

**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

DOCKET NO. EP 757

**POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES
AND CHARGES**

**COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) is a non-profit trade association representing the interests of approximately 500 small railroads and 500 railroad supply company members in legislative and regulatory matters. Small railroads operate 50,000 miles of track in 49 states, or approximately 38% of the national railroad network, originating or terminating one out of every four railcars moving on the national railroad network, serving customers who otherwise would be cut off from the network.

Background

On April 8, 2019, the Surface Transportation Board (“STB or Board”) issued a Notice of Public Hearing in Docket No. EP 754, Oversight Hearing on Demurrage & Accessorial Charges (“April 2019 Notice”), in which it announced a May 22, 2019 public hearing to hear testimony on railroad demurrage and accessorial charges. The April 2019 Notice directed Class I carriers to appear at the hearing and invited shippers, receivers, logistic providers, and other interested parties to participate. The April 2019 Notice was supplemented by another notice dated May 3, 2019 that extended the hearing for a second day.

In response to the April 2019 Notice, the Board received over 90 pre-hearing submissions and heard live testimony from 50 participants during the two days of hearings. In addition, it received 36 post-hearing comments, including comments from ASLRRA.

On October 7, 2019, the STB issued a decision in Docket No. EP 754, Policy Statement on Demurrage and Accessorial Rules and Charges (“October 7 Decision”), in which it announced it was providing information regarding certain principles the Board would consider when evaluating the reasonableness of demurrage and accessorial rule and charges. The Board said that its October

7 Decision arose “... in part, as a result of the testimony and comments in the Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754.” The goal, the Board stated, of the October 7 Decision is “to facilitate more effective private negotiations and problem solving...” between rail carriers and shippers concerning demurrage and accessorial rules and charges; to help prevent unnecessary future issues and future disputes from arising; and when they do arise, to help resolve them more efficiently and cost-effectively” October 7 Notice at 3. The Board noted, however, that it was not making any binding determinations and not promoting complete uniformity regarding demurrage and accessorial rules and charges as it recognized there are many ways to implement and administer reasonable rules and charges. The Board concluded by saying that rather than instituting an investigation, it was issuing the proposed policy statement to provide broad principles and soliciting public comment on them.

The Board then proceeded with a historical overview of demurrage and accessorial charges and practices and the case law regarding the principles concerning them. Its conclusion regarding demurrage was that “[t]he overarching purpose of demurrage is to incentivize the efficient use of rail assets ... by holding rail users accountable when their actions or operations use those resources beyond a specified period of time” October 7 Decision at 7 – 8 but that the period allowed the user must be reasonable. The STB said, however, that if the demurrage charges are imposed by a railroad when there are circumstances beyond the reasonable control of the user, those charges do not accomplish the purpose of demurrage.

The Board addressed several issues raised by rail users at the May hearing, including the reduction of free time provided by railroads, the bunching of railcars, and inconsistent rail service, which in the shippers’ estimation caused the unreasonable assessment of demurrage. On the other hand, the STB recognized that there were circumstances within a rail user’s control where assessment of demurrage is warranted. These include ensuring its facility is right-sized for the expected volume of incoming traffic, managing its pipeline to mitigate expected incoming car volumes that exceed its capacity, and order and release cars in the manner specified in reasonable tariff provisions. The conclusion the STB reached is that railroads and rail users have a shared responsibility regarding demurrage – railroads to implement and administrate reasonable demurrage rules and charges meant to meet the goals of demurrage and rail users to recognize and accept responsibility for promoting efficiencies within their control.

Overall, the Board determined that demurrage disputes are best resolved on a case-by-case basis. Its proposed policies in EP 757 are intended to provide guidance to both railroads and rail users when a dispute arises and needs to be adjudicated at the STB. For example, the Board said that railroads should be able to show its demurrage charges are designed to incentivize shipper and receiver behavior. A railroad should also be able to show its operating decisions or actions did not result in bunched deliveries and bunched charges not within the rail user's ability to control.

The Board also addressed several other demurrage related issues that arose during the EP 754, Oversight Hearing on Demurrage and Accessorial Charges.

One such issue involved the alleged overlapping charges imposed by some railroads. Regarding that issue, the Board said it would have significant concerns about the reasonableness of any tariff provision seeking to impose a charge in addition to an otherwise applicable demurrage charge for congestion or delay not within the reasonable control of the rail user to avoid.

Another issue concerned invoicing and dispute resolution. In order to provide transparency and allow the speedy resolution of disputes about a demurrage charge, the STB encouraged all railroads (including Class II and III railroads) to the extent they are capable, to provide at a minimum on a car-specific basis: the unique identifying information of each car; the waybill date; the status of each car as loaded or unloaded; the commodity being shipped; the shipper, consignee, and/or care/of party; the origin station and state of the shipment; the dates and times of actual placement (if applicable); notification of constructive placement (if applicable), and release; and the number of credits and debits issued for the shipment (if applicable). Additionally, the Board said that it expected railroads to bill for demurrage only when the charge is accurate and warranted, consistent with the purpose of demurrage.

Regarding dispute resolution processes, the Board said that rail users should be given a reasonable time to request more information about a demurrage charge and to dispute it. The railroad should respond to a dispute within a reasonable time, too. The Board also stated, subject to argument and evidence, that it saw no apparent justification for a railroad to impose a charge on a rail user when it disputes a demurrage charge. Finally, it encouraged railroads to agree to the STB's arbitration process set forth in 49 C.F.R. part 1108.

