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BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. EP 754, Oversight Hearing on Demurrage and Accessorial Charges

WRITTEN SUBMISSION OF THE NATIONAL COAL TRANSPORTATION ASSOCIATION

The National Coal Transportation Association (NCTA) is a national organization consisting of electric utilities, coal producers, and entities that produce, repair, and manage all facets of railcar component parts and systems, and services for railcar operations. This group of coal shippers has invested a significant amount of capital in the ownership, leasing, and control of fleets of railcars, which they provide to the railroads in unit trains of up to 150 cars. This constitutes an investment of roughly $6 billion on a replacement-cost basis, which does not include the millions spent on annual maintenance and repairs. The fleets of unit trains of NCTA members represent about 45% of coal cars in service in the eastern U.S. and close to 90% of the coal cars in service in the western U.S. NCTA members have significant interest in the direct and ancillary costs of maintaining and operating a modern fleet of railcars to transport coal. NCTA members are also very interested in the fair treatment of shippers regarding the total cost of service, including the costs of building and maintaining the shippers' facilities.

BACKGROUND

The Staggers Act of 1980 (Staggers) was enacted to change the regulatory framework for the railroads and to enable the rail carriers to be financially healthy. Staggers did not resolve the potential abuse of captive shippers and made captive shippers subject to differential pricing. The Act placed theoretical limitations on rates to captive shippers, but it imposed costly evidentiary restraints on the regulatory process that made rate relief difficult and rare to obtain. The first twenty years following enactment enabled a flurry of railroad mergers and abandonments resulting from a bias in the Act to encourage such gains in efficiency for the railroads. Shippers still desire to have financially healthy rail carriers providing reasonable service at reasonable rates. However, today, the rail carriers are enjoying financial prosperity while the coal shippers, both utilities and coal producers, are filing for bankruptcy and competing against volatile energy market forces and adversarial public policy.

The last decade has brought an internal review of operations by railroads that places freight railroads in a paradigm that emphasizes scheduled train operations above the flexible needs of customers. This operating theory is generally defined by the moniker Precision Scheduled Railroading (PSR). PSR is designed to decrease "operating ratios" for the railroads that have implemented this paradigm, and it has been successful in that regard after a significant period of turmoil and unsatisfactory customer service. Although no one is opposed to railroads enhancing and improving internal efficiency, there is no fairness or reciprocity in requiring customers to invest additional capital or operating expense to lower rail carrier costs. The implementation of PSR has been accompanied by the imposition of increased penalties and frequency of invoicing for demurrage and accessorial charges for the purpose of forcing customer behavior to meet the PSR plan.

COAL CUSTOMER CONTRIBUTIONS

Coal transportation is primarily a long-haul, heavy-haul movement of a commodity, and necessitates unit train operations for most movements. Today, coal represents, as a commodity, about 36% of carloads originated by Class I carriers. As railcar technology and design evolved contemporaneously with the implementation of Staggers, the rail carriers asked the coal shippers to provide the capital to purchase unit trains of railcars to serve them, as the carriers did not have satisfactory access to credit. Coal shippers and receivers responded with billions of dollars of capital to maintain rail as a viable option to transport coal. Some examples of coal customer contribution to rail carrier efficiency are:

- Purchasing or leasing of unit trains of railcars
- Replacing steel cars with aluminum cars
- Purchasing railcars capable of 20 percent more lading
- Accommodating increased train length by installing fast loading and unloading systems with loop tracks at origin and destination
- Where possible, mines have installed batch weigh loadout systems at a cost of around $25 million each to load railcars with coal within one quarter of one percent of accuracy, eliminating the requirement for the railroad to weigh the cars during the line haul
- Construction of multiple loop tracks by the mines that also pay third-party locomotive drivers to drive the train under the loadout. This allows railroads to efficiently pass off the empty train and pick up a loaded train without having to stay with the locomotive through the loading process
- Mines and utilities generally are required to supply loading or unloading crews to meet the railroad’s schedule on a 24/7 basis and pay overtime wages when applicable. Or if not able to supply an unloading crew, pay the railroad to unload the trains.
- Mines and, particularly, utilities are committed to maintaining expensive coal stockpiles at origin and destination. This is the factor that allows railroads to miss delivery schedules by days and weeks and represents the largest “surge or smoothing” capacity in the rail system between origin and destination. This stockpiling of a product exists at no cost to the rail carrier.

