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POLICY STATEMENT ON DEMURRAGE AND
ACCESSORIAL RULES AND CHARGES

COMMENTS OF THE CHLORINE INSTITUTE

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Introduction

In the *Policy Statement on Demurrage and Accessorial Rules and Charges* (“*Policy Statement*”), the Surface Transportation Board (“STB” or “Board”) addressed many of the issues that have created problems for rail shippers in recent years with respect to demurrage and accessorial rules and charges.¹ We applaud the Board for its *Policy Statement*, even though we and the Board recognize that the *Policy Statement* does not resolve all of the policy or factual issues that may arise.² Nevertheless, the *Policy Statement* should assist in resolving many of the problems with respect to demurrage and accessorial rules and charges.³

¹ *Policy Statement on Demurrage and Accessorial Rules and Charges*, 84 Fed. Reg. 54,717 (Oct. 10, 2019).

² In the related proceeding, Ex Parte No. 759, *Demurrage Billing Requirements* (served Oct. 7, 2019), the Board proposed to adopt a policy that carriers may not impose demurrage or accessorial charges without providing sufficient information on the carrier’s invoice to make clear the identity of the shipper, and the circumstances, that supposedly justify the charges the carrier is seeking to impose on the shipper. Those issues appear to be of particular relevance to terminals, and accordingly, The Chlorine Institute (“CI” or “Institute”) does not address them directly herein.

³ Also, on the same day, the Board issued a notice in Ex Parte No. 760, *Exclusion of Demurrage from Certain Class Exemptions* (served Oct. 7, 2019), clarifying exemptions of miscellaneous commodities and boxcar transportation, and revoking in part other exemptions applicable to agricultural commodities, so that the shippers and carriers would all know that demurrage is not exempt from STB regulation as a result of the exemptions for those commodities or transportation services. Because those exemptions relate to commodities not normally shipped by CI’s members, CI does not address those exemption-related issues herein.

Statement of Interest and Summary of Position of The Chlorine Institute

The Chlorine Institute is a 190-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as chlorine packagers, distributors, users, and suppliers. CI exists to support the chlor-alkali industry in advancing safe, secure, environmentally compatible, and sustainable production, distribution and use of its mission chemicals.⁴ The Institute's members account for approximately 91 percent of the total chlorine production capacity in the United States. CI's members include shippers of nearly all chlorine shipped by rail in North America, and all of CI's mission chemicals are shipped primarily by rail and highway. The Institute's mission chemicals are used throughout the U.S. economy and are key to the protection of public health.

Although CI did not itself present a witness at the May 2019 hearings in Ex Parte No. 754, CI's largest member, Olin Corporation, did submit written Comments prior to the May 2019 hearings and appeared on Panel I. Olin's Comments and testimony in Ex Parte No. 754 reflected the concerns generally of CI and its member companies.

It is critical that the Board understand that CI members generally ship their chemical products in rail tank cars, and that all tank cars in use to move commodities on railroads in North America are provided by shippers (such as CI members), not by railroads.⁵ CI and its members do not believe that there is any justification for allowing

⁴ CI's mission chemicals are chlorine, sodium and potassium hydroxides, sodium hypochlorite, the distribution of vinyl chloride monomer (VCM), and the distribution and use of hydrogen chloride.

⁵ There may be a small number of tank cars owned by North American railroads used for their own purposes. Any tank cars owned or leased by railroads are used for the railroads' own purposes and, to the best of CI's knowledge, are not used to transport products for shippers. CI believes that all tank cars used by North American railroads to carry products are provided by shippers. Some shippers own their own tank cars, while others lease them. Regardless whether the tank cars are owned or leased by shippers, those shipper-supplied tank cars do not cost railroads anything. Accordingly, hereinafter, for simplicity, any references to "tank cars"

zero “free time” to load or unload a railroad-provided car before demurrage charges may start to accrue, nor do they believe that “bunching” or “congestion,” which are generally the products of railroad operations and not actions of shippers, should be the bases for demurrage or accessorial charges. There also should not be any duplicate charges for the same circumstances.⁶

Background

Of general importance to the resolution of the issues in this proceeding, the Board explained that “[t]he overarching purpose of demurrage is to incentivize the use of rail assets (both equipment and track) by holding rail users accountable *when their actions or operations* use those resources beyond a specified period of time.” *Policy Statement* at 54,719 (emphasis added) (citing *Pa. R.R. Co. v. Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920) (“[t]he purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.”)). The Board concluded that many of the changes to demurrage and other charges implemented in recent years had not been based on actions by shippers, nor would those changes cause more efficient utilization of cars and track. Despite the fact that the Board stated that it was not making final judgments about particular circumstances, the Board appeared to conclude that the railroads do not have a reasonable basis for many of the changes to demurrage and other charges implemented in recent years.

