

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
May 8, 2019
Part of
Public Record

DOCKET NO. EP 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

**STATEMENT OF BETTE WHALEN
PRESIDENT, WESTERN COAL TRAFFIC LEAGUE**

Good Afternoon – my name is Bette Whalen, and I serve as President of the Western Coal Traffic League and Fuel Specialist Principal for the Lower Colorado River Authority. I am also a member of the Surface Transportation Board’s Rail Energy Transportation Advisory Committee. On behalf of WCTL, I thank the Board for initiating this proceeding and allowing myself, and other freight rail stakeholders, the opportunity to share our concerns regarding the demurrage and accessorial charges implemented by the Class I railroads. I am testifying today on behalf of WCTL, but also wish to express my strong support for the statement submitted by the National Coal Transportation Association and the joint statement submitted by Arizona Electric Power Cooperative and the Freight Rail Customer Alliance.

WCTL is a national voluntary trade association, whose regular membership consists of consumers of coal mined west of the Mississippi River and transported by rail. WCTL members include publicly traded companies, local governments, cooperatives, and utilities, which depend on the Union Pacific Railroad (UP) and BNSF Railway

Company (BNSF) to ship and receive hundreds of millions of tons of coal to and from their facilities each year. As a result, WCTL members are, unfortunately, very familiar with the railroads' one-sided expectations of shippers and the double standards for their respective performances. Demurrage and accessorial charges are yet another example of the striking imbalance between freight rail shippers and railroads, where shippers are required to meet certain performance standards set by the railroads or be held financially responsible, with no reciprocal requirement for the railroads.

WCTL members' issues with demurrage and accessorial fees stem primarily from: (1) implementation of Precision Scheduled Railroading (PSR); (2) railroads failing to recognize and account for key differences between commodities; (3) the railroads' inconsistent, and oftentimes incorrect, assessment and enforcement of fees, and the significant administrative burden this places on shippers to review and contest these charges; and (4) the lack of reciprocal accountability for the railroads.

1. Precision Scheduled Railroading Unfairly Punishes Shippers for Railroad Service Failures and Inconsistencies

Most of the issues with accessorial and demurrage charges were reported by WCTL members shipping on UP. These members reported that UP's implementation of PSR has been the leading driver of demurrage and accessorial fees on the railroad.

LCRA and other WCTL members have reported fewer issues with BNSF, as BNSF has not made any material changes to its tariffs over the last few years and is the only Class I railroad to not adopt PSR. Members shipping over BNSF have reported significantly fewer service disruptions, while members shipping on UP report incurring new and

substantial demurrage and accessorial charges as a direct result of the service disruptions that have accompanied UP's adoption of PSR.

This disruption and unpredictability has made it incredibly difficult for shippers to anticipate train arrival and pick up times, which, in turn, has made it incredibly difficult for shippers to manage their operations in compliance with the timelines in UP's tariffs. For example, under UP's tariffs, shippers are penalized financially if they are unable to receive a train at the scheduled time, or if they fail to unload a railcar within the allotted 24-hour free time. The railroads, however, are not subject to any reciprocal constraints and have no financial consequences when they fail to provide consistent and reliable service. Several WCTL members have reported that UP has failed to pick up trainsets at the scheduled times over the last few months, with one member reporting that UP left a trainset at its facility for nine days. Conversely, another member reported that UP insisted it take a trainset before the shipper could finish unloading the railcars, claiming it needed to stay on schedule.

While PSR may allow the railroads to operate at a lower cost, the accompanying service failures expose shippers to significant financial liability. In fact, from January 15 to April 25, 2019, a period of just 100 days, UP invoiced one WCTL member for \$183,000 in new demurrage fees. Another member reported UP has charged it \$124,500 in new demurrage fees so far in 2019, of which \$9,000 was successfully contested. WCTL members' experiences are confirmed by UP's own data. UP's May 3, 2019 submission to the Board shows the railroad generated a total of \$71.6 million in

revenue from demurrage and accessorial charges in the first quarter of 2019 – a shocking 56.5% increase from the amount it generated from those fees in the first quarter of 2016.

