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POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

OPENING COMMENTS OF CANADIAN PACIFIC

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POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

OPENING COMMENTS OF CANADIAN PACIFIC

Canadian Pacific¹ (“CP”) submits these Opening Comments pursuant to the Board’s Notice of Proposed Statement of Board Policy served on October 7, 2019 in the above-captioned proceeding (“NPSBP”). CP has serious concerns with the proposed policy statement, which it believes is inconsistent in several material respects with the statutory basis for demurrage, precedential authority, and the U.S. Rail Transportation Policy. Moreover, CP believes that the policy statement is unnecessary and could have significant unintended consequences for the North American rail network. At the very least, CP believes the proposed policy statement should be revised to reflect the longstanding and well-grounded law on demurrage. In these comments, CP addresses particularly concerning aspects of the proposed policy statement.

I. INTRODUCTION.

In considering proposed changes to its demurrage rules and promulgation of a policy statement, the Board must be guided by 49 U.S.C. § 10746, precedential authority, as well as by 49 U.S.C. § 10101, the U.S. Rail Transportation Policy (“RTP”). Section 10746 reflects

¹ Canadian Pacific is a trade name under which Canadian Pacific Railway Company and its United States subsidiaries Soo Line Railroad Company, Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. operate.

Congress’s recognition of the importance of demurrage to the efficient functioning of the railroad system. Thus, Congress has charged railroads with the requirement that they “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 the transportation of property. 49 U.S.C. § 10746.

Consistent with the statutory charge, the courts and the STB have long recognized that, as Justice Brandeis explained, “All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention.” *Turner Lumber Co. v. Chi., Milwaukee & St. Paul Ry.*, 271 U.S. 259, 263 (1926) (citing *Pennsylvania R. Co. v. Kittanning Iron & Steel Co.*, 253 U.S. 319, 323 (1920); *Edward Hines v. United States*, 263 U.S. 143, 145(1923)); *See, e.g., North Am. Freight Car Assoc. v. BNSF Ry., Co.*, Docket No. 42060 (Sub-No.1), slip op. at 1, n.2 (STB served Jan. 26, 2007) (“NAFCA”) (“Demurrage is a charge that compensates rail carriers for costs incurred when rail cars are detained by shippers and serves as a penalty for undue car detention”).

Applicable provisions of the RTP include the policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” [1]; “to minimize the need for Federal regulatory control over the rail transportation system” [2]; “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues” [3]; “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense” [4]; and “to foster sound economic conditions in

transportation and to ensure effective competition and coordination between rail carriers and other modes” [5]. 49 U.S.C. § 10101.

II. CP HAS FOUND DEMURRAGE TO BE A CRITICAL TOOL TO ENCOURAGE EFFICIENT SHIPPER BEHAVIOR.

Congress’s understanding of the importance of demurrage has been borne out by CP’s recent experience. Beginning in 2012, CP underwent a radical transformation from industry laggard to one of the most efficient, reliable and safest rail carriers in the world. CP accomplished this remarkable transformation by a relentless focus on, among other things, asset utilization.

Day in and day out, CP looks to get more out of the railroad assets on its system, which creates a virtuous circle of efficiency. By reducing dwell time and increasing system speed, CP is able to move more freight with less equipment. With less equipment on CP’s system, CP is able to increase system speed, further reducing transit times, which further reduces the amount of equipment needed. CP’s demurrage rules have played and continue to play a critical role in driving efficiency. Changes that CP made to its demurrage rules have helped encourage shippers and receivers to do their part to ensure that equipment is turned quickly and does not congest CP yards and other facilities. The result is that the overall North American rail network operates more efficiently and with increased capacity to the benefit of all stakeholders, including shippers.

Over the years, CP’s demurrage rules have evolved. The evolution has both been in response to technological, operational, and economic changes and to drive adoption of such changes in order to promote greater efficiency. These changes include faster loading and unloading facilities and CP’s investment in technology, which provides the customer not only with faster service but with unprecedented visibility as to the status and location of cars in the pipeline and the greatly increased ability to manage and avoid demurrage, among other capabilities. For example, in 2013, CP updated its demurrage rules to reduce the amount of free time for loading

and unloading from 48 to 24 hours for railroad cars. This rules change reflected the fact that what constitutes a reasonable time to load and unload has changed over time, in large part due to technological change. Because of the availability of better tools to manage their pipeline and investment in appropriate physical facilities, among other things, CP's customers are capable of consistently loading and unloading within those time frames. In fact, before the rule change many of CP's customers were already loading/unloading well within those time frames. In reducing the amount of free time, CP provided an incentive to adopt more efficient behavior or to invest in facilities that are more efficient and/or are capable of receiving a volume of cars commensurate with the volumes, as measured in revenue ton miles, in the customer's pipeline.

