Freight Rail
Customer Alliance

November 6, 2019

By Electronic Filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: EP 757, Policy Statement on Demurrage and Accessorial Rules and Charges
EP 759, Demurrage Billing Requirements
EP 760, Exclusion of Demurrage Regulations from Certain Class Exemptions.

Dear Ms. Brown:

The Freight Rail Customer Alliance ("FRCA") submits the following comments in response to the Notices of Proposed Rulemaking ("Notice" or "Proposal") that the Surface Transportation Board ("Board" or "STB") served in the three above-captioned proceedings on October 7, 2019.

FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. FRCA represents large trade associations that in turn represent more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their customers.

FRCA is submitting its comments for all three dockets in a single document because the proposals are so closely intertwined, as are FRCA's comments regarding them.

FRCA very much appreciates the Board's willingness to focus on the issues surrounding demurrage and accessorial charges at this time. Demurrage and accessorial charges are always a concern, but they have become much more so in light of the railroad industry's widespread adoption and troubled implementation of Precision Scheduled Railroading ("PSR"). Demurrage and accessorial charges are often "where the rubber hits the road" in terms of the costs, responsibilities, and burdens that PSR imposes upon shippers and receivers. In addition, PSR often results in curtailed railroad capacity and associated reductions in the quality and reliability of service and sometimes the elimination of service altogether. What is promoted as "doing more with less" in practice often becomes "doing less with less." PSR and the associated demurrage and accessorial charges have affected most FRCA members adversely in multiple respects. As a result, FRCA has been actively engaged on the issue, recently submitting written testimony and appearing before the Board in EP 754 and also participating at the Railroad Shippers Roundtable held by the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation & Infrastructure.

Accordingly, FRCA welcomes the three notices of proposed rulemaking that the Board has served in EP 757, EP 759, and EP 760. They represent useful advances in responding to this important area. They are good first steps, but they, especially EP 757, are only first steps, and they do not go as far as is needed under the circumstances.

For example, the proposed policy statement in EP 757 provides a statement of principles that the Board would consider in evaluating the reasonableness of rules and charges in individual cases. It largely reviews and summarizes past Board precedent and principles when addressing demurrage and accessorial charges, but does not purport to establish new ones. The Board also does not purport to make any binding determinations, and instead eschews any such intent. The proposal leaves that for individual cases, although at the same time the Board also hopes that its proposed policy statement will reduce or eliminate the need for any such cases. To that extent, the proposal may kick the proverbial "can down the road", which is somewhat disappointing given the effort that FRCA and numerous other shippers and receivers expended in presenting their courses and detailing their painful PSR experiences at the EP 754 hearing and the congressional roundtable.

To be sure, there are numerous helpful statements in the proposed policy statement including, but not limited to:

- the "period of [free] time must be reasonable and consistent with the purpose of demurrage;"
- carrier rules must address "variability in service and carrier-caused bunching;"
- "shippers and receivers [are to] have a reasonable opportunity to evaluate and order incoming cars before demurrage begins to accrue;"
- demurrage fails its purpose where "carrier-caused circumstances give rise to a situation in which it is beyond the shippers' or receiver's reasonable control to avoid charges" due to missed switches, bunched deliveries, and excess transit time from constructive placement;
- reductions in free time must have a reasonable justification;
- charges should not overlap absent some justification, which the carriers did not present in EP 754; forensic accountants and excess effort should not be required to review bills and charges; adequate information should be provided;
- charges should be invoiced "only when the charges are accurate and warranted, consistent with the purpose of demurrage;"
- parties should have a reasonable time period to dispute charges and request further information, and review should not be conditioned on payment of additional charges; credits should be provided on a reciprocal basis;
- adequate notice should be given;
- intermediaries should not be charged when the shipper or consignor has provided otherwise;

- "charges should not be assessed in circumstances beyond the shipper's or receiver's reasonable control;" and,
- "revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and … revenue itself is not that purpose."

