

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

**COMMENTS OF
THE FERTILIZER INSTITUTE**

Pursuant to the Board's notice served on October 7, 2019 The Fertilizer Institute ("TFI") hereby submits its comments on the Notice of Proposed Statement of Board Policy regarding Policy Statement on Demurrage and Accessorial Rules and Charges issued by the Surface Transportation Board ("STB" or "Board") in the above-captioned docket.¹ TFI commends the Board for issuing this Policy Statement, which addresses many of the issues raised by various stakeholders in their written comments and during the two-day oversight hearing before the Board.²

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

¹ Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. EP 757 (served October 7, 2019) ("Policy Statement")

² Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019)

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 of ton-miles) move by rail throughout the year.

As part of the oversight hearing held before the Board on May 22-23, 2019, in STB Docket No. EP 754, TFI submitted written testimony,³ participated in the oversight hearing, and submitted post-hearing comments to the Board.⁴ Thus, TFI has a strong interest in this proceeding.

The Board's proposed Policy Statement follows the written testimony and comments, as well as the oral testimonies of the participants in the oversight hearing in STB Docket No. EP 754, which was commenced following concerns by various industry stakeholders about radical changes to demurrage and accessorial rules and practices implemented by the Class-I railroads as part of the Precision Scheduled Railroading ("PSR").

In its previous comments, TFI asked the Board to issue a policy statement that would incorporate certain principles that address the widespread concerns voiced by various industry stakeholders in the previous proceeding.⁵ TFI commends the Board for adopting this approach, and for incorporating many of these principles.

³ Written Testimony of The Fertilizer Institute Docket No. EP 754 (May 8, 2019) ("TFI Testimony").

⁴ Post-hearing comments of The Fertilizer Institute, Docket No. EP 754 (June 5, 2019) ("TFI Comments").

⁵ See TFI Testimony at 7-8. See also, TFI Comments at 1.

TFI strongly supports the Board's proposed Policy Statement. As prescribed under 49 U.S.C. §10702, a railroad is required to establish reasonable rates and transportation-related rules and practices.⁶ The Board's proposed Policy Statement intends to provide guidance on principles that the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges.⁷

Accordingly, the Board proposes two fundamental principles for determining the reasonableness of demurrage and accessorial charges. These are: (i) "demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets,"⁸ and (ii) "transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges."⁹ The Board further states that the demurrage charges should reflect reasonable financial incentives, and the revenue should not be itself a purpose.¹⁰ TFI commends the Board for declaring these general principles. TFI strongly believes that these principles will be a valuable guidance for all industry stakeholders in the future administration of demurrage and accessorial rules and charges.

The Board's proposed Policy Statement includes certain other principles related to (i) free time provided for railroad customers to return rail assets to the railroad before demurrage charges are assessed, (ii) demurrage and accessorial charges related to bunching, (iii) overlapping

⁶ 49 U.S.C. §10702.

⁷ Policy Statement at 1.

⁸ *Id* at 21.

⁹ *Id*.

¹⁰ *Id*.

charges, (iv) invoicing and dispute resolution, (v) credit and debit issues, (vi) notice of tariff changes, and (vii) demurrage billing to shippers instead of warehousemen. TFI hereby provides its comments on these specific issues discussed in the proposed Policy Statement:

I. Free Time:

As explained in TFI's testimony, TFI members' "single most significant complaint across all Class I railroads was their recent reductions to free time for demurrage and storage charges."¹¹ Similar concerns have been voiced by various stakeholders in their written testimonies and comments in EP 754.¹² At this stage, many railroads' tariffs provide for 24 hours of free time for demurrage, and zero hours of free time for private car storage, whereas most railroads granted 48 hours of free time in the past.¹³ The reduction of free time, implemented as part of the PSR, caused many shippers and receivers to incur excessive amounts of demurrage and private car storage charges. The main causes of these increased charges have been identified as insufficient free time to load and unload railroad-owned and private cars within 24 hours and 0 hours, respectively, as well as the erratic rail service that causes the railroad customers to incur demurrage or storage charges due to reasons that are beyond their reasonable control.

The Board's proposed Policy Statement addresses many of these issues. TFI commends the Board for taking this holistic approach and addressing the shippers' and receivers' concerns. In the proposed Policy Statement, the Board explicitly stated that the free time period "must be reasonable and consistent with the purpose of demurrage,"¹⁴ and expressed its concerns "about

¹¹ TFI Testimony at 2.

¹² Policy Statement at n. 25.

¹³ TFI Testimony at 2.

