

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	248844
STB Docket No. EP 757	248845
Policy Statement on Demurrage and Accessorial Rules and Charges	248846

	ENTERED
STB Docket No. EP 759	Office of Proceedings
Demurrage Billing Requirements	November 6, 2019
	Part of
	Public Record

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

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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

*Counsel for
The National Industrial Transportation League*

Dated: November 6, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB Docket No. EP 759
Demurrage Billing Requirements

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

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League (“NITL” or “League”) 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 Exemptions³ in response to the Surface Transportation Board’s (“STB” or “Board”) notices served on October 7, 2019.

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”).

The League represents a broad cross-section of American business, united in their need for reliable, efficient and competitive transportation services. Our rail members ship chemicals, petroleum, agricultural products, paper and forest products, and many other commodities using all modes of transportation, including rail. Our members have developed complex supply chains to support their operations and efficient and competitive rail service, and fair rules and practices related to such service, is critical to maintaining the supply of goods required to meet the demand of American businesses and consumers and to compete effectively with producers around the world.

The Policy Statement and proposed rules follow the oversight hearing on demurrage and accessorial charges held before the Board on May 22-23, 2019.⁴ As part of the oversight hearing, the League testified before the Board,⁵ and submitted its pre-hearing⁶ and post-hearing comments.⁷ Thus, the League has a strong interest in the actions of the Board that are aimed at addressing the significant concerns from rail customers regarding unreasonable demurrage and accessorial rules and charges.

The League thanks the Board for promptly issuing the proposed policy and rules and, overall, it supports the Board's approach and proposals. The League hereby provides its comments on each proposal below.

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

⁵ Policy Statement at 24.

⁶ Testimony of the National Industrial Transportation League, STB Docket EP 754 (May 8, 2019) ("NITL Pre-Hearing Comments").

⁷ Supplemental Submission of the National Industrial Transportation League, STB Docket EP 754 (June 6, 2019) ("NITL Post-Hearing Comments").

I.

EX PARTE 757 - POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES:

The League commends the Board for clarifying the principles that it will consider in its evaluation of the “reasonableness” of demurrage and accessorial rules and practices. The League believes that the general principles set forth by the Board address very fundamental problems the shippers and receivers experience with the rail carriers, as demonstrated during the oversight hearing. Specifically, the Board states:

First, 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. In other words, charges should not be assessed in circumstances beyond the shipper’s or receiver’s reasonable control. It follows, then, that revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose. Second, 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

In fact, these principles are consistent with the League’s comments asking the Board to issue a policy statement that would address the following: “a demurrage-related tariff should be deemed unreasonable and unduly punitive if it fails to incentivize the efficiency of the rail network.”⁹ It is critical that railroads assess demurrage in a manner that properly serves to incentivize efficiencies to the benefit of *both* rail carriers and their customers and this purpose cannot be achieved if demurrage is assessed as a result of delays that are beyond the control of the rail customer. Thus, the League strongly supports the general principles set forth in the Board’s proposed Policy Statement.

⁸ Policy Statement at 21.

⁹ NITL Post-Hearing Comments at 2.

Furthermore, the Board establishes certain 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. The League hereby provides its comments on these specific issues below.

a) Free Time

Regarding free time, the Board explains that the free time period “must be reasonable and consistent with the purpose of demurrage.”¹⁰ The Board also expresses its concerns about “the adverse impact of reductions in free time”¹¹ where the railroad lacks reasonable mechanisms to deal with carrier-caused circumstances. Further, free time periods should allow rail customers to have a “reasonable opportunity to evaluate and order incoming cars before demurrage begins to accrue.”¹² Finally, the Board states that it would have serious concerns about reductions in free time that fail to “incentivize [shippers and receivers] to encourage the efficient use of rail assets,”¹³ and explains that demurrage charges do not serve their purpose if they accrue due to carrier-caused circumstances beyond the shippers’ and receivers’ control.¹⁴

The League supports the Board’s views on free time. As part of the implementation of Precision Scheduled Railroading (“PSR”), Class I carriers have reduced free time from 48 hours to 24 hours for system cars and provide zero hours of free time for private cars. These reductions in free time have eliminated an important buffer provided to shippers and receivers to manage inconsistent railroad service and other carrier-caused circumstances, as well as their own

¹⁰ Policy Statement at 11.

¹¹ Id.

¹² Id.

¹³ Id. at 12

¹⁴ Id. (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).

operational variables. As the League explained in its previous filing, “railroads are consistently inconsistent.”¹⁵ The League continues to believe that rail customers should not be forced to incur significant costs to substantially modify their own operations by adding work shifts or constructing rail infrastructure in order to avoid rail demurrage.

