

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 757

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

COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) respectfully files these comments in response to the proposed policy statement served in the above-captioned docket on October 7, 2019 (“Proposed Policy Statement”). CSXT joins the opening comments of the Association of American Railroads (“AAR”) in full. As AAR explains, policy statements by definition cannot be used to change the law. But the suggestion in the Proposed Policy Statement that demurrage should not be assessed for a delay unless a railroad can prove that a receiver was at fault for causing that delay would be a significant break from current law, and one that would subvert the purpose of demurrage.

The Proposed Policy Statement correctly notes that demurrage “both compensates rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (i.e., ‘free time’) for loading and unloading and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.” Proposed Policy Statement at 2. But its later suggestion that demurrage should not be assessed on a receiver unless that receiver was at fault—on the theory that the receiver could not have been incentivized to act differently—ignores the compensation function of demurrage. Loading and unloading delays impose real costs on railroads, including the congestion costs created by having cars taking up valuable space

in railroad serving yards. The law allows railroads to recover demurrage as compensation for these costs imposed by the receiver's traffic without having to demonstrate fault. See AAR Comments at 2-3, Ex Parte 757 (filed Nov. 6, 2019) (citing relevant agency and court precedent). This is no different than how any other commercial company would treat delays for detaining an asset or occupying property for longer than agreed. Hotels do not need to demonstrate fault to charge guests for failing to check out on time; parking garages do not need to demonstrate fault to impose additional charges on customers who do not remove their cars in time; and rental car companies do not need to demonstrate fault to charge customers an extra day for not returning their cars in time. In all these situations, the customer is occupying an asset for longer than the agreed time, and the companies whose assets are being used have a right to recover those costs regardless of whether the customer had an excuse for its tardiness.

The same principle applies for demurrage, where the compensation function of demurrage means that railroads are entitled to recover for costs imposed by receiver's traffic without having to demonstrate wrongful conduct by receivers. Railroads cannot collect demurrage for delays attributable to the railroad's conduct, but the Proposed Policy Statement's suggestion that railroads are also required to prove shipper fault is incorrect.

While it is important for the Proposed Policy Statement to state the law accurately, CSXT notes that in its experience, "no customer is 'powerless' to avoid a demurrage bill." See Supplemental Comments of CSX Transportation, Inc. Ex Parte 754, at 10 (filed June 6, 2019). CSXT's post-hearing comments detailed the multiple options that are available to customers to reduce or eliminate demurrage liability, and CSXT's Vice President of Sales and Customer Engagement Arthur Adams has testified about CSXT's "engage[ment] with its customers to help them take advantage of their options to increase efficiency and reduce or eliminate demurrage

charges.” Oversight Hearing on Demurrage and Accessorial Charges, Ex Parte 754 754, Day 1 Transcript at 116-21 (May 23, 2019). In CSXT’s experience, the instances where a customer has no choice but to incur demurrage charges are rare, and CSXT is always willing to work with its customers on strategies to reduce or eliminate the loading and unloading delays that lead to demurrage charges.

CSXT also offers a few brief comments on other portions of the Proposed Policy Statement. (CSXT notes that it is filing comments in the Ex Parte 759 Demurrage Billing Requirements proceeding, which address some of the Proposed Policy Statement’s comments about demurrage billing.)

Bunching. The Proposed Policy Statement’s conclusion that demurrage disputes related to bunching “are best addressed in the context of case-specific facts” is correct, and the Board should adhere to its policy of considering individual facts and circumstances when assessing the reasonableness of any charges. Proposed Policy Statement at 14. Current law already prohibits railroads from collecting demurrage for delays caused by the railroad, and CSXT’s practice is to not bill customers for demurrage that is attributable to bunching on CSXT.

Credits. The Proposed Policy Statement should take a similarly fact-specific approach to any future claims related to demurrage credit programs. CSXT provided the Board with detailed information about CSXT’s credit program in the Ex Parte 754 proceeding, and CSXT believes that its policies in this area are reasonable and fair.

Expiration of Credits. The Proposed Policy Statement also makes the suggestion that demurrage credits should not expire. CSXT submits that the Board’s concern about credits “expiring” is misplaced. Any alleged problem with service-failure-related credits expiring before they are applied to offset the associated demurrage is largely hypothetical. As a practical

matter, credits for service failures are targeted to cancel the demurrage that otherwise would have been incurred due to that service failure, so it would be unusual for such credits to build up over time. Moreover, there is no basis for allowing credits to build up indefinitely. Credits have a defined purpose: to allow sufficient time for loading and unloading and to remedy service disruptions. Those purposes are not served by allowing shippers to keep credits long after cars have been loaded and unloaded or after the effects of service disruptions have dissipated.

For these reasons, the Board should revise the Proposed Policy Statement to (1) more accurately reflect the settled law that railroads do not need to demonstrate receiver fault to collect demurrage and (2) avoid generalized pronouncements regarding the reasonableness of demurrage charges and policies, which are necessarily fact-specific inquiries that should continue to be considered on a case-by-case basis. CSXT refers the Board to the summary of demurrage law included in CSXT's post-hearing comments in Ex Parte 754, which may be useful if the Board chooses to issue a revised policy statement. *See* Supplemental Comments of CSX Transportation, Inc. Ex Parte 754, at 3-9 (filed June 6, 2019).

Respectfully submitted,

/s/ Raymond A. Atkins

John P. Patelli
Jason M. Marques
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202

Raymond A. Atkins
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

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