

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 757
Policy Statement on Demurrage and Accessorial Rules and Charges

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STB Docket No. EP 759
Demurrage Billing Requirements

ENTERED
Office of Proceedings
November 6, 2019
Part of
Public Record

STB Docket No. EP 760
Exclusion of Demurrage Regulation from Certain Class Exemptions

**COMMENTS OF
THE AMERICAN FOREST & PAPER ASSOCIATION**

Karyn A. Booth
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

*Counsel for
The American Forest & Paper Association*

Dated: November 6, 2019

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Pursuant to the notices served by the Surface Transportation Board (“STB” or “Board”), American Forest & Paper Association (“AF&PA”) hereby submits its comments on the proposed Policy Statement on Demurrage and Accessorial Rules and Charges,¹ proposed rules on Demurrage Billing Requirements,² and proposed rules on Exclusion of Demurrage Regulation from Certain Class Exemptions.³

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy.

¹ Policy Statement on Demurrage and Accessorial Rules and Charges, STB Docket No. EP 757 (served October 7, 2019) (“Policy Statement”).

² Demurrage Billing Requirements, STB Docket No. EP 759 (served October 7, 2019) (“Billing Requirements NPRM”).

³ Exclusion of Demurrage Regulation from Certain Class Exemptions, STB Docket No. EP 760 (served October 7, 2019) (“Class Exemption NPRM”).

AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures nearly \$300 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$55 billion annually and is among the top 10 manufacturing sector employers in 45 states.

Freight rail shipping is a vital part of the transportation network for our industry to move raw materials to mills, and finished products to customers. In 2014, paper and wood product manufacturers relied on the railroad industry to move about 33 million tons of pulp, paper, and converted products. Despite our members' dependency on the railroad industry, our companies suffer from the lack of adequate rail competition, as nearly one-third of forest products facilities have access to only one rail carrier. AF&PA members have also incurred significant demurrage and accessorial charges during recent years and we expressed our concerns about unreasonable demurrage practices in the Board's recent proceedings. Thus, AF&PA has a strong interest in the outcome of these proceedings.

AF&PA commends the Board for addressing many of the issues raised by AF&PA, and other rail customers, during the oversight hearing held before the Board.⁴ As part of that proceeding, AF&PA submitted written testimony in STB Docket No. 754.⁵ AF&PA strongly supports the Board's proposed Policy Statement and rules issued on October 7, 2019 that seek to make demurrage rules and practices more reasonable and consistent with their underlying

⁴ Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019).

⁵ Written Submission of the American Forest & Paper Association, STB Docket No. EP 754 (May 8, 2019) ("AF&PA Comments").

purpose to promote an efficient rail network for the benefit of all rail stakeholders. AF&PA provides its comments on each proposal below.

I.

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

The Board proposes to issue a Policy Statement, which sets out certain principles that it will “consider in evaluating the reasonableness of demurrage and accessorial rules and charges.”⁶ The Policy Statement contains two general principles that would be taken into account in the Board’s evaluation. First, the Board explains that “demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets.”⁷ As a consequence, the Board adds, “revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose.”⁸ Second, the Board states that “transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges.”⁹ AF&PA strongly agrees with both of these principles, and believes that they provide valuable guidance for the future administration of demurrage and accessorial charges. AF&PA commends the Board for setting forth these general principles, which are consistent with AF&PA’s proposals set forth in its previous filing to the Board.¹⁰

⁶ Policy Statement at 1.

⁷ *Id.* at 21.

⁸ *Id.*

⁹ *Id.*

¹⁰ AF&PA Comments at 7 (AF&PA asked the Board to take the following principles into account while evaluating the railroad practices in demurrage and storage charges: (i) whether the underlying purpose of demurrage and related charges is being met, (ii) whether the charges are intended to generate a new revenue stream, and (iii) whether railroad customers are given sufficient notice to adjust their operations to avoid the charges).

