

248794
248795
248796

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 6, 2019

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES	)))))	Docket No. EP 757	Part of Public Record
DEMURRAGE BILLING REQUIREMENTS	))))	Docket No. EP 759	
EXCLUSION OF DEMURRAGE REGULATION FROM CERTAIN CLASS EXEMPTIONS	)))))	Docket No. EP 760	

**COMMENTS OF THE
AMERICAN IRON AND STEEL INSTITUTE**

Kevin Dempsey
Senior Vice President, Public Policy,
General Counsel, and Secretary
American Iron and Steel Institute
25 Massachusetts Avenue, N.W., Suite 800
Washington, D.C. 20001
(202) 452-7100

Dated: November 6, 2019

Peter A. Pfohl
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
American Iron and Steel Institute

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES	)))))	Docket No. EP 757
DEMURRAGE BILLING REQUIREMENTS	))))	Docket No. EP 759
EXCLUSION OF DEMURRAGE REGULATION FROM CERTAIN CLASS EXEMPTIONS	)))))	Docket No. EP 760

**COMMENTS OF THE
AMERICAN IRON AND STEEL INSTITUTE**

The American Iron and Steel Institute (“AISI”) hereby submits these Comments in response to the Notices served by the Surface Transportation Board (“Board”) on October 7, 2019 in STB Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges* (“*Demurrage Policy Statement Proposal*”); STB Docket No. EP 759, *Demurrage Billing Requirements* (“*Demurrage Billing NPRM*”); and STB Docket No. EP 760, *Exclusion of Demurrage Regulation from Certain Class Exemptions* (“*Demurrage Exemption Exclusion NPRM*”).¹ AISI supports the Board’s proposals to ensure that railroad demurrage and accessorial practices are reasonable and fairly applied to all shippers, including shippers of primary iron or steel products (STCC No. 33-12), iron or steel

¹ These dockets have not been consolidated. AISI submits these comments in all three related dockets for convenience purposes and to avoid duplication.

scrap, wastes, or tailings (STCC No. 40-211), and coke produced from coal (STCC No. 29-914) (collectively, the “steel commodities”).

IDENTITY AND INTEREST

AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of 18 producer member companies, including integrated and electric furnace steelmakers and approximately 120 associate members who are suppliers to or customers of the steel industry.

The member companies of AISI rely on the railroads to transport inbound movements of raw materials, intra- and inter-plant movements of in-process products, and outbound movements of finished products. AISI’s members have a significant interest in moving their inbound and outbound materials and products efficiently and cost effectively. AISI commends the Board for seeking to implement rules and policies that ensure that rail carriers’ demurrage and accessorial programs are fair, balanced, and reciprocal, and properly incentivize the behavior of shippers and railroads to utilize rail assets efficiently.

I. The Board Should Formally Affirm That It’s Demurrage and Accessorial Rules Apply to Steel Commodity Shippers

The Board’s *Demurrage Exemption Exclusion NPRM* seeks to codify, as part of the Board’s rules at 49 C.F.R. § 1039.11, that the regulatory exemptions for certain miscellaneous commodities, including the steel commodities, “shall not apply to the regulation of demurrage.” *Demurrage Exemption Exclusion NPRM* at 5. The Board states that this coverage is already established under its existing rules at 49 C.F.R. § 1039.11(a),

which provide: “[h]owever, this exemption shall not be construed as affecting in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation regarding the use of equipment, whether shipper or railroad owned or leased” *See id.* at 4. The Board also states that coverage is established under governing precedent, including *Savannah Port Terminal R.R. – Pet. for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc.*, FD 34920 (STB served May 30, 2008), which held that “[d]emurrage is a matter regarding use of equipment and is related to car service” to which the exemption does not extend, and that “the Board has expressly declined to exempt demurrage matters from regulation.” *Id.* at 7-8.

