

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES)	)	Ex Parte No. 757
	)	
DEMURRAGE BILLING REQUIREMENTS	)	Ex Parte No. 759
	)	

**JOINT COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE
AND SEMINOLE ELECTRIC COOPERATIVE, INC.**

WESTERN COAL TRAFFIC LEAGUE

SEMINOLE ELECTRIC COOPERATIVE, INC.

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In response to the proposed Policy Statement and Notice of Proposed Rulemaking (“Notices” or “Proposals”) that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceedings on October 7, 2019,¹ the Western Coal Traffic League (“WCTL”) and Seminole Electric Cooperative, Inc. (“Seminole”) (collectively, “Coal Shippers”) submit the following joint comments.

**I.
IDENTITY AND INTEREST**

WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal, mined west of the Mississippi River, transported by rail. WCTL members currently ship and receive in excess of 90 million tons of coal by rail each year. WCTL’s members are: Ameren Missouri, Arizona Electric Power Cooperative, Inc., Austin Energy (City of Austin, Texas), CLECO Corporation, CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado

¹ These proceedings have not been consolidated.

River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Western Fuels Association, Inc., and Wisconsin Public Service Corporation.

WCTL actively participated in the hearing in EP 754, *Oversight Hearing on Demurrage and Accessorial Charges* (“*Demurrage Oversight Hearing*”), that the Board held on May 22-23, 2019. WCTL’s Written Testimony (filed May 8, 2019), oral testimony (presented May 23, 2019), and Supplemental Comments (filed June 6, 2019), presented its members’ concerns with the railroads’ implementation and application of demurrage and accessorial tariff provisions, which stem primarily from the imbalance between freight rail shippers and railroads, as exacerbated by the implementation of precision scheduled railroading (“PSR”). The provisions force shippers to meet increasingly onerous performance standards or face more severe financial penalties, but do not include any reciprocal requirements for the railroads and even leave shippers responsible for operational problems created by the railroads.

Seminole is one of the largest generation and transmission electric cooperatives in the country, serving approximately 1.7 million consumers. Seminole ships coal by rail to fuel its two coal-fired generating units at the Seminole Generating Station. Seminole has experienced the same problems as WCTL members with the railroads demurrage and accessorial tariff provisions.

WCTL and Seminole both have a strong interest in ensuring that demurrage and accessorial services are provided on a fair and reasonable basis and do not penalize shippers for matters that are beyond their control or that are controlled by the railroads.

II. INTRODUCTION AND SUMMARY

Coal Shippers' primary issue with the accessorial and demurrage fees remains the lack of reciprocity and unfairness of the charges. As WCTL explained in its May 8, 2019 Written Testimony in EP 754, demurrage and accessorial charges reflect the striking imbalance between freight rail shippers and railroads, where shippers must meet the railroads' performance standards or pay penalties, but there is no reciprocal obligation for the railroads.

Five months after the hearing, Coal Shippers continue to experience service issues. Despite reports to the contrary, Coal Shippers have seen further deterioration in cycle times and the gap between coal tonnage nominations and actual shipments. Furthermore, Coal Shippers continue to face unwarranted charges for demurrage and accessorial services.

Accordingly, Coal Shippers welcome the Board's proposed Policy Statement in EP 757 and the proposed demurrage billing requirements in EP 759. Both measures are very much needed, and they represent a useful start. However, the Board needs to make some modifications and provide clearer guidance so that all shippers benefit and are not subject to unreasonable practices and fees.

In particular, 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," Policy Statement at 17, provides a foundation, but needs more fleshing out to achieve compliance and ensure reciprocal treatment. If the Board hopes to avoid

becoming inundated with individual disputes, it needs to speak with clarity and specificity. The Board should adopt clear standards and then require the railroads to adopt those standards and incorporate them into their tariffs, as opposed to merely mentioning a broad range of factors to be considered when deciding unreasonable practice cases.

To realize the Board's objectives of "transparency and mutual accountability," Policy Statement at 16, 21, the Board should clearly provide as follows: (1) bunching should be clearly defined and free time extended when bunching is caused by the carrier; (2) when railroads create bunching and similar delays, shippers and receivers should receive credits that do not expire at the end of the month or can be redeemed; (3) railroads should be required to adopt and incorporate the Policy Statement as part of their tariffs and certify their compliance with its guiding principles; and (4) other potentially affected parties should be provided an opportunity to comment when an unreasonable practice complaint addresses the terms of a demurrage or accessorial tariff.

In addition, the Board should give meaningful attention to the level of the charges themselves. Even accepting that charges should be high enough to incent desirable behavior or discourage undesirable conduct, the level of charges should still bear some reasonable relationship to the underlying costs incurred by railroads. At the EP 754 hearing, the railroads were unable to identify what their costs were, much less how they related to charges. Their silence as to such matters is conspicuous, and should not be overlooked.