These principles are long-standing, self-evident, and should be beyond dispute. FRCA appreciates the Board's reaffirmation of them at this time. Moreover, insofar as the policy statement restates and reaffirms established precedent and existing law, rather than adopt or extend those principles, there should be no impediment to its application in disputes over past charges and related services.

Unfortunately, the proposal is disappointing in other respects. In particular, there is no adoption of anything that could be said to be "new principles or guidance". There is also little explicit discussion of PSR. The proposal also does not address in any detail what level of charge is excessive in terms of transgressing the line between what provides an adequate incentive versus what becomes punitive in nature. The absence of detail is particularly disconcerting because no carrier was able to articulate a meaningful cost justification for the level of its charges at the EP 754 hearing. However, a definition of reasonable costs is essential so that the penalty component can be limited to a reasonable level, for which 25% is more than adequate, especially in light of the inadequate showing by the carriers.

Also conspicuous in its omission is adoption of the principle of reciprocity to limit the ability of a carrier to collect demurrage and accessorial services where the carrier has failed to provide reasonable service. The policy statement recognizes that a carrier should not be able to collect such charges to the extent its own actions give rise to the charges, but there is no prohibition on the collection of such charges when the carrier's service is inadequate. The ostensible purpose of the charges is to facilitate the smooth and efficient operation of the rail network that benefits shippers as well as carriers. When the carrier itself fails to provide appropriate service, it should not then be able to inflict additional harm on the shippers by imposing and collecting additional charges. The Board may be "troubled" or have "serious concerns" about such events, but the Board's consideration is limited to how they impair a shipper's ability to avoid charges, not whether there should be any charges in the first place, or whether charge levels should be reduced. Reciprocity and basic fairness seem to be a mere afterthought, rather than a fundamental requirement, in this regard.

Beyond that, there is little explicit attempt or indication as to how these principles would apply to the particulars of individual disputes, even though virtually every shipper/receiver or representative association that appeared at the EP 754 hearing described at length the harm and injury that they had experienced. The Board's reluctance to adjudicate individual disputes in a rulemaking proceeding is somewhat understandable, but the Board could surely have gone further to provide more specific guidance, while still not purporting to adjudicate an individual dispute. That guidance could have been

qualified by addressing the results that would apply in the individual situations presented absent a showing of extenuating circumstances or by including an appendix that would address example situations on a hypothetical basis. By these or other means, the Board could have given more specific guidance, while still avoiding an actual ruling that may be best reserved for an actual adjudication.

The lack of guidance has the potential to leave uncertainty, and that uncertainty may result in more disputes being brought before the Board or perhaps in court that result in more referrals to the Board. The Board may be concerned about being flooded with individual disputes, and shippers are also concerned about the litigation and related costs associated with individual disputes. Carriers may also share those concerns (although they control which charges they seek to impose and collect). The best means to avoid such individual litigations is to provide specific guidance that limits the need for the individual litigations to begin with. In that respect, the policy statement proposal falls short.

In contrast, the Board proposes to take clear and direct action in the other two proceedings. In EP 759, the Board proposes to require a minimum level of clarity in charges for demurrage invoices and to require railroads to bill the shipper and not the shipper's warehousemen for demurrage when the shipper and warehouseman agree and so notify the carrier. In EP 760, the Board proposes to clarify and/or revoke various existing exemptions to specify that the exemption does not extend to demurrage. This is consistent with FRCA's longstanding belief that exemptions for certain commodities are no longer needed and have become counterproductive especially given the market, statutory, and regulatory changes for both railroads and shippers. FRCA also advocates, that all freight rail shippers regardless of commodity, should be able to seek rate and/or service relief before the Board.

These two proposed measures are clear, specific, and needed. The information required to be specified regarding demurrage charges is the minimum to identify the basis for the charge, and a shipper could not be expected to be able to review and process the invoice in the absence of such information. Similar requirements should also extend to accessorial charges.

