

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 759

DEMURRAGE BILLING REQUIREMENTS

Comments of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) is pleased to provide comments on the Surface Transportation Board’s (“STB” or “the Board”) Notice of Proposed Rulemaking (“NPRM”) on Demurrage Billing Requirements.¹ AFPM applauds STB’s work to date, including STB’s efforts to monitor changes the Class I railroads have made to demurrage and accessorial charges in their tariffs,² as well as considering the comments and testimony related to STB’s “Oversight Hearing on Demurrage & Accessorial Charges” (Docket No. EP 754 or the “May 2019 Hearing”). Specifically, on May 22-23, 2019, STB held hearings on railroad demurrage and accessorial charges.³ As the hearing readily demonstrated, demurrage and accessorial charges, and recent changes to those charges, are a major concern for rail shippers, including AFPM members. The spread of Precision Scheduled Railroading (“PSR”) among the Class I carriers has contributed to significant increases in demurrage charges, abrupt changes in longstanding billing policies, and inadequate advance communication by rail carriers to their customers about the charges.

In response to shippers’ concerns voiced at the May 2019 hearing and in other venues, STB has taken new actions, including Dockets EP 757 and 759, to address the obvious faults and unreasonableness of the current implementation of demurrage fees by rail carriers. We are encouraged by STB’s attention to this serious issue and AFPM will be providing comments on STB’s related proposals (*e.g.*, EP 757 - STB’s Demurrage Policy Statement).⁴ Under docket EP

¹ See 84 *Fed. Reg.* 55114, “Demurrage Billing Requirements.” Notice of Proposed Rulemaking, Docket No. FD EP 759 proposed October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22202/demurrage-billing-requirements>

² See December 2018 letters from Chairman Begeman to the Class I railroads requesting updates on Demurrage and Accessorial Charges, https://www.stb.gov/stb/elibrary/NDP_Correspondence.html

³ See 84 *Fed. Reg.* 15662, “Oversight Hearing on Demurrage & Accessorial Charges.” Notice of Hearing, Docket No. EP 754 published April 16, 2019, <https://www.federalregister.gov/documents/2019/04/16/2019-07522/oversight-hearing-on-demurrage-and-accessorial-charges>. The Board received over 90 pre-hearing submissions from interested parties; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments.

⁴ See 84 *Fed. Reg.* 54717, “Demurrage Policy Statement.” Notice of Proposed Statement of Board Policy, Docket No. FD EP 757 proposed October 11, 2019, <https://www.federalregister.gov/documents/2019/10/10/2019-22200/policy-statement-on-demurrage-and-accessorial-rules-and-charges>. AFPM has also provided comments on EP 757.

759, rail shippers asked the Board to establish minimum information requirements that enable shippers to audit demurrage and storage charges, and this NPRM is proposing to do that. AFPM looks forward to working with the Board to ensure demurrage be exercised as it was intended, which is to compensate rail car owners for the costs incurred when their assets are held up beyond a reasonable time and to promote an efficient rail network, and not to serve as a revenue generator for the railroads.

II. AFPM INTEREST IN THIS PROPOSAL

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable, and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Approximately 3.7 million carloads of our members' feedstocks and products — crude oil, natural gas liquids, refined products, plastics, and synthetic resins — were delivered by rail.⁵ To that end, three principles guide AFPM's efforts around transportation and infrastructure issues impacting our members:

1. **Safety & Security** - Ensure the ability to ship feedstocks and products, safely and securely.
2. **Free & Open Markets** - Promote free and open energy markets that benefit the U.S. economy.
3. **Ability to Build & Repair** - Ensure the ability to build, use, repair, maintain, and replace energy infrastructure.