¹⁴ Policy Statement at 11

the reasonableness of reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service and do not serve to incentivize the behavior to encourage the efficient use of rail assets.”¹⁵

The Board further identified certain carrier-caused circumstances that are beyond the railroad customers’ control, and in which assessment of demurrage charges cease to fulfill its purpose.¹⁶ These include: “charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by missed switch); charging demurrage for transit days to move cars from constructive placement in remote locations; or charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the shipper or receiver has had a reasonable opportunity to process the excess volume of incoming cars.”¹⁷

TFI is disappointed nevertheless that the Board has not taken a stronger position regarding reductions in free-time to as few as zero days. The vagaries and inconsistencies inherent in rail service are well-established and the rail industry has not offered any rationale for these most recent free-time reductions that are consistent with the justifications the Board has identified at page 13 of the Policy Statement. Consequently, the recent free-time reductions imposed by most Class I rail carriers have eliminated what little buffer shippers have had against rail service inconsistencies. To the extent a rail carrier may provide credits to offset demurrage charges attributable to rail service, the carriers have shifted the burden upon shippers to prove that rail service caused them to accrue demurrage. This shift should be deemed unreasonable at least until the rail industry has established a consistent history of reliable service.

¹⁵ *Id* at 12.

¹⁶ *Id*.

¹⁷ *Id*.

With the foregoing exception, TFI concurs with the Board in all its findings and determinations regarding free time. TFI believes that demurrage is an important tool to incentivize the railroad customers to encourage the efficient use of railroad assets, and thus prevent congestion of the rail transportation system. To that end, a certain amount of free time is clearly necessary to serve this important purpose. However, as the Board explained, this amount should be reasonable, and it should be able to correctly incentivize the railroad customers. In today's environment, lack of necessary amount of free time provided by the railroads for loading and unloading rail cars makes it impossible for TFI members to avoid demurrage charges. Thus, the primary purpose of these charges is not being served with the current rules and practices. TFI expects Class-I railroads to modify their free time rules to align them with the Board's views in the proposed Policy Statement and retract from the recent unreasonable reductions in free time.

II. Bunching:

The Board's proposed Policy Statement includes a section explaining the Board's views on the reasonableness of demurrage charges resulting from bunching of rail cars. Accordingly, the Board states that bunching-caused demurrage disputes are "best addressed in the context of case-specific facts."¹⁸ The Board also notes that the purpose of demurrage is not fulfilled, if railroads' actions cause "bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid,"¹⁹ and asks the railroads to consider these principles when analyzing the appropriateness of demurrage charges, and administering their

¹⁸ *Id.*

¹⁹ *Id.*

demurrage rules and charges.²⁰ The Board adds that the railroads should take these principles into account for both “when cars originate with the serving carrier and when cars originate on an upstream carrier.”²¹ The Board further states that the railroads should give particular consideration as to “whether their automatic billing processes sufficiently account for carrier-caused bunching ... and in resolving any related disputes.”²²

TFI strongly agrees with the Board’s statements regarding bunching in the proposed Policy Statement. TFI previously identified bunching as “the most common reason why a facility cannot receive rail cars upon arrival at a terminal,”²³ and thus incurs demurrage charges. As explained in TFI’s previous submission, bunched deliveries cause the receivers of rail cars to incur demurrage charges both because TFI members have limited storage track capacity within their plants, as well as because receiving bunched deliveries also means that TFI members need to keep more rail cars at their plants due to late deliveries of the rail cars needed for plant operations, which further reduces the track capacity in their plants.²⁴ In both of these circumstances, TFI members are being assessed demurrage charges due to reasons that are not within their reasonable control to avoid. Thus, in these circumstances, the demurrage charges cease to serve their purpose and are bluntly unreasonable. TFI also appreciates the Board addressing upstream bunching, which was another issue raised in TFI’s previous comments.²⁵

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ TFI Testimony at 3.

²⁴ *Id.*

²⁵ *Id.*

III. Overlapping Charges:

In the proposed Policy Statement, the Board explained that certain railroads impose overlapping charges (e.g., congestion charge assessed by NSR, and not prepared for service charge assessed by UP) which seek “to impose a charge, in addition to demurrage charges, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid.”²⁶ The Board noted that it would have significant concerns about the reasonableness of these types of charges. TFI did not raise these issues in its previous comments, however it agrees with the Board that the overlapping charges result in double-dipping where the railroads charge multiple overlapping fees to penalize the shippers and receivers for a single behavior that is not within their reasonable control. Thus, TFI strongly agrees that the Board should deem these types of charges unreasonable.