In the years since CP has adopted the new rules, CP has seen improvements in customer behavior. These improvements are evidenced by the fact that, while CP's car volumes have increased, demurrage charges have decreased as a percentage of total revenue as well as in absolute dollars. *See Oversight Hearing on Demurrage and Accessorial Charges, Written Testimony of Pam Arpin, AVP, Customer & Corporate Services, Canadian Pacific, Docket No. EP 754, at 5 (filed May 8, 2019) ("Arpin Testimony")*. These improvements have helped CP move significantly more volume with fewer cars and locomotives. *Id.* at 7.

Thus, demurrage continues to be a critical tool to influence customer behavior and ensure an efficient and sound transportation system. Any action by the STB that reduces the flexibility of carriers to change their rules to adapt to new conditions and technology could have a significant impact on the health and efficiency of the rail system. Given the volumes that the rail network is called on to handle each day, even small changes such as requiring a minimum free time for private cars, can have a substantial impact. It can both increase ownership costs for existing equipment and result in the need to invest in more equipment to compensate. More equipment in the system

and shippers leaving cars sitting on rail tracks for longer periods of time both contribute to congestion in the yards and across the network to the detriment of all participants in the supply chain, including shippers. Increased congestion means slower cycle times which in turn drives a need for more equipment. In light of this potential for very real harm to system capacity and speed, and the lack of a compelling need for the Board to publish a policy statement, CP urges the Board to terminate this proceeding and take no further action. At the very least, the Board should issue a revised policy statement that is consistent with the law.

III. THE PROPOSED POLICY STATEMENT IS UNNECESSARY AND COULD HAVE A DETRIMENTAL EFFECT ON RAIL SERVICE.

The industry is undergoing a period of transition as several other Class I railroads adopt variations of the precision scheduled railroading (“PSR”) operating model. Some of the concerns voiced by shippers and receivers appear to be driven by service issues that have at times accompanied the transition to PSR. However, there is every reason to believe that these service issues are temporary. Some of the concerns expressed by shippers and receivers are in response to specific changes in tariffs which force the shipper or receiver to adopt new practices and procedures that promote more efficient use of rail assets. In CP’s experience, shippers and receivers can and do adapt and realize the benefits that come from increased capacity and velocity under the PSR. Further railroads have been responsive to concerns raised by shippers, adjusting or withdrawing new rules that may have missed the mark. NPSBP at 15. In light of the fact that the issues before the Board appear to be temporary, promulgation of a broad policy pronouncement would seem unnecessary and inconsistent both with the purposes set out in 49 U.S.C. § 10746 and with the RTP. CP is particularly concerned that the proposed policy statement could be a precursor to, and the basis for, rolling back efficiency gains which have benefited both CP and its customers.

At the end of the day, the proposed policy statement, if adopted, is likely to drive litigation and undermine shipper and receiver compliance with rules that have proven effective in promoting positive shipper and receiver behavior. Moreover, as is often the case with prescribed regulatory standards, the proposed policies, if adopted, may also stifle innovation in the industry.

A. The Proposed Policy, Which Would Likely Constrain Railroads' Ability To Reduce Free Time, Is Not Sound Policy.

1. The proposed policy addresses an issue that would otherwise resolve itself.

CP believes that the Board's expression of "serious concern" regarding reductions in free time is misplaced and its policy statement would have negative consequences. As discussed above, in 2013, CP reduced free time for loading/unloading railroad cars from 48 to 24 hours and reduced free time for private cars at closed gate facilities to zero. These changes have helped propel CP's efficiency gains to the benefit of all customers. Since making these changes, CP's customers have adjusted in a number of ways. Some have added track capacity in order to be able to call in cars on arrival at a CP service yard. Some have utilized CP-provided customer tools to better manage their pipeline in order to avoid demurrage. Some have adjusted labor schedules in order to be able to receive cars on the first switch. Others have done some or all of the above. The net result is that, although CP is moving more cars, demurrage charges have decreased. Arpin Testimony at 5.

The Board's policy statement in this regard appears to be in response primarily to shippers and receivers who have more recently been subject to reductions in free time. CP's customers, however, have adapted to the reduced free time. As a result, most if not all of CP's customers have enjoyed the benefits of reduced transit times, more reliable service, lower ownership costs and lower inventory costs. CP fully expects that the other rail carriers' customers will similarly adapt to reduced free time and will similarly benefit from the resulting efficiencies. Accordingly, CP

cautions against regulatory actions that may have lasting unintended consequences to address an issue that, based on CP's experience, is likely to resolve itself.