Regarding credit and debit rules related to demurrage, the Board said it had concerns about how some railroads provided for them and with the lack of reciprocity. It said that it was open to any argument and evidence respecting the credit/debit practices of a railroad, it offered preliminary

guidance, stating it would evaluate how credit rules and practices were administrated in any adjudication, including whether the rail user was afforded a reasonable opportunity to use credits before their expiration date. The Board said it would also consider the credits' purpose and function and whether rail users were compensated for the value of unused credits at the end of each month.

Next, the STB addressed what notice railroads provide rail users of a change in their demurrage tariffs. It stated it felt 20 days' notice was too short and strongly suggested that railroads provide a longer period of notice such as 45 or 60 days.

Finally, the Board discussed whether a railroad should be able to bill a receiver for demurrage. It said it would address this issue in Ex Parte 759, Demurrage Billing Requirements.

In its General Concluding Considerations, the Board iterates its position that there are two fundamental principles that railroads and rail users are encouraged to keep in mind; namely, (1) that demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers or receivers to encourage the efficient use of rail assets and (2) that transparency and mutual accountability by both railroads and rail users are important factors in the establishment and administration of reasonable demurrage and accessorial charges.

ASLRRA Comments

Subject to the caveats below, ASLRRA generally agrees with the principles that the STB recounted as the overarching purpose of demurrage, which are: (1) to incentivize the efficient use of rail assets by holding rail users accountable when the actions or operations use those resources beyond a specified time and (2) that any period allowed a rail user before the imposition of demurrage must be reasonable. It also agrees that demurrage should not be charged to a rail user if the delay is beyond the reasonable control of that rail user. ASLRRA agrees with the Board's statement that demurrage disputes are best resolved on a case-by-case basis. Arbitration of such cases would be far less costly and time consuming than litigation and would provide a prompt resolution to a dispute.

Exclusion of Small Railroads

ASLRRA appreciates that the STB recognizes the importance of small railroads in the services they provide to the national rail network as the providers of the first mile/last mile rail providers and its exemption of small railroads in this proceeding and the companion proceeding in Docket No. EP 759, Demurrage Billing Requirements and Docket No. EP 760, Exclusion of Demurrage Regulation from Certain Class Exceptions. It is critical that small railroads continue

to be exempted as proposed by the Board in these proceedings to ensure their continued success as part of the national rail network. As explained below, these small businesses do not have the resources to take on the additional burdens the proposals contained in this proceeding and the imposition of them would impede their role as the first mile/last mile service providers.

Transparency Issue

To encourage transparency, the STB encouraged all railroads (including Class II and III railroads) to the extent they are capable, to provide a long list of information to the rail user, at a minimum on a car-specific basis. While ASLRRA will address this more specifically in its Comments in Ex Parte 759, Demurrage Billing Requirements, suffice it to say at this juncture that it accepts the premise that Class II and III railroads should provide accurate demurrage statements with as much information as reasonably possible, there are both structural and technical reasons that detailed demurrage billings as proposed by the STB simply are not be reasonable or possible for small railroads. Small railroads simply lack the personnel, the resources, and some of the offline data to supply the lengthy list of information suggested in the proposed guidelines. As a result, these Class II and Class III railroads should remain exempted.

Adjudication of Demurrage Issue

In using the proposed policies when adjudicating any dispute regarding a demurrage charge, the STB needs to take into account that it is axiomatic that demurrage is an important tool to reflect the cost to use a railroad-owned asset, whether it is an idle railroad-owned freight car under control of a customer or the railroad track on which it sits. That principle does not appear to be recognized or commented upon in the October 7 Decision and in fairness to railroads, it should be part of the proposed guidance.

Additionally, small railroads should not be included in costly and time-consuming arbitration both because the concerns raised in EP 754, Oversight Hearing on Demurrage & Accessorial Charges are generally not a result of the actions of small railroads and because small railroads do not have the resources to become embroiled in litigation.

Ensuring the Correct Emphasis in the Use of the Guidelines

ASLRRA would also respectfully request that the STB put greater emphasis in the guidelines to clarify that there are circumstances within a rail user's control where assessment of demurrage is warranted and equitable for all railroads. There should not be a presumption that all demurrage is unfair. To balance the burdens on shippers and railroads, ASLRRA supports the

notion of facts and circumstances analysis and believe that in any complaint brought before the Board through arbitration, various mitigating factors should be considered, such as whether the shipper took any steps to right-size its facility and staffing for the expected volume of incoming traffic, whether it managed its pipeline to mitigate expected incoming car volumes that exceed its capacity, and whether it ordered and released cars in the manner specified in reasonable tariff provisions. Further, the additional railroad costs borne by the railroads associated with constructively placed private cars that cannot be accepted by the receiver should also be considered. Demurrage (or a similar charge) billed by the serving carrier is appropriate in such cases because private cars not placed at the customer's facility consume rail capacity and increases congestion and operating costs. The Board should recognize and consider the shared responsibility of railroads and shippers in managing the fluidity of the rail network in its proposed guidelines.

Conclusion

ASLRRA reiterates that a one-size fits all railroads does not work for demurrage issues and placing global demands on the entire freight railroad industry for demurrage billing requirements will likely create financial stress on those small railroads least able to comply with the new regulatory demands. For the reasons set forth above, keeping in place the proposed exemption of Class II and III railroads from new demurrage billing requirements is critical to the success of the Class II and Class III railroad industry.

Respectfully submitted,

A handwritten signature in cursive script that reads "Keith T. Borman".

Keith T. Borman
Senior Vice President and General Counsel
American Short Line & Regional Railroad Association