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Office of Proceedings
November 6, 2019
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

**COMMENTS OF
THE CORN REFINERS ASSOCIATION**

Pursuant to the Board's notice served on October 7, 2019 The Corn Refiners Association ("CRA") hereby submits its comments on the Notice of Proposed Statement of Board Policy regarding Policy Statement on Demurrage and Accessorial Rules and Charges issued by the Surface Transportation Board ("STB" or "Board") in the above-captioned docket.¹ CRA praises the Board for addressing many of the issues related to demurrage and accessorial charges raised during the two-day oversight hearing before the Board.²

CRA is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. CRA is comprised of six member companies, including Archer Daniels Midland Company, Cargill, Grain Processing Corporation, Ingredion Incorporated, Roquette America, Inc. and Tate & Lyle Americas. For decades, corn refiners have been perfecting the process of separating corn into its component parts to create a myriad of value-added products. Our member companies accomplish all of this with more than 8,000 hardworking employees and one and a half billion bushels of corn, or about ten percent of America's corn crop. Together, our industry

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

² Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754 (served April 8, 2019).

supports an additional quarter-million American jobs and has an annual economic impact of \$54 billion.

Corn refining is a value-added agricultural process during which kernels are separated into their principal parts (starch, germ, fiber, and protein). These ingredients are then utilized in thousands of different consumer products and industrial goods used every day all around the world. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber. For more than 150 years, our corn-related innovations in chemistry and technology have made food taste better, cosmetics last longer, pharmaceuticals easier to swallow, and plastics more environmentally friendly. And now, corn products are used in 3-D printing inks and studied by nanotechnology scientists as a method for delivering cancer treatments.

CRA members are highly dependent upon reliable and economic rail transportation for their products, both for inbound shipments of raw materials and outbound shipments of finished products. Rail service issues, especially with the recent implementation of the Precision Scheduled Railroading (“PSR”), have disrupted the business of CRA members, resulting in additional costs, threatening our members' production, and jeopardizing their customer relationships. CRA testified in the oversight hearing held before the Board on May 22-23, 2019, in STB Docket No. EP 754.³ Therefore, CRA has a strong interest in this proceeding.

The proposed Policy Statement contains a variety of principles according to which the Board aims to evaluate the reasonableness of demurrage and accessorial rules and charges.⁴ CRA commends the Board for laying out these principles in the proposed Policy Statement, which

³ Written Testimony of the Corn Refiners Association, STB Docket No. EP 754 (May 8, 2019) (“CRA Testimony”).

⁴ Policy Statement at 1.

addresses many of the issues raised by various parties during the oversight hearing. CRA believes that the proposed Policy Statement will prove to be a valuable guidance for both the railroads and shippers and receivers in future administration of demurrage and accessorial charges.

On the other hand, CRA is disappointed that the Board did not take a stronger position against the recent changes in demurrage and accessorial rules and practices. CRA believes that the Board should investigate, and declare the recent free-time reductions unlawful, and evaluate the recent changes based on the four factors listed in CRA's previous filing in STB Docket No. 754.⁵ Although CRA appreciates the Board's current proposal, CRA also believes that issuing a Policy Statement, which naturally lacks any real teeth, falls short of the industry's expectations or what the industry actually needs. CRA strongly believes that more can be achieved in this proceeding by the Board initiating an investigation on the recent changes.

Nonetheless, CRA believes that the Board's proposed Policy Statement addresses many of the most important issues voiced by the railroad customers during the oversight hearing. The Board proposes two general principles that would govern the Board's evaluation of reasonableness of demurrage and accessorial rules and practices in future proceedings. First, the Board proposes to declare 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."⁶ The Board adds that "revenue from demurrage charges should reflect reasonable financial

⁵ CRA Testimony at 1 (CRA listed the following principles: 1) ensure reciprocity on demurrage and accessorial charges so that railroads compensate shippers for service failures, 2) the ability of shippers to comply with the new rules in a timely manner, if at all, 3) the role of rail service inconsistencies in the assessment of charges, and 4) railroad motivations, especially how railroads have profited from the new rules and charges either directly through demurrage payments or indirectly through new storage track leases and switching charges to and from remote storage tracks).