Accordingly, the League continues to believe that the Board should declare that the “current zero-day free time regime for private cars is *prima facie* unreasonable.”¹⁶ Under the current regime, a railroad may provide notice of placement for a private car at 11:59 PM, and start assessing demurrage charges if the car is not ordered within one minute, until 12:00 AM the next day. Consequently, shippers and receivers are automatically assessed demurrage charges if they are notified after hours. The League believes that the Board should take a stronger position against this unduly narrow free time approach, and declare that zero-day free time is *prima facie* unreasonable. At the very least, zero free days should be presumed unreasonable unless the railroads can rebut that presumption based on the specific circumstances that clearly establish that such a restrictive free time rule does result in network efficiencies and can allow rail customers to avoid the charges on a regular basis.

b) Bunching

In the proposed Policy Statement, the Board explains that the purpose of demurrage is not fulfilled if rail carriers cause the delivery of bunched rail cars, which result in the assessment of demurrage charges outside the “reasonable control of the shipper or receiver to avoid.”¹⁷ The League commends the Board for addressing the unreasonableness of the assessment of demurrage charges caused by bunched deliveries, which has been a major issue for many

¹⁵ NITL Pre-Hearing Comments at 4.

¹⁶ NITL Post-Hearing Comments at 2.

¹⁷ Policy Statement at 14.

shippers and receivers, including NITL members.¹⁸ The Board also addressed upstream bunching, and stated that this principle should be applicable both “when cars originate with the serving carrier and when cars originate on an upstream carrier.”¹⁹ The League also agrees with the Board that rail carriers should evaluate whether their “automatic billing processes sufficiently account for carrier-caused bunching” which would help to avoid demurrage assessments that fail to incentivize efficiencies, and eliminate unnecessary burdens on rail customers to dispute the charges. The League appreciates the Board’s views on the unreasonableness of demurrage that results from carrier-caused bunching, and supports adoption of the bunching-related principles in the final Policy Statement.

c) Overlapping Charges

The proposed Policy Statement includes the Board’s views on the unreasonableness of overlapping charges that seek to impose a charge, in addition to demurrage charges, “for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid.”²⁰ The League agrees with the Board’s proposed principles regarding overlapping charges. The League believes that overlapping charges, such as the “congestion” charge previously assessed (but since eliminated) by the Norfolk Southern Railroad, are highly problematic and likely to result in “double-recovery.”²¹ The League thanks the Board for addressing this important issue.

d) Invoicing and Dispute Resolution

In the proposed Policy Statement, the Board states that “[i]f rail carrier practices effectively preclude a rail user from determining what happened, then the user would not be able

¹⁸ NITL Pre-Hearing Comments at 5.

¹⁹ Policy Statement at 14.

²⁰ Id. at 15.

²¹ NITL Pre-Hearing Comments at 7.

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 The League previously raised its serious concerns about the lack of adequate information in demurrage invoices, which require rail customers to spend an enormous amount of resources to audit and challenge improper charges.²³ Thus, the League strongly agrees with the Board’s views that demurrage invoices must include sufficient information that allow the invoiced party to determine the validity of the charges by undertaking a reasonable and efficient investigation. Furthermore, the Board also states that there should be reasonable time period “to request further information and to dispute charges,” and for the railroads to respond to disputes.²⁴ The League commends the Board for addressing reasonable time periods for dispute resolution, which have been a long-time concern for the League members who have been required to spend many months and substantial resources on demurrage disputes.²⁵ The Board also initiated a separate rulemaking which proposes the minimum information standards for demurrage invoices which the League addresses below.

e) Credits

In its Policy Statement, the Board proposed principles on the reasonableness of credits issued by the railroads for carrier-caused circumstances that result in demurrage. The Board states that its evaluation of the reasonableness of a credit system would take into account whether the railroad customer has been “afforded a reasonable opportunity”²⁶ to use the credits before their expiry. The Board further states that its concerns related to a lack of adequate reciprocity would be alleviated if the railroads compensated their customers for the value of

²² Policy Statement at 16.

²³ NITL Pre-Hearing Comments at 8.

²⁴ Policy Statement at 17.

²⁵ NITL Pre-Hearing Comments at 9.

²⁶ Policy Statement at 18.

unused credits at the end the month, instead of allowing credits to merely expire.²⁷ The League strongly agrees with both of these proposed principles.

The League believes that current credit mechanisms are inadequate because the credits expire too quickly and the railroads require “rail customers to follow cumbersome processes to simply obtain a credit,” rather than automatically granting these credits.²⁸ Thus, consistent with its previous comments, the League urges the Board to clarify in its Policy Statement that the railroads need to issue credits automatically for carrier-caused circumstances in order to meet the reasonableness standard. The League believes that it would comport more closely with the purpose of demurrage, if the railroads are required to automatically issued credits for carrier-caused circumstances, rather than expecting each rail customer to challenge the demurrage charges in order to obtain these credits.

f) Notice of Major Tariff Changes

The proposed Policy Statement also includes the Board’s principles regarding the notice period provided to rail customers for major demurrage rules changes. The Board states 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 The Board also encourages the railroads to help their customers by taking other measures, including “delayed billing and working with those that needed more flexibility.”³⁰ The League strongly supports the Board’s proposed principles.

²⁷ Id.