If and where the shipper and warehouseman agree that the shipper is to be responsible for demurrage, the carrier should be expected to honor that agreement. To do otherwise is to undermine contract efficiency. In that regard, the Board is correct in recognizing that nothing in EP 707 requires the carrier to invoice only the warehouseman. Also, recent events have amply demonstrated that whatever level of competition may exist, or may have existed, to justify an exemption, present circumstances do not begin to immunize such shippers and receivers from the problems associated with PSR and associated accessorial and demurrage charges. A shipper/receiver of exempted commodities, or one that receives intermodal or boxcar traffic, that has made a major investment or commitment to rail transportation is unlikely to be able to change course suddenly in the midst of a service disruption or abuse charges, and it is foolish for anyone to contend otherwise.

The clarity and directness of the proposals in EP 759 and EP 760 stand in significant contrast to the more general nature of the proposed policy statement in EP 757. That contrast may be due to differences in the subject matter, but nonetheless highlights a need for the Board to address what is and is not permissible when it comes to the legitimacy of demurrage and accessorial charges. Again, one consequence of failing to do so is that shippers, receivers, carriers, the Board, and the courts will be exposed to a large number of disputes. Guidance can reduce that prospect, but only when it is clear and specific.

The above is not intended to convey that the Board's proposal in EP 759 regarding invoice information is perfect because it is not. The same problems attach to Class II and Class III carriers, some of which have treated accessorial and demurrage charges as a means to enhance the divisions or allowances they negotiated with Class I carriers. Entities such as Genesee & Wyoming, OmniTRAX, and Watco, to name only a few, have substantial operations, and they should be required, not merely "encouraged," to comply with these requirements. In particular, Class II carriers, and Class III carriers that are affiliated with large holding companies, should be subject to the same EP 760 requirements, unless they make a timely "show cause" demonstration to the contrary.

In addition, carriers should be required to make all information required to be included in the invoice, including potential charges, readily available in a shipper/receiver-friendly format, with a lag of no more than one month. One carrier tactic is to allow potential charges and associated data to accumulate, but not present it to shippers until shippers begin to seek some relief for impaired service. Demurrage (and accessorial service) charges are then deployed as a club to beat shippers into submission. If shippers are informed on a timely basis, then they can begin to compile their own information to be able to challenge railroad claims and, on some occasions, modify their activities to avoid the secret accumulation of potential charges.

Furthermore, the Board needs to take measures to address the fundamental asymmetry in the nature of demurrage and accessorial charges. Specifically, collection of such charges is initiated and controlled by the carriers at their discretion. Carriers benefit from the imposition and collection of such charges, but they face no downside exposure for any abuse in their practices. If a carrier seeks to collect a charge that is improper, the collection may prove unsuccessful (at least if the shipper has the financial resources and documentation to prevail), but the carrier suffers no adverse consequence, other than perhaps wasted legal costs. The carrier is thus incented to adopt abusive charges and engage in further abusive collection efforts.

The Board should take measures to address this problem. For example, the Board should require carriers to certify that their rules and practices comply with the Board's standards, and then impose fines or other penalties if noncompliance is demonstrated. In addition, carriers should have an affirmative

obligation of carriers to show that their demurrage and accessorial charge rules, practices, and collections are undertaken in good faith. Where a shipper demonstrates otherwise, not only would the charges be disallowed, but otherwise legitimate charges would be reduced by an equivalent amount. This type of measure would provide carriers with an incentive to engage in sound practices and a financial disincentive not to engage in abuse.

To conclude, the Board's proposals are a useful first step, but they are only a first step. They do not address all aspects of the carriers' recent conduct that has harmed shippers and receivers. As the Board moves forward in its promulgation of these three proposals, FRCA encourages the Board to spend more attention on what it can do regarding enforcement and implementation

Respectfully submitted,

Ann Warner

Ann Warner LLC
Spokesperson for FRCA

About FRCA

An umbrella membership organization, the Freight Rail Customer Alliance (FRCA) includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. Through a growing coalition of industries and associations, the mission of FRCA is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices. www.railvoices.org