⁶ Policy Statement at 21.

incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose.”⁷ 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.”⁸ CRA commends the Board for addressing these two fundamental principles. CRA strongly agrees with the Board’s views on both principles.

Furthermore, the Board proposes to declare other principles in connection with (i) free time, (ii) bunching, (iii) overlapping charges, (iv) invoicing and dispute resolution, (v) credits, (vi) notice of tariff changes, and (vii) demurrage billing to shippers instead of warehousemen. CRA hereby provides its comments on these issues.

I. Free Time

The Board’s proposed Policy Statement includes a section discussing the free time provided by railroads for the use of their assets (i.e., railroad track and rail cars) by their customers. Accordingly, the Board declares that “[t]hat period of time must be reasonable and consistent with the purpose of demurrage.”⁹ The Board further explains that it “is troubled by the adverse impact of reductions in free time to rail users and the potentially negative consequences of providing no credit days for private cars if rail carriers do not have reasonable rules and practices for dealing with, among other things, variability in service and carrier-caused bunching, and for ensuring that shippers and receivers have a reasonable opportunity to evaluate and order incoming cars before

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 11.

demurrage begins to accrue.”¹⁰ Finally, the Board expresses its “serious concerns about the reasonableness of reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service and do not serve to incentivize their behavior to encourage the efficient use of rail assets,” and states that demurrage does not fulfill its purpose if it accrues due to certain carrier-caused circumstances beyond the shipper’s or receiver’s reasonable control.¹¹

CRA strongly agrees with the Board’s principles on free time practices. CRA reiterates that demurrage and storage charges serve a valuable purpose.¹² However, recent reductions of free time, where the railroads provide 24 hours of free time for system cars, and zero days of free time for private cars, “are more difficult and expensive for even the most efficient shippers to be compliant.”¹³ With the current rules, a receiver can have less than a minute to place a car to avoid demurrage or storage charges, where it has received a private car at 11:59 p.m.¹⁴ Thus, CRA believes that the Board’s principles on free time practices will facilitate the resolution of many issues CRA members are experiencing with the railroads.

CRA is concerned, however, that the Board did not clearly declare that zero days of free time for private cars is unreasonable. The Board’s proposed Policy Statement suggests that the Board considers zero days of free time as unreasonable if the serving railroad does not have credit

¹⁰ *Id.*

¹¹ *Id.* at 12 (the Board explains that such circumstances include: charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by the missed switch); charging demurrage for transit days to move cars from constructive placement in remote locations; or charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the shipper or receiver has had a reasonable opportunity to process the excess volume of incoming cars; and changes in historical practices on which the shipper or receiver has long relied on).

¹² CRA Testimony at 3.

¹³ *Id.*

¹⁴ *Id.* at 4.

mechanisms to deal with service irregularities. However, railroad service has been erratic for many years, and the irregularities only intensified with the recent implementation of PSR. Thus, reducing the free time for private cars to zero days eliminates a very valuable buffer the shippers and receivers had to avoid demurrage charges in these circumstances. Although the Board explains in the proposed Policy Statement that it deems demurrage charges exacerbated by carrier-caused circumstances as unreasonable, CRA believes that the Board should unequivocally declare that zero days of free time is unreasonable, regardless of the credit mechanisms. Otherwise, the rail carriers that provide such mechanism will have merely shifted the burden to shippers and receivers to prove that the carrier-caused circumstances caused them to accrue demurrage charges. CRA believes that, to the extent that the irregularities continue to exist in the rail service, the recent reductions in free time should be declared as unreasonable.