In a series of decisions issued over twenty years ago, the Board’s predecessor, the Interstate Commerce Commission, used its authority to exempt the steel commodities,² along with a number of other commodities. However, for the reasons stated by the Board, those exemptions were not intended to apply to the use of equipment. AISI agrees with the Board’s interpretation that the steel commodities are subject to the Board’s regulations with respect to demurrage and related charges, and to eliminate any uncertainty or ambiguity, the Board should “state unambiguously that the exemptions . . . do not apply to the regulation of demurrage.” *Demurrage Exemption Exclusion NPRM* at 5.

² *See Rail Gen. Exemption Auth. – Exemption of Ferrous Recyclables*, Ex Parte No. 346 (Sub-No. 35), 1995 WL 294272 (ICC served May 16, 1995) (iron or steel scrap, wastes, or tailings); *Rail Gen. Exemption Auth. – Pet. of AAR to Exempt Rail Transp. of Selected Commodity Grps.*, 9 I.C.C.2d 969, 987 (1993) (coke produced from coal, primary iron or steel products); *Rail Gen. Exemption Auth. – Misc. Manufactured Commodities*, 6 I.C.C.2d 186, 206 (1989) (primary iron or steel products).

However, AISI is concerned that the Board's proposed language may be interpreted too narrowly by some carriers, who may contend that "demurrage" narrowly covers a carrier debit and credit system for loading/unloading equipment after placement or constructive placement, even though the existing exemption for miscellaneous commodities set forth at 49 C.F.R. § 1039.11(a) specifically excludes more broadly "the use of equipment." Also, the Board's *Demurrage Policy Statement Proposal* is designed to cover additional railroad practices and programs affecting railroad equipment besides demurrage, including such things as "not prepared for service" charges, congestion charges, and other related accessorial practices of carriers. To ensure that the Board's rules reasonably cover all such programs and practices, AISI respectfully requests the Board to clarify and confirm in its final rules that the exemption shall not apply to the regulation of demurrage, **and other railroad accessorial programs.**

Additionally, while AISI strongly supports the Board's *Demurrage Exemption Exclusion NPRM* as a necessary measure to affirm the full availability of regulatory protections for steel commodity shippers regarding demurrage and related accessorial assessments, AISI respectfully submits that such a clarification of existing law in no way obviates the need for the Board to promptly finalize its longstanding proposal to remove the steel commodities exemptions altogether. The Board proposed removing the steel commodities exemptions in 2016, finding that steel commodity shippers require the same regulatory protections afforded to other shippers, and there is no remaining, valid justification for exempting the steel commodities from regulation. *See Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (STB served Mar. 23, 2016) ("*Commodity Exemption NPRM*"); *id.*, Comments of Steel Manufacturers

Association (“SMA”) and AISI (filed July 26, 2016); *id.*, Reply Comments of SMA and AISI (filed Aug. 26, 2016). AISI, together with SMA, recently provided updated information supporting exemption removal. *See* Summaries of Ex Parte Meetings Between AISI/SMA and Chairman Ann Begeman (filed June 14, 2019), Vice Chairman Patrick Fuchs (filed June 13, 2019), and Board Member Martin Oberman (filed June 14, 2019).

Providing steel commodity shippers full access to the Board’s regulatory oversight and processes, including the ability to obtain common carrier service upon reasonable request, the maintenance of reasonable practices and rates, and the provision of adequate service, is clearly necessary and appropriate. Revocation will help facilitate the full and fair participation of steel commodity shippers in current and future regulatory proceedings and minimize regulatory burdens on shippers seeking administrative relief – while not increasing regulatory burdens on carriers. AISI urges the Board to finalize and adopt its *Commodity Exemption NPRM* promptly.