2. Standardizing Service Terms across Commodities Creates Inefficiencies

Like its decision to adopt PSR, UP claims it decided to standardize and consolidate unit train service terms across all bulk commodities “to drive reliability and efficiency for both UP and [UP] Unit Train Customers.” However, just like its choice to implement PSR, the standardization of unit train service terms actually creates inefficiencies for WCTL members, which results in higher costs for their customers.

As the Board has heard over the last two days, shippers of different commodities have different needs, and a one-size-fits-all approach to accessorial and demurrage charges is not the solution. Our members’ facilities take coal in unit train deliveries, which the railroads have served for many years. Facilities capable of handling unit trains require substantial capital investment from shippers and are designed specifically based on input from the serving railroad. WCTL members have expended significant resources to adhere to the railroads’ requirements, and did so based on a good faith understanding of how unit trains would be handled and how the railroads would assess and enforce accessorial and demurrage fees. The changes UP has made to its tariffs by streamlining its unit train service terms further erodes shippers’ already-limited protections.

For example, UP’s previous Tariff 6603-C, Item 390 outlines a number of events that would extend a shipper’s unloading free time without penalty from the

railroad. In the event a WCTL member suffered one of the specified events and was unable to unload the railcar within the allotted free time, the member could be secure in knowing its free time would be extended, and it was protected from incurring any penalties. UP's new streamlined tariff, Tariff 6004-C, Item 9613, simply states charges "will not accrue during circumstances beyond the Customer's reasonable control, as determined by UP." The tariff eliminates all specificity, and affords UP significant discretion to assess and enforce charges against the shipper as it sees fit. UP's claim that streamlining unit train service terms and fees will increase efficiency and reliability for shippers is simply false. Like PSR, UP is using its tariffs to lower its own operating costs and generate additional revenue, all at the expense of shippers.

The railroads' failure to evaluate the needs of individual shippers, or account for weather and shipping conditions, also results in overall system inefficiencies. For example, one WCTL member often has coal stick to the inside of railcars and usually removes it by dumping the cars twice. This is common for coal shippers, particularly when transporting coal through cold climates, as the coal can freeze and stick to the railcar. Despite this being a standard industry practice, the member reported an instance where UP's railroad crew would not let the shipper run the cars through its unloading facility a second time. Although the member still had some free time remaining, UP's crew insisted on taking the train, stating they had a schedule to keep and could not wait. The train departed with about half a carload of coal still inside. Residual coal creates a number of problems for shippers, but was especially problematic in this instance, since the train was headed to a shop for scheduled maintenance. So, in addition to losing the

residual coal and paying UP for the extra fuel needed to transport the added weight, the member was charged a cleaning fee by the shop. UP's blatant disregard for a standard coal industry practice resulted in increased shipper costs, wasted time, and lost coal.

3. Shippers are Forced to Expend Substantial Resources Reviewing and Disputing Accessorial and Demurrage Fees

Both BNSF and UP have substantial discretion when assessing and enforcing fees against shippers. The railroads exercise this discretion inconsistently, unpredictably, and oftentimes, incorrectly. As a result, WCTL members must spend significant time and resources reviewing each invoice for accuracy, and disputing those that are not.

Just last month, BNSF incorrectly charged a WCTL member \$75,000 in demurrage fees for a train traveling from Colorado to the members' facility and back. When the member reviewed the invoice, it found BNSF had incorrectly charged it for approximately 300 hours of demurrage – beginning the moment the train left Colorado, including the time the train spent at the facility, and finally ending when the train returned to Colorado. BNSF cancelled the charge, but only after the member spent time processing and disputing the invoice. Another WCTL member reported that “just about any train that shows detention has to be disputed” because BNSF's arrival time at the facility does not reflect the actual time the train is delivered to the shipper for unloading.