²⁸ NITL Post-Hearing Comments at 2-3. See also, NITL Pre-Hearing Comments at 5 (“[e]ven if the railroad provides relief for their own errors, which could encompass bunching, they often bill for the charge and require the shipper or receiver to apply for a credit or dispute the charge.”)

²⁹ Policy Statement at 19.

³⁰ Id.

II.

EX PARTE 759 - NOTICE OF PROPOSED RULEMAKING ON DEMURRAGE BILLING REQUIREMENTS

In STB Docket No. 759, the Board issued proposed rules regarding demurrage billing requirements. Accordingly, the Board seeks comments on (i) certain proposed requirements regarding Class I railroads' demurrage invoices, and (ii) a proposed requirement for Class I railroads to send demurrage invoices directly to the shipper, and not require the warehousemen to guarantee payment, if certain conditions are met.³¹

Specifically, the Board proposes to require all Class I carriers to include certain minimum information with any demurrage invoices. The minimum information elements identified by the Board include unique identifying information of each car, and the dated and times of when the car was actually or constructively placed, when the notification was made to the customer, and when the car was released, among others.³² The League believes that the minimum information requirements identified by the Board address critical issues that have been a wide-spread concern for many shippers and receivers. The League expressed its concerns regarding lack of adequate information on demurrage bills, which preclude the League members from appropriately reviewing, auditing and challenging the assessed charges.³³ In fact, the League asked the Board to initiate a rulemaking proceeding to address these concerns.³⁴ Thus, the League strongly supports the Board's proposals regarding minimum information requirements.

Although the Board addressed the need for fair and reciprocal dispute resolution processes in its proposed Policy Statement, the League believes that it would be beneficial for the Board to adopt rules to facilitate efficient resolutions to demurrage disputes, similar to the

³¹ Billing Requirements NPRM at 8.

³² *Id.* at 9-10.

³³ NITL Pre-Hearing Comments at 8.

³⁴ *Id.* at 9.

procedures used for cargo loss and damage claims. It is important not only for rail customers to present timely claims but also for railroads to timely acknowledge and respond to such claims. The Board should open a rulemaking to adopt fair and reciprocal dispute resolution procedures.

The Board also proposed to require Class I railroads, prior to sending a demurrage invoice, “to take appropriate action to ensure that the demurrage charges are accurate and warranted.”³⁵ The League commends the Board for addressing many shipper and receivers’ concerns about inaccurate or erroneous demurrage bills, which create substantial administrative burdens for rail customers.³⁶ The League believes that the proposed rule, once promulgated, will ensure that Class I railroads create internal mechanisms to filter out inaccurate and erroneous invoices and facilitate the resolution of many rail customers’ concerns.

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. The League urges the Board to require Class II and Class III railroads to also comply with the requirements set forth in the proposal. The League 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, the League 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.

³⁵ Billing Requirements NPRM at 10.

³⁶ *Id.* at n. 14.

Additionally, the League has no concerns regarding the Board's proposal that allows Class I railroads to send demurrage invoices directly to shippers instead of a warehouseman if they are notified of an agreement in writing between the shipper and warehouseman pertaining to the shipper's responsibility to pay demurrage invoices.

III.

EX PARTE 760 - NOTICE OF PROPOSED RULEMAKING ON EXCLUSION OF DEMURRAGE REGULATION FROM CERTAIN CLASS EXEMPTIONS

Finally, the Board issued another notice regarding proposed amendments to its class exemption regulations. Accordingly, the Board proposes to amend its regulations to state that certain class-exempt commodities and boxcar transportation continue to be subject to Board regulation on demurrage rules and practices, and to partially revoke the exemption on certain agricultural commodities to ensure that the regulation of demurrage applies to these commodities.³⁷

The League agrees with the Board's proposals regarding class exempt commodities and boxcar transportation. The League recognizes that court and Board precedent have concluded that exemptions for certain class-exempt commodities and boxcar transportation do not apply to the regulation of demurrage.³⁸ However, the League believes that amending the class exemption regulation to clearly state this principle is necessary to eliminate confusion, and the League commends the Board for addressing this issue.

Finally, the League supports the Board's proposal to partially revoke the commodity exemption for agricultural commodities to apply its demurrage regulation to such commodities. In making this proposal, the Board recognized the costly burdens that shippers of these commodities would otherwise need to absorb simply to access the Board's demurrage regulation.

³⁷ Class Exemption NPRM at 1.

³⁸ *Id.* at 5.

Specifically, the Board stated that without this rule change it otherwise “would need to grant partial revocation of the class exemption as it applies to demurrage in every individual case, which may add to the complexity, length and cost of such proceedings to the parties and the Board.”³⁹ The League strongly supports the proposed partial revocation for these commodities and also urges the Board to apply this important principle to other proposed and requested commodity exemption revocations that are at issue in the Board’s pending EP 704 proceeding.

CONCLUSION

The League commends the Board for taking prompt action to address unreasonable demurrage and accessorial rules and practices. The League strongly supports the Board’s proposed Policy Statement and rules and urges the Board to swiftly adopt its proposals consistent with the League’s comments.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE

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

³⁹ Class Exemption NPRM at 6.