These pronouncements and proposals from the STB in the *Policy Statement* are an improvement as compared to some of the ambiguous language in the Board’s decision in

hereinafter refer only to tank cars provided by and used for transportation of materials for shippers, and not to those relatively few tank cars owned by railroads and used by railroads for their own purposes.

⁶ CI is aware of the Comments of the American Chemistry Council being filed herein, and generally concurs with those Comments.

Ex Parte No. 707, *Demurrage Liability* (STB served April 11, 2014). The ambiguities in the 2014 *Demurrage Liability* decision unfortunately led to railroads seeking to impose charges of varying types for actions that were not caused by a shipper or receiver. The Board's *Policy Statement* provides welcome clarification of some of those matters that were ambiguous in *Demurrage Liability*.

Accordingly, CI encourages the Board to stick to the views it expressed in the *Policy Statement*, and not to soften those views, or make them ambiguous. Ambiguity has not served shippers, the Board, or the public interest in the past—it has only encouraged certain railroads to take advantage of the ambiguities to charge shippers for things that shippers have not caused, and cannot cure.

There is no public policy reason for allowing regulated entities to take advantage of their customers through unwarranted charges. As the Board found, that is also not consistent with the Rail Transportation Policy, because it is not consistent with the needs of the public and, to the extent that some traffic could move by other modes, may encourage at least some rail customers to ship traffic to those other modes. This is contrary to public policy not only if such traffic is best-suited to move by rail, but also because Congressional policy has been to encourage traffic to move by railroad for many reasons, including encouraging railroad revenue adequacy, promoting safety, and avoiding unnecessary use of public assets such as the nation's highways.

Argument

A. "Free Time."

The *Policy Statement* clarified the Board's views in many respects. For example, the Board indicated that shippers should not be charged demurrage unless it could be

shown that the shipper was responsible for exceeding the “free time” allowed for loading and unloading rail cars:

Free time is a critical component of demurrage charges, the purpose of which, as noted above, is “to promote car efficiency by penalizing undue detention of cars.” *Kittanning*, 253 U.S. at 323 (further noting that “the duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate.”).

Policy Statement at 54,719-20.

The Board provided an explanation for what may constitute legitimate grounds for a railroad setting reasonable limits on “free time:”

A railroad has a right to set a reasonable time—free time—for a shipper to finish using rail assets and return them to the railroad. If a shipper keeps an asset for too long (beyond the allocated free time), it should compensate the railroad for the extended use of its asset (rail cars or track)—in other words, for demurrage. However, a shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay.

Id. at 54,720 (citing *R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges*, NOR 42102, *et al.*, slip op. at 4 (STB served July 20, 2010)). The Board went on to say:

Free time also helps temper adverse impacts to shippers and receivers of delays arising from service variability.²²

²² See *N. Am. Freight Car Ass’n*, NOR 42060 (Sub-No. 1), slip op. at 13 (noting, among other things, that private agricultural hopper car owners were given an average of two days to accept empty private cars without charge, in response to claim that objectionable storage charges were attributable to service variability).

Id.

The Board also stated its concerns about railroads charging demurrage for carrier-caused circumstances (which are, of course, beyond a shipper’s or receiver’s reasonable control):

Based on the information presented in the Docket No. EP 754 oversight proceeding, the Board has serious concerns about 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 their behavior to encourage the efficient use of rail assets (footnote omitted). The Board is also concerned that, in some circumstances, such reductions may be inconsistent with rail carriers' statutory charge to compute demurrage and establish related rules in a way that fulfills the national needs specified in § 10746 and may be incompatible with the overarching purpose of demurrage—namely, to encourage the efficient use of equipment by penalizing the *undue* detention of cars (footnote omitted). Where, for example, carrier-caused circumstances give rise to a situation in which it is beyond the shipper's or receiver's reasonable control to avoid charges, demurrage does not fulfill its purpose.

