars).

buffer for private cars) before charges accrue does not result in any increased efficiency in the railroad system. Rather, it simply guarantees the railroads an increased amount of revenue.

The Interstate Commerce Commission, the Board's predecessor, previously condemned reductions in free time solely intended to increase the railroad's net revenue.¹⁴ As previously noted, although ISRI acknowledges and supports the necessity of the demurrage and storage charges for the efficient utilization of the railroad equipment and infrastructure, ISRI also believes that, in a number of respects, the recent demurrage rules changes are unreasonably generating a substantial additional revenue stream for the railroads, without measurably increasing efficiency of the railroad system.

B. Railroad Customers Should Not be Penalized for Railroad Service Failures

As explained herein, the railroad industry profits from its own service inconsistencies to the extent that relief from the demurrage charges is not offered,¹⁵ is not readily available,¹⁶ or expires too quickly.¹⁷ Thus, there are many cases where shippers are being charged when railroad conduct is the cause of the detention of the cars beyond free time (*e.g.*, missed switches, bunching, congestion in rail yard). Railroad service inconsistencies are entirely beyond the control of the shippers and it is not reasonable for the railroad to penalize customers when the underlying cause of the car detention or storage is due to the railroad's own conduct.

C. Railroad Customers Should Be Given Sufficient Notice to Allow For Adjustment of their Operations

¹⁴ See Reduced Free Time at Points on Long Island Rail Road, 325 I.C.C. 714, 720 (1965) (finding that reduction in free time is not shown to be just and reasonable, and that it is intended to increase railroad's net revenue, which does not comport with the purpose of demurrage).

¹⁵ See, *e.g.*, CSXT 8100 (Customers are granted relief only for the force majeure events).

¹⁶ See, *e.g.*, UP 6004-C, Item 9870 (In the event of a railroad error, customers are required to present a claim in writing within ninety calendar days after the date the demurrage bill is rendered).

¹⁷ See, *e.g.*, NS 6004-D, Item 950 (Credit days earned in one calendar month cannot be carried over to another month).

The railroad industry is expecting their customers to comply with the changes in demurrage rules and practices in 45 days or less. That amount of time is nowhere near what is necessary for many customers to adjust their operations (*e.g.*, building or acquiring new infrastructure, adjusting inventory, or altering plant shift schedules) to be able to avoid or reasonably mitigate the charges. The lack of sufficient notice, planning and coordination to allow customers to adapt their operations is unreasonable and results in a revenue windfall for the railroads.

IV. POSSIBLE STB ACTIONS TO ENSURE FAIR DEMURRAGE PRACTICES

ISRI believes that there are several actions that the Board can take to help ensure that railroad practices in connection with demurrage and accessorial charges are reasonable and commercially fair.

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 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.¹⁸

Second, ISRI requests the Board to initiate a rulemaking proceeding to adopt rules to to apply when railroads cause inefficiencies and supply chain disruption for their customers, prohibit double-dipping or other conduct designed to be a revenue stream, and provide fair processes for dispute resolution.

ISRI believes that reciprocity is an essential element to ensuring commercial fairness in demurrage and accessorial charges and practices. True reciprocity should entail compensating shippers for railroad actions that disrupt their supply chain and operations, similar to charges aimed to compensate the railroads for shipper actions that adversely affect the rail system; or should at least ensure that errors and inefficiencies in a railroad's operations do not result in charges to their customers. Our members operations have suffered and costs have increased substantially as a result of bunching, missed switches and other service inconsistencies, none of which are within their control. At the very least, reciprocity should allow for compensation to rail customers when the railroads detain private 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. 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

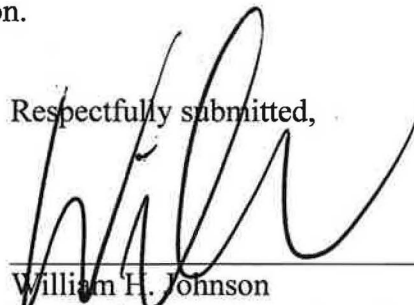
¹⁸ See 49 U.S.C. § 11701(d).

rules or none at all. We request the Board to introduce commercially fair rules that provide for remedies for rail customers against railroad caused disruptions.

Furthermore, the Board should prohibit application of multiple charges that serve the same purpose. These types of charges, such as the “congestion charge” imposed by NS, may result in double-dipping by the railroads, by penalizing the shipper twice when no increased efficiency can be accomplished.

Finally, ISRI requests the Board to adopt rules for clear, simple and accessible claims filing and dispute resolution processes for demurrage and accessorial charges. Currently, there is no uniform process for disputing these charges, and the Board should ensure the availability of data needed to audit these charges and potential credits. The claims process under 49 C.F.R. Part 1005, which governs cargo loss and damage, is an example of an existing process. 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,



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Dated: May 8, 2019