II. The Board’s *Demurrage Policy Statement Proposal* Should Be Adopted, with Additional Appropriate Protections and Compliance Requirements

A. General Principles/Carrier Compliance

The Board’s *Demurrage Policy Statement Proposal* seeks to provide guiding principles that the Board will consider in evaluating the reasonableness of railroad demurrage and accessorial rules and charges. One of most important principles is that railroads should not send invoices to customers unless warranted, and they should not assess charges for “circumstances beyond the shipper’s . . . reasonable control.” *Demurrage Policy Statement Proposal* at 7, 21. In addition, the Board’s proposed Policy Statement stresses “transparency

and mutual accountability” with respect to the carriers’ demurrage programs. *Id.* at 21.

These are important principles that AISI strongly supports.

The Board stresses that its proposed Policy Statement is designed to provide stakeholders with guiding principles, without making “binding determinations.” *Id.* at 3. “Nor is the Board promoting complete uniformity across rail carriers’ demurrage and accessorial rules and charges.” *Id.* Instead, the Board states that its Policy Statement can be used by parties in individual proceedings and by the Board “[w]hen adjudicating specific cases.” *Id.* at 4. While AISI appreciates the Board’s reluctance to mandate “one-size-fits-all” binding rules, and it generally agrees with the Board’s approach, AISI is concerned that the Board’s *Demurrage Policy Statement Proposal* lacks any accompanying railroad compliance mechanisms. AISI does not believe that shippers should need to come to the Board and adjudicate a lengthy and expensive unreasonable practice case in order for individual carriers to implement the Policy Statement into their tariffs and for the Policy Statement to take effect.

Accordingly, AISI respectfully submits that the Board should require railroads to implement appropriate tariff changes and certify compliance with the Board’s Policy Statement within a reasonable period of time (60 or 90 days) and provide notice to their customers of such changes. In addition, the carriers should be required to specifically incorporate the Board’s Policy Statement into their demurrage and accessorial tariffs, at least by reference, so customers can be made aware of the general principles and that carrier conduct and tariff application is to be governed by those principles. In the event disputes arise, the general principles established by the Board will then appropriately guide the parties, hopefully, through negotiations or informal dispute resolution, without requiring a

shipper to bring a full-blown unreasonable practice case at the Board to ensure that the principles are actually implemented by the railroads. AISI believes that such straightforward compliance and accountability measures will benefit all stakeholders and reduce uncertainty and confusion.

B. Free Time/Debits/Credits

The Board states that, until recently, the railroads provided at least 24 hours of free time (or one credit day) to load railcars and at least 48 hours of free time (or two credit days) to unload railcars, and that it is “troubled by the adverse impacts of reductions in free time to rail users” from these levels. *Demurrage Policy Statement Proposal* at 11. It also expresses concerns about “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.” *Id.*

The proposed Policy Statement declares that demurrage free time “must be reasonable and consistent with the purpose of demurrage,” *id.*, which is to encourage the efficient use of railcar assets. The Board states that the railroads’ tariffs should reasonably take into account “carrier-caused circumstances,” such as missed switches, bunched deliveries, or “[c]hanges in historical practices on which the shipper or receiver has long relied (e.g., regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties).” *Id.* at 12. However, the railroads’ demurrage rules generally do not include provisions providing credits or other meaningful relief for service variabilities, shipper facility capacity constraints, bunching, missed switches, or other matters outside a shipper’s control that might lead to the accumulation of demurrage. As such, AISI respectfully submits that the Board should more clearly declare that unless these “carrier-

caused circumstances” and variations in rail service are fully accounted for in a railroad’s tariff, the referenced traditional 48-hour and 24-hour free time standards shall be the minimum amount of free time provided. In addition, the Board should consider clarifying that a shipper should receive additional demurrage credits for each day a carrier misses its trip-plan, in addition to standard credit time.

The Board states that it is “troubled” about the carriers’ arbitrary demurrage credit expiration dates, which often expire at the end of each month, if not sooner, and its proposed Policy Statement concludes that customers should be “afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the rail carrier.” *Id.* at 18.

The carriers have provided no reasonable explanation for their arbitrary demurrage credit expiration tariff rules and do not provide compensation for the value of any unused credits. Accordingly, AISI respectfully submits that the Board should clarify more definitively that, unless a carrier’s tariff terms provide for customer compensation at the end of the expiration period for the full value of the unused credits, any expiration provision will be deemed presumptively unreasonable.