II. Bunching

In the proposed Policy Statement, the Board explains that the purpose of demurrage is not fulfilled if the railroads assess demurrage charges caused by bunching of rail cars “that are not within the reasonable control of the shipper or receiver to avoid.”¹⁵ Furthermore, the Board states that the Board’s principles encompass both “when cars originate with the serving carrier and when cars originate on an upstream carrier.”¹⁶ The Board asks the rail carriers “to take these considerations into account in their future administration of demurrage rules and charges, particularly in evaluating whether their automatic billing processes sufficiently account for carrier-caused bunching.”¹⁷

¹⁵ Policy Statement at 14.

¹⁶ *Id.*

¹⁷ *Id.*

CRA commends the Board for addressing these important issues related to demurrage charges caused by bunched deliveries. CRA members have been receiving bunched deliveries increasingly amid the implementation of the PSR by certain railroads. As CRA previously explained, “[w]hen railroads deliver inbound cars in bunches, despite our members' best efforts to spread them out, our members cannot accept delivery of those cars all at once,” and thus start incurring demurrage charges that are not within their reasonable control.¹⁸ CRA concurs with the Board’s views on the reasonableness of demurrage charges caused by bunched deliveries. CRA strongly believes that assessment of demurrage charges caused by circumstances beyond the receivers’ reasonable control should be viewed as blatantly unreasonable. CRA also praises the Board for addressing upstream bunching, which has been another important concern for the CRA members.

III. Overlapping Charges

The proposed Policy Statement includes the Board’s views on overlapping charges (e.g., “congestion” charge assessed by NSR, and “not prepared for service” charge assessed by UP).¹⁹ The Board defines these charges as “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,” and stated that it would have significant concerns about the reasonableness of these charges.²⁰ CRA strongly agrees with the Board’s views on overlapping charges, and adds that these charges result in double-recovery for railroads because they serve the same purpose as demurrage charges.

¹⁸ CRA Testimony at 4.

¹⁹ Policy Statement at 15.

²⁰ *Id.*

IV. Invoicing and Dispute Resolution

The Board's proposed Policy Statement includes certain minimum information requirements in demurrage bills, as well as other recommended billing and dispute resolution practices, and the Board also initiated a rulemaking proceeding in another STB docket relating to the same issues.²¹ CRA strongly agrees with the minimum information requirements and commends the Board for expressing its "concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim."²² CRA intends to respond to the Board's proposals with another filing in Docket No. EP 759.

V. Credits

In the proposed Policy Statement, the Board addresses many issues raised by various parties during the oversight hearing related to credits issued by the railroads for carrier-caused circumstances and free time. Specifically, the Board expressed its concerns about the lack of reciprocity, "particularly where the expiration date of a credit, in effect, 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."²³ The Board further stated that it would evaluate the credit rules and practices in determining the reasonableness of demurrage rules and charges, including "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."²⁴ Finally, the Board

²¹ *Id.* at 16-17.

²² *Id.* at 17

²³ *Id.* at 18.

²⁴ *Id.*

stated that its concerns would be “allayed if shippers and receivers were compensated for the value of unused credits at the end of each month, rather than the credits merely expiring.”²⁵

CRA concurs with the Board’s statements in connection with the credit issues and reciprocity. CRA believes that these principles will help alleviate many of the concerns the shippers and receivers are experiencing with rail carriers. However, CRA also believes that the Board should adopt a stronger position against the lack of reciprocity in the rail industry. Although CRA appreciates the Board’s proposed concept of railroads compensating the shippers and receivers for unused credits at the end of each month, CRA also believes that more can be achieved in this proceeding by providing greater reciprocity, which was among the most problematic issues raised by CRA and many others in the prior hearing. Specifically, CRA proposed that the Board require railroads “to compensate shippers when they are unable to accept rail cars due to railroad service failures and inconsistencies,”²⁶ to require railroads to “pay a comparable daily charge for each day a private rail car is unreasonably detained by a rail carrier,”²⁷ or to require “railroads ... [to] compensate shippers for acts and omissions that affect shipper operations.”²⁸ CRA believes that the Board should include these proposals in the final Policy Statement.