IV. Invoicing and Dispute Resolution:

The Board proposed certain minimum information requirements in demurrage bills, as well as other recommended billing and dispute resolution practices, and the Board also initiated a proposed rulemaking in another STB docket on the same topic.²⁷ TFI intends to respond to the Board’s proposals with another filing in Docket No. EP 759.

V. Credits:

TFI believes that the Board addressed two of the most important issues related to credits issued by the railroads for either carrier-caused problems or free time. In the proposed Policy Statement, the Board stated that in determining the reasonableness of credit rules and practices, it would take into account whether the railroad customers were afforded a reasonable opportunity

²⁶ Policy Statement at 15.

²⁷ *Id* at 16-17.

to make use of the credits in question before their expiry, and that the railroads could compensate their customers for the value of the unused credits at the end of each month.²⁸ TFI previously raised its concerns about the expiry of credits at the end of each month.²⁹ TFI continues to believe that this practice diminishes the utility of the credits, as expiry of the credits at the end of the month effectively means that credits received as a result of bunched deliveries near the end of the month expire within a few days.³⁰ TFI remains concerned, however, that the Board's suggestions that railroads compensate shippers for unused credits will be insufficient to result in this becoming actual practice unless and until the Board actually determines that that the failure to provide such compensation is unreasonable.

The Board's views suggest that these issues are closely related to the lack of reciprocity in the rail industry, which was one of the main topics that the Board sought public input before the oversight hearing on demurrage and accessorial rules and practices.³¹ TFI believes that more can be achieved in this proceeding by establishing a true reciprocity in the rail industry. In its previous comments, TFI listed several examples that would hold railroads accountable for their service failures disruptive to railroad customers.³² TFI believes that the Board should consider

²⁸ *Id* at 18.

²⁹ TFI Testimony at 4.

³⁰ *Id*.

³¹ Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019) (the Board invited all hearing participants and interested persons to comment on “[p]erspectives on whether demurrage and accessorial tariffs in effect during the past three years have created balanced and appropriate incentives for both customers and railroads, including views on the extent to which reciprocity should be incorporated into demurrage and accessorial charges”).

³² TFI Testimony at 6-7 (TFI's suggestions include requiring railroads to pay shippers a comparable charge when the railroads detain a shipper's private car for an unreasonable time, or to forego the charges for switching service requested by the shippers to clear up the congestion in their plants created by railroad service failures).

these suggestions before promulgating the final Policy Statement. For example, the ability of railroad to charge shippers for behavior that disrupts rail operations should be contingent upon railroads accepting responsibility for comparable costs that shippers incur when a railroad's behavior disrupts shipper operations.

VI. Notice of Major Tariff Changes:

The proposed Policy Statement includes the Board's views on the reasonableness of the amount of notice of major tariff changes, including reductions in free time. Accordingly, the Board recognized the widespread concerns expressed by various stakeholders, including TFI, on the insufficiency of 45 days' notice for the changes recently implemented by the railroads. TFI thanks the Board for clearly addressing these concerns. As the Board explained, "railroads should provide sufficient notice of major changes to demurrage or accessorial tariffs to enable shippers and receivers to evaluate, plan and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges."³³ TFI strongly agrees with the Board's statement, and TFI further states that 45 days' notice is not sufficient for TFI members to comply with major tariff changes, as compliance "takes time and comes at a substantial cost."³⁴ In fact, in its previous filing, TFI asked the Board to issue a policy statement that requires the railroads to provide customers sufficient time to comply with changes,³⁵ and TFI thanks the Board for addressing this issue. TFI further supports the Board's statement to encourage the railroads to help railroad customers in complying with tariff changes with various other actions, including "delayed billing

³³ Policy Statement at 19.

³⁴ TFI Testimony at 2.

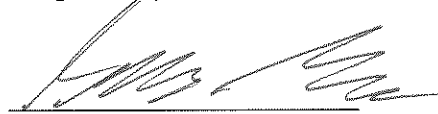
³⁵ *Id* at 8 ("Railroads must allow customers a sufficient time to comply with changes to demurrage and storage practices that would subject the customer to such charges in circumstances where they previously did not apply.")

and working with those that needed more flexibility,” and to be accommodating and cognizant of any unique obstacles a shipper may have in complying with the changes.³⁶

VII. Conclusion

TFI strongly believes that the proposed Policy Statement sheds light on many of the issues that have given rise to various disputes in the past, and that it will facilitate the resolution of the issues that the railroad customers are experiencing with the current demurrage and accessorial rules and practices. TFI expects the railroads to align their rules and practices closely with the Board’s views in the proposed Policy Statement, and thus retract from unreasonable rules and practices recently implemented by Class-I railroads.

Respectfully submitted,



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³⁶ Policy Statement at 19.