COAL CUSTOMER FINANCIAL INVESTMENT

Coal shippers have invested billions of dollars to improve the operational and financial efficiency of the rail carriers with no guarantee of a return on their investment. In other words, coal shippers have employed capital and the return on this capital largely goes to the railroad. The customers' investment has enabled the railroads to reduce their rolling stock, locomotive power, crews, and surge capacity. In return for this largesse, the railroads impose demurrage charges for any train delay beyond times set by the railroad for loading and unloading. (Essentially imposing penalties for having one's own railcars or equipment delayed!) Any necessary diversion or switching of the shipper-owned trainsets for maintenance or operational demands is subject to accessorial charges when railroads decide such service will be provided. Such charges must be fair to both the shipper and the carrier, and reciprocal in that the huge capital investment made by each in the overall rail operations must be reasonably protected. Recently, the Association of American Railroads has requested that the Surface Transportation Board (STB) support legislation that requires future regulations be subject to a cost/benefit analysis. This would also be a welcome change for coal shippers to have their capital improvements be considered on a cost/benefit basis rather than as an unrecoverable and obligatory expense to receive service. Even so, this change would not assure the coal shipper the protection of that investment or fair treatment overall.

DEMURRAGE AND ACCESSORIAL CHARGE TRENDS

It is instructive to list a few of the general complaints and comments of NCTA members relative to recent experience with all of the Class I railroads that haul coal:

- Slamming—Railroads will deliver multiple trains in one day and expect utilities to unload within demurrage time allotted

- Railroads will unilaterally divert trains to a more convenient mine. This may maintain their schedule, but it causes quality and contract problems for shippers

- Railroads will demand that a trainset be picked up at a repair facility only at the same time they deliver a trainset to the facility

- It is difficult to tell if short-term deterioration of service is due to PSR or flooding or other weather conditions. In any case, it appears surge capacity is diminished.

- Railroads are storing empty trains (or other types of cars not owned by the facility) at origin and destination, taking advantage of loop tracks without providing compensation.

- Over the past year, railroads have increased frequency of invoicing for demurrage and accessorial charges previously not enforced (except the BNSF, the non-PSR carrier)

- Railroads often delay train pickups from utility yards or shops well beyond the date of request from the shipper, after proper advance notification is given, thereby causing issues for the shipper with logistics, planning, and inventory management

- If delays occur in the process of delivering coal to an export terminal, customers are exposed to vessel demurrage and other costs associated with terminal fees

In terms of specific complaints, many NCTA members rely on the Union Pacific Railroad Company (UP) for their transportation of Powder River Basin (PRB) coal. Of the two western Class I railroads, only UP has decided to implement a version of PSR, which UP has named Unified Plan 2020. Since October 2018, UP has made significant changes to its tariff provisions implementing demurrage and accessorial practices and charges for unit train coal transportation. While much of coal transportation is pursuant to contract, NCTA understands that coal transportation contracts in today's industry incorporate by reference many of UP's common carrier circulars and tariffs, so UP's implementation of PSR affects all of its coal customers in some manner. Specific issues include:

- Effective January 1, 2019, UP implemented a significant change to the terms applicable to unloading coal unit trains by amending its circulars applicable to coal transportation so that the cumulative effect was to eliminate a provision that granted relief to the shipper in the event of an "Unloading Disability."[1] As defined in Item 390, Unloading Disability included a list of causes outside of the shipper's control for which charges for loading delays would not be assessed, including "any delay caused by Railroad."[2] Effective March 1, 2019, UP substantially replaced UP Circular 6603 almost entirely with UP 6004, in part by adding a wholly new section entitled "Unit Train Service Terms," which did not include Item 390. The effect of this wholesale change to Tariff 6603 was to make all PRB coal unit train transportation subject to Item 9613 of Tariff 6004 effective March 1, 2019. Item 9613 does not include any definition of "unloading disability" or any other terms setting out when its customers would be excused from charges due to certain occurrences, including delay caused by UP. On the contrary, Item 9613 states vaguely that "The charges provided in this Item do not apply to and will not accrue during circumstances beyond the Customer's reasonable control, *as determined by UP*" (emphasis added). UP's unilateral removal of the Unloading Disability provision

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1 UP Circular 6603, Applying on Loading, Handling, Accessorial Charges, Fuel Surcharges and General Rules for Coal Trains Originating in Wyoming, Item 390 ("Item 390").

2 The other causes were: (a) an act of God; (b) a strike, lockout, or other labor disturbance; (c) a riot or other civil disturbance; (d) unusual snow and/or ice accumulation sufficient to immobilize Train operations and prevent unloading of such Train; (e) an act or regulation of local, state, or federal governmental authorities; and (f) mechanical or electrical breakdown, explosion, or fire affecting the unloading Facility.

from UP 6603 means that henceforth all determinations of whether a shipper shouldn't be charged for unloading delays is within the sole discretion of UP.[3]