The Board's proposed Policy Statement also includes other principles related to (a) free time, (b) bunching, (c) overlapping charges, (d) invoicing and dispute resolution, (e) credits, and (f) notice of major tariff changes. AF&PA provides its comments on these specific issues below.

a) Free Time

The proposed Policy Statement includes the Board's views on the free time provided by rail carriers for the use of their assets (i.e., rail cars and tracks) by shippers and receivers. Specifically, the Board explains that it would have significant concerns on reductions in free time that impedes shippers' and receivers' ability to address variable rail service, and that do not incentivize them to use the rail assets more efficiently.¹¹ The Board clarifies that assessing demurrage charges when delays result from carrier-caused circumstances, such as bunching, missed switches, or transit days to move cars from constructive placement to remote locations, may be viewed as unreasonable, because these circumstances are beyond the shippers' and receivers' reasonable control.¹² Thus, it is impossible to avoid these charges and the charges would not fulfill their underlying purpose to promote efficiencies in the use of rail assets.

AF&PA generally agrees with the Board's principles regarding free time. AF&PA previously explained that recent reductions in free time (i.e., 24 hours of free time for system cars, and zero days of free time for private cars) have created significant challenges for AF&PA members.¹³ Some AF&PA members' manufacturing processes makes it impossible to load and unload system cars within 24 hours.¹⁴ Whereas, zero free time for private cars essentially translates into an automatic assessment of demurrage charges, "since the railroad can deliver cars after hours at our members' facilities, yet the storage clock starts after midnight once cars are

¹¹ Policy Statement at 12.

¹² Id.

¹³ AF&PA Comments at 3.

¹⁴ Id.

constructively placed.”¹⁵ These challenges are aggravated when railroad service is erratic and irregular, which is often the case. While AF&PA believes that the Board’s principles on free time clarify the proper incentives for the railroads to adhere to in future administration of their demurrage charges, it remains concerned that based on continuing service variabilities the Board should go further and declare that railroads should provide at least 48 hours free time for system cars and 24 hours free time for private cars. At a minimum, the current practice of zero days for private cars and 24 hours for system cars should be presumed unreasonable, and the railroads should bear of the burden of establishing reasonableness in the context of a specific fact-scenario that plainly and consistently shows that the purpose of demurrage can and be met.

b) Bunching

Similar to free time reductions, AF&PA members challenged the reasonableness of demurrage charges that result from bunched deliveries. On the issue of bunching, the Board states that “demurrage disputes pertaining to bunching are best addressed in the context of case-specific facts.”¹⁶ Nonetheless, the Board adds that the purpose of demurrage is not fulfilled if shippers and receivers are assessed demurrage charges caused by bunched deliveries.¹⁷ Furthermore, the Board explains that this principle should encompass “both when cars originate with the serving carrier and when cars originate on an upstream carrier.”¹⁸ Finally, the Board comments that the railroads should consider whether their automatic billing processes sufficiently account for bunching.¹⁹

AF&PA strongly agrees with the Board’s findings in connection with bunched rail cars. As AF&PA explained in its previous filing, bunching is a serious problem for many AF&PA

¹⁵ Id.

¹⁶ Policy Statement at 14.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

members.²⁰ AF&PA reiterates that the railroads' variable service which can result in bunched car deliveries should not result in additional demurrage charges that are beyond the shippers' and receivers' control. AF&PA also commends the Board for addressing the issue of upstream bunching, which typically falls outside of the railroads' demurrage credits programs and has been among the concern of many AF&PA members.²¹

c) Overlapping Charges

AF&PA commends the Board for clearly stipulating its concerns about the reasonableness of accessorial charges (e.g., "congestion" charge assessed by NSR and "not prepared for service" charge assessed by UP) that aim to address congestion and incentivize network efficiencies and that are assessed in addition to demurrage charges which are designed for the very same purpose. AF&PA expressed its concerns about the potential for "double-dipping" by the railroads who engage in such practices which appear designed to establish a new revenue stream. AF&PA strongly supports the Board's guidance on this issue.

d) Invoicing and Dispute Resolution

AF&PA and many other rail customers expressed serious concerns about inaccurate demurrage invoices and the administrative burdens associated with auditing and disputing demurrage charges. The Board found these reports "deeply troubling" and AF&PA strongly agrees with the Board's statements that "[i]f rail carrier practices effectively preclude a rail user from determining what happened, then the user would not be able to determine whether it was responsible for the delay; the responsible party would not be incentivized to modify its behavior; and the demurrage charges would not achieve their purpose."²² AF&PA further applauds the Board for addressing issues related to dispute resolution, including that there should be a

²⁰ AF&PA Comments at 4-5.