Policy Statement, 84 Fed. Reg. at 54,721.

The Board explained some of the circumstances that would be beyond a shipper's or receiver's reasonable control:

Such circumstances might include, for example, charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by the 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. Changes in historical practices on which the shipper or receiver has long relied (*e.g.*, regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties) may also be taken into account.

Id.

The Board also explained its concern that recent changes in demurrage and other charges would violate the Rail Transportation Policy (49 U.S.C. § 10101):

Lastly, the Board is concerned that, in some circumstances, such reductions in free time may jeopardize important goals of the nation's rail transportation policy by rendering freight rail service less likely to meet

the needs of the public and, if other modes are even effectively an option for a rail user, less competitive with other transportation modes.

Id. at 54,721-22.

CI agrees with the Board's foregoing analysis and conclusions about "free time."

B. "Bunching."

In accordance with the Board's views of "free time," the Board, on a related subject of great concern to CI's members, proposed that shippers should not be required to pay demurrage associated with "bunching" of rail cars unless a rail carrier could show that the shipper was responsible for the bunching. The Board stated:

Demurrage disputes pertaining to bunching are best addressed in the context of case-specific facts. *See Demurrage Liability Final Rule*, EP 707, slip op. at 23-24. As discussed above, demurrage charges must be designed to incentivize shippers' and receivers' behavior. Where rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled.⁴¹

⁴¹ As noted above, such circumstances might include, for example, 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."

Id. at 54,722.

CI's members' experience is that bunching is caused by railroad operating practices (e.g., failure to make timely pickups, missed switches, or failure to make timely deliveries), and not because of any action of a shipper.

Accordingly, CI agrees with the Board that, in such circumstances, "bunching" is not a proper basis for charging demurrage.

C. “Congestion” Charges.

On another matter of importance to CI’s members, the Board indicated that rail shippers also should not be responsible for “congestion” charges unless the actions of the shipper caused unusual congestion on the carrier’s system:

Many participants in the Docket No. EP 754 oversight proceeding voiced concerns about additional charges recently instituted by two Class I carriers for claimed customer-caused congestion or delay. The first, a so-called “congestion” charge, was reportedly being assessed by NSR following a determination, in its sole judgment, that an excessive quantity of cars for a given consignee causes material operating problems at an NSR facility (footnote omitted). Commenters objected that the \$100 per car/per day charge, assessed on five days’ notice for all cars destined for the location identified as congested, was arbitrary and unreasonable in its own right, and that it effectively resulted in a double recovery for NSR because it served the same purpose (incentivizing the prompt removal of cars held in railroad yards) as demurrage charges, to which the cars in question were also subject.

Id.

The Board concluded:

The Board is encouraged by these actions but nevertheless notes that, when adjudicating specific cases, it would have significant concerns about the reasonableness of any tariff provision that sought to impose a charge, in addition to the otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid. Although the Board remains open to evidence and argument that such a charge could in some instance be reasonable, no such information was presented in Docket No. EP 754.

Id. at 54,723.

Again, CI agrees with the Board, and further states that CI and its members are unaware of any information that could justify a charge, in addition to the otherwise applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid.

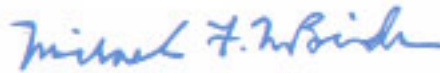
The Board clearly stated that shippers should not be charged for both demurrage and congestion where those overlapping concepts are due to the same circumstances. On that point, the Board is clearly right—there is simply no possible justification for double-charging shippers for the same occurrence (and, if demurrage is not appropriate, there almost certainly would be no basis for charging a shipper for “congestion” charges, unless the shipper requests the railroad store a shipper’s cars on its tracks, in which case only a storage charge would be appropriate).

Conclusion

The Board should adopt CI’s recommendations herein. CI encourages the Board to stick to its guns on such matters as “free time,” “bunching” and “congestion” charges, and with regard to duplicative charges on the same cars for the same circumstances. Adequate “free time” must be provided. “Bunching” and “congestion” charges should not be billed to shippers when “bunching” or “congestion” are caused by the railroad. Duplicative charges should never be permitted.

CI appreciates the Board’s consideration of its views.

Respectfully submitted,



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