

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 6, 2019
Part of
Public Record

Docket No. EP 754 – Oversight Hearing on Demurrage and Accessorial Charges

**SUPPLEMENTAL SUBMISSION OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

Pursuant to the Decision served in this proceeding on May 24, 2019, the North America Freight Car Association (“NAFCA”) provides this supplemental written submission to the Surface Transportation Board (“STB” or “Board”) on the issues covered by this oversight hearing proceeding. NAFCA again commends the Board for its ongoing and intense concern with the practices of Class I railroads concerning demurrage and accessorial services and charges and for the Board’s decision to hold an oversight hearing on May 22-23, 2019. By all accounts, the hearing was a huge success in terms of the Board learning of the issues currently facing private car owners and lessees as they try to deal with patently unreasonable demurrage and accessorial service practices and common carrier circulars and tariffs (all generally referred to in this submission as “tariffs”).

In these supplemental comments NAFCA reiterates its request that the Board update its rules and policies governing the use of freight rail cars in today’s rail industry in light of the fact that around 73% of the railcars in service today nationwide are owned by non-railroad entities who have collectively invested tens of billions of dollars to acquire and maintain them in large part for their use by the Class I railroads. The rules and policies governing demurrage and accessorial

charges and practice that were originally adopted and enforced to protect the investment made by railroads in their fleets must change to protect the significant investments in railcars non-railroads have made. During the hearing, the Board heard multiple suggestions on how to advance the salutary goals of “reciprocity” and “commercial fairness.” These included taking steps to fix the “credit” and “debit” practices of the Class I railroads. Pursuant to such practices, shippers and receivers are given “credits” in the form of days or hours to unload or load railcars, or store a railcar, and then “debits” when the free time is exceeded. Stated simplistically, charges are assessed to the extent debits exceed credits. At the hearing, the Board heard testimony from shippers and railroads about various credit and debit programs and practices, and the Board members engaged in dialogues about how they could be fixed to account for instances where the railroad was at fault for the free time being exceeded and debits and associated charges accrued. NAFCA concurs that many, if not all of the Class I railroad’s credit and debit practices are not reciprocal and are commercially unfair for a variety of reasons, not the least of which is that today’s rail tariffs do not explicitly explain how the programs function in practice. By lacking such detail, they provide the issuing railroad with a tremendous amount of discretion to arbitrarily grant or deny additional credits when the railroad is at fault, and then they place 100% of the burden on the shipper to prove the charge was wrongly assessed. Moreover, echoing the sentiments of numerous other participants in this proceeding, NAFCA does not believe a railroad providing zero credit days for demurrage and storage charges on private equipment after a car is constructively placed is a commercially reasonable or fair practice, and NAFCA urges the Board to direct the Class I railroads to provide at least one credit day for private cars. For these and other reasons, NAFCA supports the Board taking a very close look at the Class I railroads’ practices concerning debits

and credits, and then directing the railroads to amend their demurrage and accessorial practices to make them more reasonable and commercially fair.

However, the Board also heard from numerous witnesses that for private car owners true “reciprocity” and “commercial fairness” regarding demurrage and accessorial charges and practices goes beyond merely waiving charges and/or issuing loading or unloading credit days. Such measures will relieve the shipper/car owner of wrongly assessed charges or perhaps give credits against future charges, but they will not either (1) provide compensation for the inability to use the private car to conduct the shipper’s business operations; or (2) provide sufficient incentives for the railroad to use the private equipment more efficiently. As NAFCA roughly estimated in its opening submission, just the cost of replacing the national private car fleet of approximately 1.2 million cars would be well over \$100 billion. This does not count the (1) the annual cost of maintaining the rail cars; (2) storage costs; and (3) additional costs assessed by the Class I railroads for the transportation of newly manufactured cars to their first loading location as well as more recent rates and charges assessed for movement of empty private railcars to repair shops, a cost that shippers do not incur if the railroad is moving its own empty railcars. And these costs do not include the significant business costs incurred by shippers who suffer harm from lost business opportunities, plant and labor costs, and other costs incurred solely because the railroads to whom the shipper provides cars for transportation do not provide dependable rail service.

NAFCA reiterates that the time has come for the Board to update its policies and rules to fully incentivize the nation’s Class I railroads to more efficiently utilize the private railcars in their possession in order to protect that significant investment (that in many cases they have forced their customers to supply). NAFCA maintains that the Board can take a significant first step toward accomplishing this objective at the conclusion of this oversight proceeding simply by requiring

Class I railroads to amend their common carrier tariffs governing demurrage, car storage, and accessorial charges so that they reciprocally apply to instances where the railroad's actions cause the inefficient usage of private railcars and other non-railroad assets through delays or other actions for which rail customers are presently penalized. More specifically, in addition to fixing the problems with the current debit and credit systems utilized by the Class I railroads, the Board should adopt policies and guidelines that establish demurrage, storage, and accessorial charges and practices are not reasonable unless they include measures by which the railroad pays to the shipper/private car owner the same or similar charge that the railroad would assess the shipper for the same action.

In conclusion, NAFCA thanks the Board for instituting this oversight hearing proceeding. NAFCA submits that achieving meaningful reciprocity and commercial fairness for private car owners and lessees requires the Board to go beyond simply addressing the flaws in railroad debit and credit procedures, and to directing the Class I railroads to amend their tariffs to require the railroads to apply to themselves the same requirements for efficiency that they demand of their customers. As NAFCA stated in its prior written submission in this proceeding, one result of the Board's pursuit of reciprocity and commercial fairness in this more aggressive manner will be an improvement the overall efficient operations of the national rail system because railroads will be properly incentivized to use over 70% of the cars on their system more efficiently.

Finally, NAFCA suggests that the Board should retain oversight authority over this proceeding and the modifications made by Class I railroads to their tariffs and practices.

Respectfully submitted,



Thomas W. Wilcox
GKG Law, P.C
1055 Thomas Jefferson St, NW
Suite 500
Washington, D.C. 20007
202-342-5248
twilcox@gkglaw.com

*Attorney for the North America Freight Car
Association*

June 6, 2019