The Board has an important oversight role in looking at the impact of freight rail policies on rail shippers, and this includes demurrage charges. As is pertinent to this NPRM, parties from a broad range of industries raised concerns about demurrage billing practices at the May hearings, including issues with the receipt of invoices with insufficient information. Both the written and verbal testimony related to the May hearing demonstrated that clear communication of fees and charges is essential to ensure that a fair system is in place. The hearing also clearly showed that demurrage charges, as they are being currently implemented, are not achieving the intended purpose of promoting an efficient rail network and for compensating asset owners for the costs incurred when their assets are held up beyond a reasonable time. To this end, AFPM's comments on the demurrage billing proposal focus on improvements to the proposal that will improve communication between rail carriers and shippers and provide clarity on the type of fees that are being levied and the circumstances related to those fees. Other elements surrounding the fairness of demurrage fees are beyond the scope of these comments, but we address those issues in the AFPM comments on STB's Demurrage Policy statement filed in Docket EP 757. We also encourage STB to consider regulatory action that would update clearly outdated regulations.

⁵ Rail Traffic Data - Association of American Railroads. (2019). Retrieved from <https://www.aar.org/data-center/rail-traffic-data/>

III. BACKGROUND

Pursuant to 49 U.S.C. § 10702(2), the Interstate Commerce Commission Termination Act (“ICCTA”), requires that a railroad “establish reasonable...practices” related to “transportation and service.” Further, “[i]n section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or a practice is reasonable; rather, it gave the Board ‘broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.’”⁶ This broad discretion applies to STB’s handling and oversight of demurrage charges issued by rail carriers.

The principle underlying demurrage is straightforward-when a person or entity holds a someone else’s assets (*i.e.*, a rail car) beyond a reasonable period of time, it is taking up an asset for which the owner of that asset should be compensated. At the same time, when a person or entity holds someone else’s assets beyond a reasonable time, it can negatively impact the fluidity of the overall rail network. The Board even noted that “[d]emurrage charges serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient.”⁷ Moreover, “when a shipper’s privately-owned rail cars are idled on the railroad’s tracks, it is depriving the railroad of the use of that track.”⁸ An efficient rail network is in the best interests of both rail carriers and rail shippers, therefore a reasonable and workable demurrage system has the potential to benefit all parties.

It must be noted the rail industry has changed tremendously since the adoption of demurrage regulations and implementation of demurrage practices. In the last three decades there has been considerable consolidation of the Class I railroads and ownership of tank car assets has shifted from the rail carriers to the rail shippers. Demurrage charges were developed at a time when the railroads owned the rail tank cars and the rail industry was competitive. Today, however, almost all tank cars are owned by rail shippers or rail lessors, not by the few Class I railroads. Further railroads do not have to pay demurrage to shippers when they hold their assets (*i.e.*, a rail car owned by a rail shipper) beyond a reasonable period of time. AFPM believes the changed dynamics of the rail industry warrant a larger scale update of the regulations governing demurrage.

⁶ *North America Freight Car Ass’n, et al. v. BNSF Railway Co.* STB Docket No. NOR 42060 (Sub-No. 1), slip op. at 8 (STB served January 26, 2007) (quoting *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005))

⁷ *NAFCA*, slip op. at 8 (hereinafter “*NAFCA*”). See also 49 CFR § 1331.1.

⁸*R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102, slip op. at 4 (STB served July 20, 2010).

Under 49 U.S.C. § 10746, “[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to 1) freight car use and distribution; and 2) maintenance of an adequate supply of freight cars to be available for transportation of property.”⁹ Shipper’s share the goal of ensuring an efficient rail network, but demurrage charges assessed only against the shipper are unfair and demonstrate how outdated current demurrage regulations are. Moreover, there is great concern as to how rail carriers compute demurrage charges, establish rules related to their charges, and communicate those charges. Further, the process of challenging non-meritorious charges is incredibly flawed due to a lack of oversight and inconsistency in the billing processes.