While WCTL members have to dispute BNSF invoices regularly, they are rarely successful. One member reported having only a 10-12% success rate, and explained that although the plant keeps records of when a train leaves the facility, BNSF

relies solely on its crews' records and does not meaningfully consider the shipper's records.

It is similarly both necessary and difficult for WCTL members to process UP invoices. One member reported it has been charged \$124,500 in demurrage charges so far in 2019, and has only managed to successfully contest 7% – about \$9,000. The member successfully disputed those charges after finding UP had incorrectly penalized it for a train that was only delayed because UP's own rail crews arrived 12 hours late. The crews' 12-hour late arrival delayed the first train and prevented the member from unloading the next train within the required 24 hours. As a result, UP charged the member \$3,000 per engine for failing to timely unload the second train. Although UP has improved somewhat in accurately invoicing shippers, one WCTL member reported that more than 75% of UP's invoices still have to be disputed. As a result, members are dedicating a significant amount of time to reviewing and correcting the charges.

The burdensome review and dispute process is exacerbated by the railroads' inefficient invoicing procedures. For example, UP invoices each engine on a unit train individually. This requires a shipper to track down all three engines on a unit train and make any necessary edits to the three corresponding separate invoices. To address this inefficiency and reduce the administrative burden on shippers, WCTL recommends that the railroads issue all invoices associated with a particular unit train together, or consolidate all of the invoices into one master invoice.

4. The Lack of Reciprocity is Unfair to Shippers and Compounds the Already Significant Disparity between Freight Shippers and Railroads

The most significant problem WCTL members, and other freight rail shippers, face with regard to demurrage and accessorial fees is the complete lack of reciprocity and the inherent unfairness of the charges. These fees, and the railroads' assessment and enforcement against shippers, have added to the imbalance between freight rail shippers and railroads. While shippers are required to adhere to strict timelines and are subject to steep financial consequences, railroads have no corresponding obligation or punishment. As a result, the railroads have little incentive to perform consistently, or even invoice shippers correctly. Shippers have limited protection under the tariffs and are required to take matters into their own hands, expending significant resources just to process and review each invoice for accuracy to recoup any incorrect charges.

In a letter to the Board dated November 27, 2018, UP stated that in the event UP fails to pick up or deliver a car at the scheduled time, it provides a shipper with credits to offset demurrage fees. This is a good place to start, but does not go far enough, as the shipper is ultimately held responsible for any imbalance. As I previously mentioned, one WCTL member reported numerous instances where UP failed to show up at its scheduled time, leaving trains to sit at the member's facility for days. A shipper is required to unload every train it receives within 24 hours – regardless of whether that train is picked up by UP the following day. Although a shipper does not pay demurrage fees on a sitting train, requiring shippers to abide by the 24-hour unloading deadline

when UP is not going to pick up the train unnecessarily wastes shipper resources. When multiple trains are scheduled to arrive at a facility in a month, shippers increase the amount of staff on site to ensure that it can unload the trains within the required 24 hours and avoid incurring fees. There is no punishment for the railroad if it fails to pick up the train at the scheduled time the following day, nor is there any reimbursement for the shipper's wasted time and expense. A more balanced solution would be to track the number of times the railroad is late picking up a train over a twelve-month period and give the shipper credits or reimbursement based on that amount, so the shipper can be compensated for its actual increased costs – not just given credits to offset future demurrage fees. This would incentivize railroads to evaluate its 24-hour unloading deadline in light of its pickup capabilities and avoid unnecessarily driving up costs and inefficiencies for shippers.

In summary, we request that the railroads work with shippers to ensure that the accessorial and demurrage charges do not unnecessarily penalize and burden shippers, especially when many of these charges are a direct result of PSR or railroad error. Most importantly, any next steps should focus on increasing reciprocity and rewarding shippers for meeting the railroads' requirements in their tariffs, rather than just penalizing shippers when they fail to do so. WCTL also urges the Board to consider any other actions it believes will aid those negatively impacted by the demurrage and accessorial charges implemented by the Class I railroads.

On behalf of WCTL, thank you for allowing me to testify today. I am happy to answer any of your questions.