

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES
AND CHARGES

COMMENTS

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
JAMES B. BOLES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

Attorneys for Union Pacific Railroad
Company

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INTRODUCTION¹

Union Pacific's entire approach to accessorial and demurrage charges continues to be framed by the testimony of Kenny Rocker, Executive Vice President of Marketing and Sales at Union Pacific Railroad, submitted during the Board's May 22–23, 2019 Oversight Hearing on those charges (Oversight Hearing). The Board will recall that Mr. Rocker began his testimony by emphasizing Union Pacific's priority is to provide a quality service product for our customers:

[I]t is important that I explicitly tell you how we think about accessorial and demurrage charges at Union Pacific and what we've done to work with customers through the recent changes. Our top priority is to provide safe and reliable service to all our customers. The objective of our accessorial and demurrage program is to align customer behavior in a way that promotes network fluidity for the entire supply chain. All customers benefit with improved service reliability and reduced cycle times when all assets are utilized to their fullest.

Mr. Rocker went on to describe the proactive approach Union Pacific has taken to accessorial and demurrage program changes and the modifications we have made to that program in response to comments the Board received in advance of the Oversight Hearing.

As the Board knows, Union Pacific's work did not end with the close of the Oversight Hearing. Union Pacific continued meeting and talking with our customers. Union Pacific also voluntarily implemented a Customer Bill of Rights for Accessorial and Demurrage Charges ("UP BOR") both to take into account the unique circumstances of each customer and to assure our customers, and the Board, of Union Pacific's steadfast commitment to the effectiveness and fairness of our accessorial and demurrage program. The June 6, 2019 Supplemental Comments (Supplemental Comments) Union Pacific filed with the Board contextualized the UP BOR and asked that the Board keep the service goals underlying the program in mind if it decided to take further action:

Nonetheless, the hearing revealed several ways Union Pacific can further improve its demurrage and accessorial programs. Union Pacific took immediate steps to address genuine concerns from the written comments, and appreciates the Board's recognizing those efforts at the hearing. But in light of the testimony from Union Pacific's stakeholders, more is possible. Most of the criticisms

¹ Union Pacific appreciates the opportunity to submit these comments on the Proposed Statement of Board Policy issued by the Surface Transportation Board (Board). Union Pacific hereby incorporates into this filing: (1) the comments the Association of American Railroads files on behalf of the industry in this docket; and (2) the June 6, 2019 Supplemental Comments Union Pacific filed in Docket EP 754.

require technology improvements These improvements will take some time, but Union Pacific is already well into developing tools that make the process friendlier and more transparent to the customers. The “UP Customer Bill of Rights for Accessorial and Demurrage Charges” ... details the efforts Union Pacific will take – and the broad principles it will follow – to assure Union Pacific stakeholders that demurrage and accessorial charges are fair, reasonable, properly invoiced, supported by clear and transparent information, triggered only by circumstances within the reasonable control of customers, and provide modern tools to improve real-time visibility of rail shipments.

In the end, however, it is imperative that the Board not place the carriers in a Catch 22. For years, the agency has challenged the railroad industry to elevate its game and improve its service product so that it meets the public interest in a robust and resilient national freight rail network. Union Pacific is meeting that challenge. Union Pacific has deployed a new operating plan at a measured and strategic pace, and the changes to the demurrage and accessorial programs are an important feature in helping Union Pacific strike the right, moderate balance. The Board should not simultaneously drive the railroad industry to improve its service product while depriving it of a key tool needed to meet that goal.

UP Supplemental Comments at 4.

Union Pacific understands the Board’s October 7, 2019 Proposed Statement on Board Policy (Policy Statement) is a request for the entire industry to consistently and thoughtfully strike a balance between concerns about reciprocity and fairness, on the one hand, and the industry’s vital and pressing need to implement accessorial and demurrage programs enhancing the consistency, reliability, and fluidity of the national freight rail network, on the other hand. We deeply appreciate that the Board has rejected a mandatory, one-size-fits-all approach for the industry. The Board’s Policy Statement instead describes areas of concern and leaves it to individual railroads to determine how each may best resolve those concerns.

UNION PACIFIC'S ACCESSORIAL AND DEMURRAGE PROGRAM HAS ADDRESSED THE BOARD'S AREAS OF CONCERN

The Board's Policy Statement identifies specific areas of concern. The Policy Statement suggests that railroad accessorial and demurrage programs successfully addressing these concerns would be more likely to pass muster in the event of any legal challenge before the Board. The Policy Statement specifies the following as areas of concern: (1) the reasonableness of free time reductions and reductions that are incompatible with the efficient use of railroad equipment; (2) charges to customers due to carrier-caused bunching; (3) multiple charges applying at the same time to the same cars; (4) unreasonable limits on, or hurdles to, accessorial and demurrage charge challenges; and (5) adequate notice of major tariff changes.²

The UP BOR defines a Union Pacific accessorial and demurrage program that *already* addresses those areas of concern. The UP BOR fully and voluntarily resolves those concern areas in favor of reciprocity, fairness, and consistent and reliable service:

1. UP customers do not and will not incur accessorial and demurrage charges for circumstances beyond their reasonable control.
2. UP customers will continue to have at least 24 hours to load or unload cars before demurrage or Private Empty Car Storage (PECS) begin to accrue.
4. UP accessorial and demurrage charges will remain proportionate, have a rational economic link to the actions and behaviors that trigger them, and reflect their twin statutory goals.
6. UP does not and will not impose multiple types of accessorial and demurrage charges on the same car, for the same cause.
7. UP customers will continue to have reasonable notice of accessorial and demurrage tariff changes but not less than 60 days' notice.
8. UP's process for resolving accessorial and demurrage billing disputes with its customers will continue to be governed by fairness, enabled by effective technology tools, free of arbitrary rejections and unreasonable time limits, and characterized by diligence in determining charge validity.