As noted, demurrage is subject to Board regulation under 49 U.S.C. 10702 and 49 U.S.C. 10746. These statutes require railroads to establish reasonable rates and transportation-related rules and practices, and mandates that railroads determine demurrage charges alongside rules related to those charges, in a way that will fulfill national needs relating to freight car use, distribution, and maintenance of an adequate car supply.

Rail shippers are often saddled with burdensome demurrage tariff charges that are easily triggered; whereas rail carriers face limited or even no penalties should they not provide an adequate level of service that results in delays of delivering the shippers tank car assets. This situation seems inherently unreasonable and unbalanced, particularly with ownership of rail assets now the responsibility of rail shippers and lessors. With many refiners and petrochemical manufacturers “captive” to a single rail carrier, they are at the mercy of rail carriers regarding service, rate determinations, and demurrage fees. Our members are frequently faced with late or partial rail shipments in direct conflict with agreed-upon service agreements. The result is lost profits, angry customers, and partial orders that disrupt the supply chain and goods delivered to the American consumer. In addition, delayed shipments cause refineries and petrochemical manufacturers to incur overtime or trucking costs to make up for a delayed or missed railcar delivery.

Most relevant to this docket, the communication of fees charged and reasons for the charges is either minimal or non-existent. The one-sidedness of the overall demurrage system is evident when examining the process of challenging a demurrage fee. As noted in the May 2019 hearing, the data provided by the railroads in billing statements or invoices is inconsistent across industry and very limited regarding the specific reasoning for the fees and the circumstances surrounding those fees. Under Docket 759, rail shippers stated repeatedly that invoices from rail carriers are often woefully lacking basic information needed to assess the validity of demurrage charges. This dearth of information increases the burden on shippers to document and track any and all possible situations that might result in charges as a means to identifying and disputing charges applied at a later date. Further, a lack of uniformity or detail leads to a situation where rail shippers face significant disadvantages in efforts to challenge such fees.

With respect to demurrage charges, the Board has looked at the policy behind these tariffs several times over the last decades to determine if railroads are being reasonable in their application. The levying of demurrage charges and the practices used to calculate and

⁹ See 49 U.S.C. § 10746

communicate those charges are in need of review, updates, and regulatory clarity. Recent rail carriers' changes to demurrage tariffs do not appear to promote the stated purposes of demurrage, to compensate railcar owners for the use of their assets and to improve network fluidity, rather these changes are calculated to further enhance railroad revenues at the expense of shippers.

IV. AFPM COMMENTS ON DEMURRAGE BILLING REQUIREMENTS

AFPM's comments focus on the specific elements included in the billing statements, supporting documentation that should be required, and issuance of billing to relevant parties. In the Appendix, AFPM also provides recommended updates to the proposed regulatory text that are reflective of our comments.

A. GENERAL REQUIREMENTS FOR DEMURRAGE INVOICES

Per STB, the "overarching purpose of demurrage is to encourage the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those resources beyond a specified period of time."¹⁰ STB continues that "[i]f demurrage invoices are so vague that they effectively preclude shippers from determining what happened, then shippers are unable to challenge the invoices if they believe the demurrage charges were improper or to take appropriate actions to avoid future demurrage charges if they were responsible for the delays." To alleviate these concerns the Board has proposed requirements applicable to Class I carriers that establish a minimum amount of information to be included in STB invoices as well as a requirement to ensure accuracy of such information. AFPM believes the proposals in this NPRM support the stated purpose of demurrage and has the potential to vastly improve the current state of play.

AFPM supports the concept of a uniform set of minimum information being required with all demurrage invoices. This process will likely alleviate some of the issues faced daily by rail shippers. Specifically, a defined set of information that can aid in the proving of fault will result in a reduction of non-meritorious charges brought forth by the rail carriers and provide clarity during the dispute resolution process should a shipper wish to dispute a charge.