VI. Notice of Major Tariff Changes

The Board’s proposed Policy Statement addresses another important issue related to notice of major tariff changes. Accordingly, the Board stated that “railroads should provide sufficient notice of major changes to demurrage or accessorial tariffs to enable shippers and receivers to

²⁵ *Id.*

²⁶ CRA Testimony at 5.

²⁷ *Id.* at 6.

²⁸ *Id.*

evaluate, plan and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges.”²⁹ Furthermore, the Board encouraged rail carriers to take other actions, such as delayed billing and working with those that need more flexibility, and “to thoughtfully consider the amount of advance notice that should be given, and to be especially cognizant of and accommodating to any unique obstacles a shipper or receiver may face in adapting to demurrage or accessorial tariff changes.”³⁰

CRA strongly believes that the Board’s findings and determinations in connection with notice of tariff changes are highly accurate. CRA previously explained its concerns about the lack of sufficient notice of tariff changes, and identified several instances where shippers may not be able to adjust their operations to comply with the new rules within short time frames.³¹ CRA also proposed that the Board require railroads to “waive the imposition of free-time reductions on customers who are demonstrating good faith efforts to comply with the changes.”³² CRA continues to believe that the Board should incorporate its proposal in its evaluation on determining the reasonableness of demurrage rules and practices. CRA strongly supports the Board’s determinations in connection with notice of tariff changes.

VII. Other Comments

CRA suggests that the Board consider establishing a task force on demurrage and accessorial rules and practices, similar to the rate reform task force, which will recommend to the Board other potential changes to current regulations on demurrage and accessorial charges. CRA

²⁹ Policy Statement at 19.

³⁰ *Id.*

³¹ CRA Testimony at 5.

³² *Id.*

believes that a task force would prove to be very beneficial for the Board by analyzing the current demurrage and accessorial charges regulations, receiving input from many different stakeholders and identifying other areas that the Board may address in future proceedings.

CRA also believes that the Board could significantly benefit from the establishment of an advisory board comprised of railroad industry stakeholders (e.g., shippers, receivers, warehousemen) that would provide the Board with regular feedback regarding the railroad rules and practices on demurrage and accessorial charges. The Federal Maritime Commission's ("FMC") final report on the fact-finding investigation on detention and demurrage in the maritime industry included, among other things, the fact-finding officer's recommendation that a shipper advisory board should be established to "offer information and insights to the Commission on emerging maritime issues."³³ The Board should consider establishing a similar mechanism to receive continuous feedback from the industry that would enable the Board to address future issues relating to demurrage and accessorial charges more timely and accurately.

VIII. Conclusion

CRA commends the Board for issuing the proposed Policy Statement, which is a valuable guidance for the rail industry on demurrage and accessorial rules and practices. CRA believes that the Policy Statement, once promulgated, will help resolve many issues the shippers and receivers experience with the railroads. On the other hand, CRA reiterates that the Board should consider taking a stronger position against the reasonableness of the recent changes in demurrage and accessorial rules and practices and initiate an investigation to review these changes and ultimately declare them unreasonable consistent with the Board's views discussed in the proposed Policy Statement. Further, CRA recommends that the Board establish a task force on demurrage and

³³ FMC Fact Finding Investigation No. 28 Final Report (December 3, 2018).

accessorial rules and practices to inform and shape other potential changes to current regulations on demurrage and accessorial charges by the Board. CRA thanks the Board for tackling these important issues and hopes that the rail carriers will retract from unreasonable rules and practices as an outcome of this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jeffrey O. Moreno', written over a horizontal line.

Jeffrey O. Moreno
Jason D. Tutrone
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4107

Counsel for The Corn Refiners Association

November 6, 2019