² The Policy Statement also describes a Board concern regarding accessorial and demurrage invoices being addressed to receivers. We will limit our remarks on this issue to the comments submitted on the industry's behalf by the Association of American Railroads in Docket EP 759.

After examining the Board's areas of concern and comparing it against the UP BOR, Union Pacific believes it has voluntarily struck the balance described by the Board between reciprocity, fairness, and consistent and reliable service. Union Pacific will not, however, be complacent. We will continue relentlessly to improve our accessorial and demurrage program and work with customers one-on-one to ensure this balance is consistently and thoughtfully maintained.

CLARIFICATION OF THE POLICY STATEMENT IS NEEDED TO ACKNOWLEDGE THE PURPOSE UNDERLYING CREDIT EXPIRATION

Union Pacific uses a credit/debit system³ to assess demurrage charges. *See* Supplement Comments (pgs. 19-20). A customer is granted one credit when its car arrives in the serving area, giving the customer 24 hours of free time with which to unload its car. If the customer orders its car and Union Pacific fails to deliver when promised, Union Pacific issues additional credits (effectively additional free time) as outlined in the tariff. The point of the credits and debits part of the program is to bring fairness to the process for the customer.

Some customers expressed concerns about the expiration of credits during the lead up to the Oversight Hearing and the Hearing itself. Union Pacific directly addressed those concerns in its Supplemental Comments (*id.* at 20):

Extending the expiration period undermines the dual purposes of the program – to foster better customer service on Union Pacific and better transportation practices by Union Pacific's customers. [...] Union Pacific would be unable to plan appropriately – resource balancing could vary wildly, depending on the cycles of various individual customers rather than the capacity and demands of a system that must serve all customers. This development would undermine the desired impact on the network, but be directly incentivized by the credit accrual.

The Policy Statement contains contradictory statements that obscure and confuse what is otherwise a clear line of support for the monthly expiration of credits. In its Policy Statement (at 17-18), the Board repeated what it described as a “common concern” about carrier programs that place limits (*e.g.*, expiration) on the use of credits to offset debits. The Board characterized these limits as a “lack of reciprocity, particularly where the expiration date of a credit ... undermines the value of a credit or credits that were allocated for a problem or delay that was not within the reasonable control of a shipper or receiver.”⁴ Although the Board states it will take into account

³ This credit/debit system does not apply to Union Pacific's handling of bulk trains.

⁴ Policy Statement at 18.

the purpose and function of credits, that promise is contradicted by: (1) the Board suggestion that its concerns would be mitigated if shippers were compensated for expired credits; and (2) the Board statement that it would “evaluate how credit rules and practices are administered in determining the reasonableness of demurrage rules and charges when adjudicating specific cases ... whether the shipper or receiver has been afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the rail carrier.”⁵

More than 100 years ago, the Interstate Commerce Commission (“ICC”), considered the reasonable period over which demurrage credits and debits can be reconciled before determining that the monthly expiration of credits was a well-settled approach. The ICC found that the regular accounting course of business is the guide for a reasonable expiration period:

Some definite period at the end of which the average must be obtained and a balance struck must be prescribed. A calendar month is a natural division, and such division conforms to commercial usage and to the time statements of debits and credits are made in car accounting.

Red Ash Coal Co. v. Central R.R. Co. of N.J., 37 I.C.C. 460, 462 (1916) (see also Peale, Peacock & Kerr v. Central R.R. Co. of N.J., 18 I.C.C. 25, 36 (1910) (“In the framing of demurrage regulations the object sought to be secured is the prompt release of cars. It is not intended that [the demurrage regulations] be so liberal as to defeat the end sought to be attained, but to operate to stimulate a shipper to aid the carrier to serve all shippers.”) Union Pacific’s use of a monthly cycle to reconcile its debits and credits is consistent with commercial usage and the accounting course of business, and is therefore wholly consistent with Board precedent.

The Board should modify its Policy Statement text on credit expiration to make it consistent with the foregoing precedent.⁶ As noted in the Supplemental Comments (at 21), “modifying the system to carry credits is a change that would make the goal behind the charges – to fairly realign customer practice and thereby help Union Pacific and its customers realize a fluid, improved network and a better, safer service product – more elusive and difficult to realize.”⁷

⁵ Id.

⁶ Generally speaking, notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551, et seq., is the mechanism by which an agency seeks to change law. The Board’s Policy Statement is therefore meant to be a statement of current law rather than a change to the current legal scheme.

⁷ Union Pacific also anticipated that a shift to non-expiring credits could create disruption for us and our customers:

[R]unning carry-over tallies over months introduces significant accounting complications into the process. Processes and software, all currently set to track credits and debits

The Board need only directly embrace the policy goals underlying credit expiration (as the ICC did in the course of adjudications dating back to 1910) to avoid unintentionally undermining the credit portion of the industry's accessorial and demurrage programs.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By: 
RHONDA S. FERGUSON
CRAIG V. RICHARDSON
JAMES B. BOLES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

between one month billing cycles, would have to be changed to account for longer periods or even an indefinite cycle time. Union Pacific and its customers would have to account for credits for longer periods – a development that would likely demand more, rather than less, resource commitments on both sides.

Supplemental Comments at 20.