AFPM also believes such information should also be supported, where appropriate, with documentation (i.e., signed and certified documents, photos, etc.) that can confirm the veracity and accuracy of the data and thus the charges levied. Regarding the specific elements and amount of information that should be required to be submitted by the railroads, AFPM provides our thoughts on each element, as well as potential additional elements, below.

B. PROPOSED DEMURRAGE INVOICE DATA ELEMENTS

In the NPRM, STB proposed that each Class I railroad provide the unique identifying information (e.g., reporting marks and number) for each car involved in the demurrage charges. AFPM sees this information as fundamental to establish demurrage charges. In addition to

¹⁰ See, e.g., Pa. R.R. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920) ("The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.")

identifying tank car information, STB proposes certain shipment-specific information be included where applicable. This information includes:

- The date the waybill was created;
- The status of each car as loaded or empty;
- The commodity being shipped (if the car is loaded);
- The identity of the shipper, consignee, and/or care-of party, as applicable;
- The origin station and state of the shipment;
- The dates and times of; actual placement of each car, constructive placement of each car (if applicable and different from actual placement), notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable), and release of each car; and
- The number of credits and debits attributable to each car (if applicable).

AFPM supports the inclusion of these data elements as proposed; however, relating to the “origin station and state of the shipment,” AFPM suggests that the destination station and state of the shipment also be included. AFPM believes its inclusion is reasonable when considering the origin station requirement.

C. ADDITIONAL DEMURRAGE INVOICE DATA ELEMENTS

AFPM also suggests that STB require some data elements that can establish carrier-initiated changes to the trip plan that may have resulted in the charging of demurrage. If this type of data were collected and available, STB would have an enhanced ability to determine the cause of a network bottlenecks, and thus the need to charge demurrage. Further, this may help STB establish an acceptable level of service that a railroad must provide before issuing a demurrage charge to a rail shipper.¹¹

Original Schedule / Dwell Time

AFPM suggests STB require that shippers provide the “original release date, pick up date, and delivery date versus scheduled transit time.” For instance, the invoice may show cars on plan, early by “x” days or late by “x” days. This will result in increased scrutiny by rail carriers prior to issuing charges to ensure such charges are reasonable. This information will also aid rail shippers should they wish to dispute such charges. AFPM believes inclusion of this information would further promote the stated purpose of demurrage - fostering a more fluid and efficient rail network and compensating rail car owners for the use of their assets. If the Board chooses to include scheduled versus actual transit time, terms should be clearly and consistently defined so that all railroads measure these time periods in the same way.

¹¹ For example, the STB could develop precedential decisions through the dispute review process that would establish a tolerance related to original scheduled delivery date (i.e., +/- a number of days or a percentage off target date). Should a railroad exceed the acceptable tolerance, it would then be deemed unreasonable to charge a demurrage fee on a rail shipper. This could incentivize rail carriers to develop more accurate delivery estimates and thus improve network fluidity.

Including the terms “original release date, pick up date, and delivery date versus scheduled transit time will help to further determine the validity of a demurrage charge. This metric is similar to how “laydays” are utilized frequently in marine contracts. Specifically, in the context of maritime contracts, if a carrier misses the original scheduled delivery date, no demurrage is chargeable to the shipper.

AFPM members are not opposed to demurrage charges that are rightfully charged. With that said, the addition of “original scheduled date for pick-up/delivery” or “dwell time” data elements could ensure rail shippers are not charged in instances beyond their control or due to carrier delays.

Service Events & Log Numbers

AFPM also suggests STB require that demurrage billing invoices include railroad service events and log numbers of said events for the billing period in question. This will assist in achieving STB’s desired goal of more accurate demurrage invoices. In addition, it would likely streamline any disputes of demurrage fees. This information would help all parties involved quickly identify relevant information related to the charges.

D. DEMURRAGE INVOICE ACCURACY

In the NPRM, the Board proposes that prior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that the demurrage charges are accurate and warranted, consistent with the purpose of demurrage. However, the methods to ensure such accuracy are largely left unaddressed.