C. Bunching

AISI agrees with the Board’s proposed Policy Statement that “[w]here rail carriers’ operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled,” and in such instances, carriers should not charge demurrage. *Id.* at 14. The Board recognizes that the carriers’ automatic billing practices may fail to sufficiently account for carrier-caused bunching, including both cars originating on their

network, or upstream on third-party carriers, and bunching attributable to missed switches or reduced service days. *Id.*

Neither the carriers' tariffs, nor their billing practices, properly address railcar bunching. The Board should clarify that this matter needs to be appropriately addressed in railroad tariffs, including that "bunching" credits should be provided where bunching occurs that is not the fault of the shipper, as well as additional "ripple effect" credits.

D. Invoicing/Dispute Resolution

AISI fully agrees with the Board that the current practice of carriers to send computer-generated invoices that require customers to dispute charges within limited time frames, and without sufficient information for the customer to be able to determine whether it was responsible for the delay, are "deeply troubl[ing]." *Id.* at 16. The Board's proposed Policy Statement provides that, in addition to providing customers additional pertinent backup information and time to review dispute charges, "[t]he Board . . . expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage." *Id.* at 17.

AISI strongly supports this initiative. However, because much of the information necessary to verify the validity of the charges is in the exclusive control of the railroads, the Board should clarify that carriers shall promptly provide all pertinent supporting information upon request from the invoiced party, including information showing the fault of the invoiced party and not that of the railroad, upstream carriers, missed switches, bunching, untimely or variable service, or other events or circumstances outside the invoiced party's reasonable control. If such verifying information is not made available, or the

information provided does not properly substantiate the charges, then the invoice should be deemed invalid.

In addition, the analysis and dispute of demurrage invoices is a very manual process and is especially problematic for large volume shippers. The absence of any reporting standard today is a significant advantage to the rail carriers in furthering demurrage charge collections, due to the significant burden on shippers to obtain, review, and validate invoices, especially in the face of standard tariff terms that require invoice disputes be submitted by shippers in a very short period of time, and with railroad threats of collection actions for non-payment. AISI submits that a standard collection of required electronic data fields with each demurrage invoice could be developed to allow stakeholders to develop common software to help simplify the computation, review, and verification of demurrage liability. Additionally, such standardization should benefit the railroads, with understaffed customer service departments that face difficulty in collecting and providing customers with the necessary backup information required to reasonably review and validate individual demurrage invoices.

III. The Board's *Demurrage Billing NPRM* Should Be Adopted, with Additional Protections

The Board's *Demurrage Billing NPRM* requires each railroad to take "appropriate action to ensure that the demurrage charges are accurate and warranted." *Demurrage Billing NPRM* at 10. It also outlines the minimum information railroads must provide with each demurrage invoice, including unique identifying information of each railcar, pertinent shipment information, the dates and times of phases of placement of a car, and the number of credits and debits attributable to each railcar. AISI supports this initiative

to improve the validity and accuracy of billing. However, as specified above, AISI requests that, as part of its final rules, the Board clarify that, upon request from the invoiced party, the railroad shall promptly provide all pertinent supporting information to verify that the charges are accurate, valid, and warranted.

CONCLUSION

For the reasons set forth above, AISI respectfully submits that the Board should adopt its proposed Policy Statement and Rules, including the reasonable modifications set forth herein, to help restore fairness and balance to railroads' demurrage and accessorial programs.

Respectfully submitted,

/s/

Kevin Dempsey
Senior Vice President, Public Policy,
General Counsel, and Secretary
American Iron and Steel Institute
25 Massachusetts Avenue, N.W., Suite 800
Washington, D.C. 20001
(202) 452-7100

Peter A. Pfohl
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: November 6, 2019

Attorneys for
American Iron and Steel Institute