²¹ *Id.* at 5.

²² Policy Statement at 16.

reasonable time period to request further information, dispute charges and for the railroads to respond, and that it is not reasonable to impose charges that could deter shippers and receivers from pursuing a claim.²³ Moreover, AF&PA strongly agrees with the Board's statement that it "expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage" and it shares the Board's "serious concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim."²⁴ AF&PA will address the rest of the Board's billing proposals, which are reflected in the Board's notice in STB Docket No. 759, separately below.

e) Credits

In the proposed Policy Statement, the Board explains its views on the reasonableness of railroad credit systems and practices in connection with demurrage assessments that apply to carrier-caused delays. Accordingly, the Board expressed its concerns with the lack of reciprocity in current credit policies especially with respect to expiring credits before they reasonably may be used by a customer. The Board states that in determining the reasonableness of a credit system, it would consider "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."²⁵ The Board also suggested that as an alternative to allowing credits to expire, railroads could compensate shippers and receivers "for unused credits at the end of each month."²⁶

AF&PA commends the Board for addressing the issues related to the expiry of the credits, which was among the issues raised by AF&PA in its previous filing in STB Docket No.

²³ Id. at 17.

²⁴ Id.

²⁵ Id. at 18.

²⁶ Id.

754.²⁷ AF&PA also strongly agrees with the Board's proposal that encourages the railroads to compensate their customers for unused credits, which would be a constructive step forward towards establishing true reciprocity in the administration of demurrage charges. However, AF&PA believes that the Board should take further action to improve reciprocity by clarifying that railroads must offer credits to address delays that are beyond the control the shipper or receiver and that the application of credits should be identified, verified and applied by the railroad in the first instance, rather than forcing rail customers to determine whether credits apply based on the railroad service failures, force majeure, or other circumstances beyond the control of the customer. This request for clarification in the Policy Statement appears consistent with the Board's approach to demurrage billing requirements set forth in the EP 759 docket.

f) Notice of Major Tariff Changes

AF&PA commends the Board for recognizing the insufficiency of 45 days of notice for the recent changes implemented by the railroads. As AF&PA previously explained, 45 days "is not sufficient to secure alternative storage track, assess potential added infrastructure options."²⁸

AF&PA also applauds the Board for establishing the principle that "railroads should provide sufficient notice of major changes to demurrage and accessorial tariffs to enable shippers and receivers to evaluate, plan, and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges,"²⁹ and for encouraging the railroads to take other measures to help their customers, including "delayed billing and working with those that needed more flexibility."³⁰

AF&PA strongly agrees with the Board's views on notice of major tariff changes.

²⁷ AF&PA Testimony at 5 ("[c]redits also expire in some cases too early, and before they can be used to offset a charge incurred in a different situation if the incident occurred in a different month.")

²⁸ *Id.* at 8.

²⁹ Policy Statement at 19.

³⁰ *Id.*

II.

NOTICE OF PROPOSED RULEMAKING ON DEMURRAGE BILLING REQUIREMENTS

The Board issued a notice of proposed rulemaking and requested comments on proposed rules in connection with demurrage billing requirements. Specifically, the Board proposes to (i) impose minimum information requirements in demurrage invoices applicable to Class I railroads, (ii) require all Class I railroads “to ensure that the demurrage charges are accurate and warranted,”³¹ and (iii) require Class I carriers to “send demurrage invoices directly to the shipper instead of the warehousemen if the shipper and warehousemen agree to such an arrangement and notify the rail carrier of the agreement.”³²

AF&PA commends the Board for addressing these very important issues related to demurrage invoices. AF&PA previously asked the Board to initiate a rulemaking proceeding that would “provide fair processes for billing and dispute resolution,”³³ and includes a requirement “that the railroads furnish the invoiced party with both the date and time that a car is constructively placed.”³⁴ AF&PA thanks the Board for responding to AF&PA’s and many other rail customers’ concerns voiced during the oversight hearing.

