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November 6, 2019
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Comments of the American Chemistry Council
on
Surface Transportation Board Docket No. EP 757
Policy Statement on Demurrage and Accessorial Rules and Charges

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The American Chemistry Council (ACC) is pleased to provide comments on the Board's proposed policy statement on railroad demurrage and accessorial rules and charges. We commend the Board's work to articulate the principles it would consider in evaluating the reasonableness of such rules and charges.

ACC represents the leading companies in the business of chemistry. Our members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier and safer. As a \$526 billion enterprise, the business of chemistry is a key element in the nation's economy and one of the largest customers of the U.S. freight rail system. Thanks to the shale gas revolution, our industry is growing significantly. With more than \$200 billion in announced new capital investments and an estimated 60 million metric tons of additional production capacity expected to come online by 2022, chemical shippers are increasingly reliant on the U.S. freight rail system.

ACC strongly supports the proposed policy statement, and urges the Board to adopt a final version as soon as possible. In these comments, we offer a few suggestions for the Board's consideration.

Need for Board Action

As stated in ACC's testimony at the Board's May 22-23, 2019, oversight hearing, ACC members have been concerned with the litany of changes to Class I railroads' demurrage, storage and accessorial charges. Railroads have leveraged their substantial market power to impose rules and fees with little regard to the impacts on their customers. Lacking effective recourse in the marketplace, rail customers look to the STB to ensure that such practices are reasonable.

Since the Board announced the hearing, several railroads have revised or ended some of their most problematic rules. ACC is pleased that Norfolk Southern will no longer assess a "congestion charge" and that Union Pacific modified its charges for rail cars that are "not prepared for service." There is little doubt that the Board's oversight and focus on commercial fairness helped to bring about these changes.

However, these positive steps do not diminish the need for further Board action. The Board's proposed Policy Statement is necessary to establish standards for evaluating the reasonableness of a broad range railroad demurrage rules. It will provide guidance to both railroads and shippers, and help to minimize the number of disputes the Board may have to resolve. By staking out the boundaries of permissible railroad action in tariffs, the Board also can facilitate the negotiation of contracts that are better tailored to the circumstances of individual shippers and their facilities, instead of the one-size-fits-all approach that railroads have too often imposed on their customers.

Free Time

The proposed policy statement appropriately recognizes the importance of free time, and that when free time is reduced, "an important buffer against service inconsistencies and variations in car deliveries is undermined."¹ As discussed in ACC's hearing testimony, bunching of rail cars can occur for many reasons beyond the shipper's control.

ACC understands that the Board is not promoting "complete uniformity across rail carriers' demurrage and accessorial rules and charges,"² and may be reluctant to draw a bright line defining what a reasonable amount of free time is. Rather, the Board states generally that it is "troubled by the adverse impacts of reductions in free time to rail users and the potentially negative consequences of providing no credit days for private cars."³ The Board then outlines conditions where reductions in free time might be justified.

However, the Board should state, as a general principle, that railroads must provide free time for private cars. Free time is necessary to account for railroad-caused bunching and service variability. While the Board recognizes that reductions in free time might be justified based on evidence of technology advances or service improvements, it is difficult to imagine conditions that would justify the complete elimination of free time. Therefore, affirming a *requirement* for some level of free time as will not unduly limit the Board's ability to address changing circumstances. Based on railroad service variability, ACC believes no railroad has demonstrated that reducing free time to less than 48 hours is reasonable.

Credits

ACC supports the Board's preliminary guidance in the proposed policy statement on how it would evaluate credit rules and practices when adjudicating specific cases.

The Board should also adopt a policy calling for credits to be issued for cars delivered more than a specific time early or late from the original estimated time of arrival (ETA). It should be standard practice for carriers to provide an ETA for car delivery and define an "on time" window. Carriers should provide credits when delivery falls outside of this window. ACC

¹ Notice of Proposed Statement of Board Policy, pp. 7-8.

² *Ibid.* p. 3.

³ *Ibid.* p. 11.

understands that at least two Class I railroads currently issue credits delivered more than 24 hours early or late from the original ETA.

Overlapping Charges

ACC appreciates the Board's discussion of overlapping charges, including the specific concerns raised by ACC and other stakeholders regarding the Norfolk Southern "congestion charge" and the Union Pacific "not prepared for service" charge. However, the draft policy statement does not fully address the overall concern with overlapping charges.

The draft policy statement states that, when adjudicating specific cases,

[The Board] 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.⁴

However, this misses the point about overlapping charges. The Board has already stated the fundamental principle that "charges should not be assessed in circumstances beyond the shipper's or receiver's reasonable control."⁵ Overlapping charges are a concern, even when either one of the separate charges might be considered reasonable by itself. ACC recommends adding language stating that the Board also would have significant concerns about the reasonableness of any tariff provisions that impose multiple charges that serve the same purpose.

Again, ACC commends the Board for its leadership in addressing broadly-shared concerns about railroad demurrage and accessorial charges. The Board's proposed policy statement represents a strong and positive step forward. We believe it will help to prevent disputes from arising, and, when they do arise, help to resolve them more efficiently and cost-effectively.

Thank you for your consideration of these comments and suggestions. If you have questions about this submission, please contact Jeffrey Sloan at 202-249-6710 or jeffrey_sloan@americanchemistry.com.

⁴ *Ibid.* p. 15.

⁵ *Ibid.* p. 21.