- Tariff 6603 Item 390 also included a provision for Notice at Destination requiring UP to furnish the Shipper at Destination not less than four hours' notice of the arrival of loaded Trains at Destination. This provision was removed in its entirety with the new tariffs now requiring the Shipper to track Train arrivals on its own with Train notifications available through the Unit Train Customer Interface (UTCI).
- Tariff 6603 Item 550 included a provision for locomotive release in lieu of destination detention charged at $3,010 per occurrence per Train. This provision was removed and the new tariff provisions include a charge for each deadhead move, at release of locomotive power and at return of locomotive power, of $3,200 each ($6,400 total), thus more than doubling the charge related to locomotive releases.
- Tariff 6603 Item 250 included a provision for the Shipper to provide a monthly coal tonnage forecast no later than the second-to-last business day of the preceding month. This provision was removed and the new tariff provisions include a requirement for the Shipper to provide a 30-day rolling forecast that could potentially require significant additional work depending on interpretation of the requirement.

The unilateral changes UP has made to the tariffs that apply to its transportation of coal have significantly disadvantaged UP's customers by (1) removing provisions that gave the

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[3]Under Item 9613, the charges that can accrue are multiple and substantial. They include a charge of $200 per locomotive (most unit coal trains have three or four) per hour or fraction thereof for exceeding unloading free time.

shipper and UP clarity on each party's responsibility for its actions associated with the movement; (2) placing the authority for determining whether either party (or neither) was at fault for delay or other inefficiency solely within the discretion of UP, transferring the burden of dispute entirely to the Shipper; (3) substantially increasing the Shipper's burden and responsibility for issue notification, tracking, researching, and disputing all related demurrage and accessorial charges; and (4) omitting any means of reciprocity for the Shipper to assess charges and recover damages incurred as a result of UP's actions, including cases of Train bunching that prevent the Shipper from adhering to the onerous requirements of the revised tariffs. As to the first point, NCTA submits that railroad tariffs should contain specific language that sets forth, to the maximum extent possible, when a rail shipper is excused from paying accessorial or demurrage charges because it is either not the cause of the action triggering the charge or the railroad is at fault. To eliminate such language makes the tariff impermissibly vague. As to the second point, it is highly unfair and unreasonable to compound the lack of clear tariff language with provisions that give the railroad the sole power to make all determinations of whether a rail shipper should be excused from a particular accessorial or demurrage charge. It has been the recent experience of our members that such an arrangement results in the Shipper receiving multiple invoices from UP's corporate accounting department that require the Shipper's staff to spend numerous hours researching and contesting the charges through a computer interface portal with limited visibility to status. Additionally, the invoices contain woefully inadequate documentation specific to the charges to allow assessment and evaluation of validity of the charges. This increases the burden on the Shipper to document and track any remotely possible situation that might result in charges to allow a means for identifying and disputing charges applied. It has also been the experience of our members that the vast majority of these invoices are dismissed on dispute, indicating that the charges are invalid at inception and the Shipper's burden to research and dispute the charges is, in effect, an additional inefficiency to the process.

SUMMARY AND REQUEST

NCTA sincerely appreciates and commends the Commissioners for providing the opportunity to testify and submit written comments relative to demurrage and accessorial charges and expenses associated with unit train deliveries of coal. The NCTA's member commitment to the maintenance, operations, and repair of the tens of thousands of coal cars in their fleets is so significant that we hold an annual conference to educate the NCTA membership on best practices for fleet management. The rail carriers also participate in these conferences and are helpful with technical information. We certainly desire to cooperate with rail carriers to enable efficient demand and forecasting, and are dedicated to providing efficient loading and unloading facilities. It is important that we and the rail carriers continue to supply a stable, reliable, and cost-effective coal supply to consumers worldwide.

Accordingly, we firmly believe it is important for the STB to ensure that there is fairness and reciprocity of risk and reward between carriers and coal shippers when any off-line costs are imposed on the shippers. NCTA respectfully requests the STB use this oversight hearing to review and direct modifications to Class I railroads' tariffs to make them more reciprocal and commercially fair. Such measures are needed in large part to balance the equities between the Class I railroads and their customers by recognizing the significant capital investment made by coal shippers in railcars and rail infrastructure, all of which benefits rail carriers. Tariffs should be carefully reviewed for reasonableness under regulatory law to ensure fairness and reciprocity for the assumed risk and responsibility of both the carrier and shipper, and provisions that do not accomplish this goal should be changed. In this light, NCTA thanks Chairman Ann Begeman and the Surface Transportation Board for its recently released Rate Reform Task Force Report—a critical step in helping to identify and implement new or modified processes and protocols to help the Board effectively address today's economic conditions and market forces. NCTA looks forward to commenting on the Report's recommendations in an upcoming public comment process.

Respectfully submitted,

John N. Ward

John N. Ward
Executive Director
Littleton, CO 80127-5718
tom@movecoal.org
National Coal Transportation Association