AF&PA believes that the minimum information requirements, which include a list of components for each rail car, are proper and would help substantially to resolve issues related to inadequate information on demurrage invoices. AF&PA commends the Board for proposing to establish the much needed standards for demurrage invoices, and believes that once the proposal is promulgated, demurrage invoices containing the designated elements will improve the ability of shippers and receivers to review, audit and, if necessary, challenge the invoices, thereby

³¹ Billing Requirements NPRM at 10.

³² *Id.* at 11.

³³ AF&PA Comments at 9.

³⁴ *Id.* at 10.

reducing administrative burdens and costs and increasing efficiencies. Furthermore, AF&PA strongly agrees with the Board that the railroads should be required to ensure, before sending the demurrage invoices to their customers, that they are accurate and warranted.

In its Notice, the Board seeks to apply the demurrage billing requirements to only Class I railroads but has requested comments as to whether they should also apply to Class II and III carriers. AF&PA urges the Board to require Class II and Class III railroads to also comply with the requirements set forth in the proposal. AF&PA believes that the absence of regulation of demurrage invoices for Class II and III railroads may result in Class I railroads exploiting the lack of regulation for other carriers and could create a loop hole that would lead to a shift in having demurrage invoices issued by Class II and Class III railroads where possible to evade the regulatory requirements. Additionally, AF&PA does not believe that the billing requirements would be too burdensome or costly for the Class II and III railroads. However, if this remains a concern, the Board could apply the regulation to all carriers but allow for an exemption to be granted on a case-by-case basis where the costs or burdens of compliance are clearly established.

III.

NOTICE OF PROPOSED RULEMAKING ON EXCLUSION OF DEMURRAGE REGULATION FROM CERTAIN CLASS EXEMPTIONS

The Board initiated another rulemaking proceeding to amend its regulations relating to class exemptions to clarify the continued application of demurrage regulation. Specifically, the Board proposes to amend these regulations to “unambiguously state that demurrage continues to be subject to Board regulation,”³⁵ and to “revoke, in part, the exemption that currently covers certain agricultural commodities so that exemption would not apply to the regulation of

³⁵ Class Exemption NPRM at 1.

demurrage.”³⁶

AF&PA strongly supports the Board’s proposals. Forest and paper products are among the commodities that have been exempted from regulation.³⁷ AF&PA is an active participant in the Board’s EP 704 proceeding where it has requested revocation of certain of the exemptions applied to forest and paper products.³⁸ As AF&PA stated in its filings, forest and paper products need to “have access to the same oversight as other industries.”³⁹ AF&PA believes that the Board’s proposal will ensure that, at least to the extent that the demurrage regulations are concerned, the forest and paper industry has a level playing field with other industries, and has direct access to the Board should it be necessary to pursue recourse against the railroads on demurrage rules and practices. Accordingly, AF&PA believes that it is of utmost importance to expressly clarify the application of the Board’s demurrage regulation to exempt commodities to avoid any confusion. Accordingly, ISRI strongly supports adoption of the Board’s proposed rules in EP 760.

IV.

CONCLUSION

AF&PA appreciates the Board’s efforts to clarify and address the regulation of demurrage and accessorial rules and practices as proposed in its three separate orders in order to

³⁶ Id.

³⁷ 49 C.F.R. § 1039.11.

³⁸ Review of Commodity, Boxcar, and TOFC/COFC Exemptions, STB Docket No. 704.

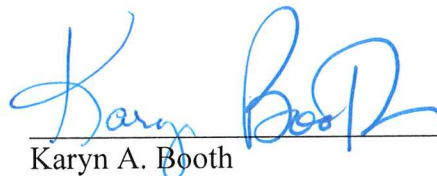
³⁹ Comments in Response to Memoranda Summarizing Ex Parte Communications, STB Docket No. 704 (July 16, 2019).

address serious concerns about unreasonable railroad rules and practices. AF&PA urges the Board to adopt the proposals consistent with the comments set forth herein.

Respectfully submitted,

The American Forest & Paper Association

By its attorney:



Karyn A. Booth
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Dated: November 6, 2019