These proposed revisions are described in more detail below.

III. DISCUSSION

A. The Board's Proposed Policy Statement Does Not Adequately Address the Need for Reciprocity and Fairness.

1. Carrier-caused Bunching Should be Defined, and Free Time Extended When Bunching Occurs.

The Board has defined bunching to be “rail car deliveries that are not reasonably timed or spaced.” *Utah Cent. Ry. Co. – Pet. for Declaratory Order – Kenco Logistics Servs., LLC, Kenco Group, & Specialized Rail Serv., Inc.*, FD 36131 (Mar. 20, 2019) at 2 n.3. Bunched train arrivals compromise unloading and other activities for shippers. Moreover, bunching can have a cascading effect, as the delay in one train causes delay in subsequent trains, and railroad demurrage and accessorial charges for delay charges can get “stacked” or “pancaked” and quickly become exorbitant.

Shippers can contribute to bunching by delay in turning around cars or trains. However, shippers simply have no chance when railroads cause one train to arrive on top of another, before shippers have had a reasonable opportunity to turn around the previous train(s). The problem is rampant. As the Board noted in its Policy Statement at 13, “[m]any commenters stated that they regularly experience bunched deliveries of rail cars and are charged demurrage for related backlogs.”

The Board's statement that bunching disputes “are best addressed in the context of case-specific facts,” *id.* at 14, is likely to invite the case-specific disputes that the Board elsewhere seems to want to avoid. The better approach is to define clearly the circumstances under which carrier-caused bunching will excuse demurrage charges.

Bunching relief should apply when an additional train(s) arrives while an earlier train is still being unloaded or loaded during reasonable free time, and the number of trains ordered for the month does not require trains to be delivered in such close succession. For example, a shipper that orders eleven trains per month should not receive as many as three of those trains within any seven-day period. Bunching may be operationally expedient or efficient for the railroad, but should not then enable the railroad to then impose additional charges on the shipper. When the carrier is responsible for the bunching, that each subsequent or “stacked” train be allotted extended free time, and the shipper should be charged demurrage, if at all, only for exceeding free time on the train that it is actually turning around. This protection is necessary so that a shipper that encounters an initial issue with one train is not punished with multiple fees as a result of carrier-caused bunching.

**2. Credits Should Not Expire or Should
Be Redeemable at the End of the Month.**

The Board expressed concern about the lack of demurrage credits and expiration of demurrage credits and noted “that these 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.” Policy Statement at 18. The existing practice is that shipper credits expire at the end of the month (if they last at all), and while shippers may need to settle up charges and credits, the payments flow only one way, to the railroads. As explained *supra*, shippers should receive credits when the railroads cause delay through bunching or other means, but those credits will be of

limited value if they quickly expire. Accordingly, credits should endure past the end of the month, or alternatively, shippers should be allowed to cash them out at the end of the month, just as many shippers are currently required to pay net demurrage to their carriers when the month ends.

3. Railroads Should be Required to Incorporate the Policy Statement and Rules Requiring Prompt Responses to Demurrage Disputes into Their Tariffs.

The Board presents its demurrage policy and adds that it “expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage” and that when an invoice is challenged, “the rail carrier likewise should respond within a reasonable time period.” Policy Statement at 17. The railroads should be required to incorporate the Policy Statement as part of their tariffs for demurrage and accessorial charges. In addition, the railroads should be required to respond meaningfully to a shipper challenge to a charge within thirty (30) days. Such actions will provide all shippers with the ability to use the Board’s guidance when refuting unreasonable demurrage charges and dealing with a railroad that fails to meaningfully respond to the disputed charge.

4. The Board Should Allow Interested Parties a Reasonable Opportunity to Participate in Individual Disputes Where Appropriate.

The railroads’ demurrage and accessorial tariffs apply directly to common carrier traffic, but are typically also incorporated by reference into contract movements. A contract shipper may need to dispute a demurrage or accessorial charge in court, and such disputes may be referred to the Board or become the subject of a petition for

declaratory order. Similarly, if a shipper brings an unreasonable practice complaint involving a tariff provision, the Board's decision may impact numerous non-party shippers, including contract shippers. There is thus potential for redundant proceedings at the Board and in court or arbitration, resulting in inefficiencies, inconsistent outcomes, and related uncertainty.