Currently, the rail carriers have discretion in what they include to verify the demurrage charges levied are an accurate reflection of the circumstances leading to the charge. In fact, all documentation related to the fees is provided by the railroad and is often not supported by evidence. This creates a scenario where a rail shipper is subject to the charges until proven otherwise. Put simply, the burden of proof is on the rail shipper and solely their responsibility to refute any false information. Much like other rate dispute processes, rail shippers are put in the unenviable situation of having inadequate information and no leverage when challenging these demurrage fees.

While AFPM supports the intent of this proposal, STB fails to define what would be considered “appropriate actions” or how the Board would evaluate rail carrier accuracy in demurrage billing. To clarify this procedure, AFPM suggests that STB define specific methods or types of documentation that a rail carrier must furnish when assessing demurrage fees to ensure the charges are accurate. AFPM strongly supports the inclusion of documentation (*i.e.*, signed and certified documents, photos, copies of original documentation, originally trip plans) that can confirm the veracity and accuracy of the data and the charges levied. Indeed, inclusion of railroad service events and log numbers of said events for the billing period in question are invaluable to ensuring accuracy. AFPM also suggests that demurrage billing information should include information that can confirm the rail carrier is not issuing overlapping charges.

Overlapping charges is identified as a core issue of the demurrage policy statement in Docket No. EP 757.

While some may argue this is overly burdensome, AFPM believes that providing this supporting documentation on the front end of a charge would lead to a more efficient overall demurrage process and a reduction in unnecessary or wrongfully cited charges. Specifically, by properly documenting and supporting the invoices, all parties are likely to experience a reduction in the number of, and time to resolve, disputes on demurrage charges. This could lead to reduced litigation and an improved relationship between rail shippers and carriers.

E. DEMURRAGE INVOICE APPLICABILITY

The NPRM proposal limits the applicability of the demurrage billing requirements strictly to Class I railroads. STB correctly noted that most issues relating to demurrage “identified before, during, and after the hearing predominantly pertained to Class I carriers.” With this understanding, and that any compliance costs may be overly burdensome on smaller rail carriers, STB chose not to propose to apply these requirements on smaller railroads. STB did note that while they did “not propose at this time to require Class II or Class III carriers to comply with the requirements for demurrage invoices, [should] the rule be adopted, the Board would strongly encourage Class II and Class III carriers to comply with these requirements to the extent they are capable of doing so.” The Board specifically asked for comment on the applicability of this NPRM to Class II and Class III carriers.

AFPM acknowledges the potential burden placed on small entities lacking the resources of larger Class I railroads. Further, AFPM recognizes that demurrage issues generally surface more often with Class I railroads. However, AFPM does have concerns with exempting rail carriers from these proposals given the stated purpose of demurrage is to compensate tank car owners and improve overall network efficiency. This requires coordination among all entities, large and small. AFPM would support a *de minimis* exemption for very small entities (e.g., Class III and smaller) but cautions STB to carefully consider the applicability when it comes to more sophisticated Class II carriers. AFPM therefore believes that exempting only Class III carriers may be more appropriate. AFPM notes that rail shippers are not exempted from the demurrage regulations and the burdensome process of challenging fees even though mainly rail shippers own the assets for which we are charged.

F. DEMURRAGE INVOICES NOTICE

Several participants at the May 2019 hearing expressed concerns about the impact of demurrage on third-party intermediaries who handle goods shipped by rail but have no property interest in them (commonly referred to as warehousemen). Participants raised concerns that the rule adopted in Docket No. EP 707 led rail carriers to impose demurrage charges on warehousemen, who lack control over the timing or volume of railcars shipped and have no business relationship with rail carriers. Commenters suggested shipper-direct billing as a potential solution but noted that warehousemen and shippers have been unable to reach agreement with the rail carriers.