One means to address and ameliorate these issues is to permit additional participants to provide comments in accessorial and demurrage disputes before the Board, where appropriate. The additional participants may not have knowledge as to the specific facts in dispute, and their own facts may be somewhat different, but they still have an interest in the principles and treatment that may be adopted. Their participation may also help the Board to understand the larger interests that may be affected. The Board has allowed for such participation in the past for these reasons. *E.g., Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc.*, NOR 42121 (STB served Dec. 19, 2013) at 2 n.3 (allowing the Association of American Railroads to participate as *amicus curiae* and provide comments where the participation “would not broaden the issues [of] the proceeding”). Allowing such participation may help the Board to proceed fairly and efficiently. Therefore, Coal Shippers urge that the Board provide for interested parties to file limited and timely comments as part of any unreasonable practice proceeding involving an accessorial tariff provision that will not broaden the issues or negatively impact the procedural schedule.

B. The Board Should Require Better Online Access to Train Data, Require Notification of Train Laydown Events, and Require Additional Information be Provided with Demurrage Invoices.

The undisputed goals for invoicing are: transparency, uniformity, and efficiency. As described below, Coal Shippers request that (1) the Board provide some guidance regarding online access for shippers to train data; (2) railroads give timely notice to shippers when a train is laid down; and (3) railroads include additional information with their demurrage invoices so shippers can more easily review them for accuracy.

1. Shippers Need to Have Better Online Access to Real-Time and Historical Train Data in Order to Review and Prevent Demurrage Charges.

Shippers require user-friendly online access to real-time and historical train data to review events and address potential fees. Railroads tout their web-based e-business platforms, however, the shipper's experience when accessing train information within and between the carriers' e-business platforms is cumbersome and difficult. Moreover, the ease of working with the platforms varies from railroad to railroad. In particular, some WCTL members report the Union Pacific Railroad Company's ("UP's") "MyUPRR" website platform to be more accessible and user friendly than BNSF's system, as train data can be accessed without having to enter numerous queries, and UP can be more easily notified about service issues, at least some of the time. (As explained *infra*, UP's practices are deficient relative to BNSF in other respects.) There should be some open forum or other mechanism for shippers, the railroads, and the Board to improve carrier e-business platforms in this regard.

2. Shippers Need Real-Time Notice When a Train is Laid Down and the Basis for Associated Charges.

Coal Shippers strongly support the supplemental rules proposed for 49 C.F.R. § 1333.4(a) requiring the railroads to provide basic identification information with each demurrage invoice. In addition, the railroads should be required to provide shippers with real-time notice when a train is laid down and will incur charges.

Specifically, shippers should be notified on a timely basis of the location, date, and time the train is laid down. Notice will enable shippers to take prompt action if their operations are contributing to the problem and to determine if the charge is correct. Requiring timely notice should not be burdensome as local crews will sometimes provide our members with information or flag an issue, but this practice is inconsistent and needs to be automated. As such, Coal Shippers request that the Policy Statement at 17 be revised and after “consistent with the purpose of demurrage” to specify that: “Rail carriers are also expected to provide prompt and timely notice to shippers of expected charges, and prior to invoicing, if the railroad expects a train will incur demurrage charges.”

3. Shippers Need to Know the Basis for the Demurrage Charges, the Sequence Number of the Train, and be Provided with a Monthly Summary of all Demurrage Charges.

Coal Shippers recommend that proposed 49 C.F.R. § 1333.4(a) be amended to include additional information that would be useful for shippers when evaluating the demurrage invoices. At the outset, shippers when reviewing invoices would benefit from knowing the basis of the charge and we recommend revising 49 C.F.R. § 1333.4(a) to

require that the invoice include: “(5) The reason, if known, for the charge.” Such information will help the shipper to identify the events and occurrences that the railroad asserts formed the basis for the charge, and enable the charge to be reviewed more expeditiously.

Invoices for coal shippers should also include a sequence number. UP coal shippers, for example, may, due to origin bunching, have multiple trains loaded at a single mine on the same day, and those trains may also be assigned the same reporting marks and supposedly “unique” identifying information on the invoice, which makes it very difficult to link a particular charge to a specific train. Including the sequence number on the invoices should not be burdensome as UP actually assigns a sequence number when the train is in transit, only to expunge it when the train is terminated or quickly thereafter. The Board should revise § 1333.4(a)(1) to require: “The unique identifying information (e.g., reporting marks, ~~and~~ number, and sequence number if applicable) of each car involved.”

Lastly, all shippers with multiple rail shipments that currently ship on the UP would benefit from receiving a monthly summary listing all demurrage charges, information that BNSF already provides. Reviewing demurrage invoices from UP sometimes require sorting and referencing numerous separate invoices, making it much harder for shippers to review the invoices for accuracy. The Board should amend § 1333.4(a) to require that: “(6) A summary be provided on a monthly basis of all demurrage charges which includes all information required under this part for demurrage invoices.”

IV. CONCLUSION

The Coal Shippers respectfully request the Board adopt its proposed modifications to the Board's Policy Statement and Notice, in order to provide shippers with more certainty, and promote more fair and balanced demurrage and accessorial programs.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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