In response to these concerns, STB proposed a requirement that serving Class I carriers send demurrage invoices directly to the shipper instead of the warehouseman, if the shipper and warehouseman agree to such an arrangement and the rail carrier is notified. Nevertheless, AFPM cautions that, as proposed, there may still be miscommunication as there is no clear mandate on which party should receive the documents.

AFPM supports a system in which the default notification would go to the warehouseman or terminal operators, should the rail cars be delivered to a third-party intermediary. This is reasonable given that terminal operators are most likely the responsible party for receipt of the tank cars and for storage of assets at their location, and thus are best suited to confirm or refute the information required on the invoice. AFPM members generally stipulate this provision in contracts with terminal operators, and rarely would they request the invoice be served to the shipper directly. However, if an agreement were reached between the shippers and warehouseman or terminal operators, and the Class I is notified, AFPM sees no issue with permitting flexibility.

V. CONCLUSION

AFPM shares STB's goal of ensuring the flow of commerce on our nation's rail system and thanks the Board for its consideration of our comments relating to demurrage charges and billing requirements. AFPM underscores the importance of a fair and competitive rail market to the energy industry and, more broadly, the U.S. economy. Reasonable demurrage charges and practices are essential, and requiring information and data is critical to ensuring such charges are fair and levied only as warranted. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

A handwritten signature in blue ink that reads "Rob Benedict".

Rob Benedict,
Senior Director Petrochemicals, Transportation,
and Infrastructure
American Fuel & Petrochemical Manufacturers

VI. APPENDIX – PROPOSED REVISIONS TO REGULATORY TEXT

AFPM provides suggested edits to the regulatory text based on, and supporting, our comments in redline format to ease STB's review. AFPM has no edits on sections not listed.

§ 1333.3 Who Is Subject to Demurrage

* * *

(b) ~~Unless otherwise stipulated, if the~~ rail cars are delivered to a third-party intermediary, that ~~has reached an agreement with a shipper (or consignee) that the shipper (or consignee)~~ third-party intermediary shall be liable for demurrage and any demurrage invoices should be served to the third-party intermediary.

(1) A third-party intermediary and shipper (or consignee) may enter into an agreement with a rail shipper (or consignee) allowing a Class I and II rail carrier to bill the shipper (or consignee) for demurrage charges without requiring the third-party intermediary to act as a guarantor.

(2) Should such an agreement be reached:

(i) The third-party intermediary must notify the Class I and II carrier of the agreement; and

(ii) The serving Class I carrier shall, after being notified of the agreement by the ~~shipper, consignee, or~~ third-party intermediary, bill the shipper (or consignee) for demurrage charges without requiring the third-party intermediary to act as a guarantor, unless and until a party to the agreement notifies the serving Class I and II carrier that the agreement is no longer in force.

§ 1333.4 Requirements for Demurrage Invoices

(a) The following information shall be provided on or with any demurrage invoices issued by Class I and II carriers:

(1) The unique identifying information (e.g., reporting marks and number) of each car involved;

(2) The following information, where applicable:

(i) The date the waybill was created;

(ii) The status of each car as loaded or empty;

(iii) The commodity being shipped (if the car is loaded);

(iv) The identity of the shipper, consignee, and/or care-of party, as applicable; and

(v) The origin and destination station and state of the shipment; and

(vi) Railroad service events and associated log numbers

(3) The dates and times of:

(i) actual placement of each car,

(ii) constructive placement of each car (if applicable and different from actual placement),

(iii) notification of constructive placement to the shipper or third-party intermediary (if applicable); and

(iv) release of each car; and

(v) The original scheduled date for pick-up/delivery of train/cars; and

(vi) The actual days of dwell.

(4) The number of credits and debits attributable to each car (if applicable).

(b) Prior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that the demurrage charges are accurate and warranted. ~~Methods to ensure accuracy may include certified statements from the rail carriers, pictures or copies of original documentation, originally trip plans, as well as other relevant materials.~~