2. The proposed policy enshrines cross-subsidization of inefficient shippers by all other shippers.

The Board's concern that some shippers and receivers have limited track space and are unable to expand is not a sound basis for disallowing carrier's ability to encourage efficient use of rail assets by reducing free time. It is reasonable for a railroad to expect that a facility will manage its pipeline consistent with its track capacity, allowing for some amount of variability in rail service. In CP's experience, most shippers and receivers have adequate track capacity or are capable of acquiring such capacity to handle cars without incurring demurrage under CP's reduced free time regime. Shippers and receivers without sufficient track capacity tend to be the exception. These customers, instead of managing their pipeline, often choose to utilize CP's serving yard as temporary storage. Such behavior contributes to congestion and less efficient operations in CP's service yards, which in turn impacts network fluidity and service to other customers. If these shippers are not required to compensate the railroad for their use of its facilities and their impact on efficient operations, they are effectively being cross-subsidized by all other shippers. *See NAFLA*, slip op. at 6 (finding that prior to BNSF's adoption of demurrage charges for storage of empty private cars on rail carrier tracks, costs to the railroad of such storage, "including loss of system fluidity" was being cross-subsidized by other shippers). The Board has upheld demurrage policies that seek to eliminate such cross subsidies, including by encouraging investment in private track or entering into leases to avoid charges. *Id.*, slip op. at 11. *See also Savannah Port Terminal R.R., Inc.—Petition for Declaratory Order—Certain Rates and Practices as Applied to Capital Cargo, Inc.*, Finance Docket No. 34920, slip op. at 11 (STB served May 30, 2008) (upholding as a legitimate use of demurrage, charges that penalized a shipper with inadequate track capacity, and

encouraging the shipper to move to a facility with sufficient track capacity to meet its business needs). Use of demurrage rules to reduce or eliminate such cross subsidization is both reasonable and consistent with the RTP. *See id.*, slip op. at 6-7. The proposed policy statement, however, would tolerate some amount of cross-subsidization. It would force the many customers who have invested in sufficient track facilities to subsidize the few customers who do not have sufficient track capacity. Thus, the proposed policy statement would help to preserve and protect inefficient behavior and sub-optimal investment in facilities by a small group of shippers at the expense of the North American rail system and all other rail customers. Such a policy is unsound and at odds with the well-established law governing demurrage.

3. Reductions in free time are consistent with CP's investment in tools that enable its customers to manage better their pipeline to avoid demurrage.

Online tools, such as CP's Customer Station are becoming widely available and provide shippers and receivers with unprecedented ability to manage their pipeline to avoid demurrage. As explained in CP's comments concurrently filed in EP 759, CP's Customer Station provides a shipper with real time visibility as to its inbound pipeline. This includes cars that are on upstream connecting carriers. CP has invested considerable time and expense in developing its version of these tools. Given that customers have improved capability of managing their pipeline, shippers need less free time to turn rail cars.

CP has also invested time and expense in developing timely, fair and effective demurrage charge dispute resolution processes and practices. For example, as Pam Arpin explained in her May 23, 2019 testimony to the STB, CP provides the opportunity to log issues online in real time, CP has an internal review process to identify railroad caused charges, and CP provides an

opportunity for a pre-bill review. If CP does not respond to a dispute within 15 days, it is resolved in the customer's favor. Arpin Testimony at 2-4.

Moreover, most shippers and receivers have made investments in their physical plant in order to be able to accommodate potential rail service variability. As the Board has acknowledged, there are many variables outside a railroad's control and therefore "a railroad cannot reasonably be expected always to meet an ideal timetable." *NAFCA*, slip op. at 12 (quoting *Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Ry. Co.*, Docket No. 42068, slip op. at 7 (STB served April 12, 2004)). It is neither unfair nor unreasonable to charge those that have not made sufficient investment or otherwise managed their pipeline, to pay for the privilege of using CP tracks and cars for temporary storage.

B. The Proposed Policy That Would Make The Delivering Carrier Bear The Cost For Bunching That Occurs Upstream Would Reverse Longstanding Law And Is Bad Policy.

The Board's proposed policy regarding demurrage charges for bunching that occurs beyond the delivering carrier's control is inconsistent with precedent. The STB has long held that shippers and receivers are responsible for demurrage unless the railroad is at fault. *See, e.g., Chrysler Corp. v. N.Y. Cent. R.R. Co.*, 234 I.C.C. 755, 758 (1939) (stating that "[d]emurrage may properly be assessed where the detention occurs through no fault of the shipper, even though the cause of the detention is beyond the shipper's control"). This includes demurrage charges that are based on events that occurred on an upstream carrier.

The existing law is sound policy as it holds accountable the participants in the supply chain best able to avoid or mitigate demurrage, *i.e.*, the shipper or receiver. Bunching may be the result of, among other things, a delay of a vessel, poor service by the motor carrier, or operational issues of a connecting carrier. Normally, the delivering carrier has no control, and in many cases no

influence, over these other participants in the supply chain. In all these instances, it is the shipper or receiver that is best positioned to influence the timing and quality of services provided by these upstream carriers and to negotiate for concessions in the event of poor service.

In some cases, the upstream events that cause bunching occur at the direction of the shipper or receiver but the delivering carrier will be entirely in the dark. For example, cars originating offline may be released over multiple days but may be bunched at origin because of track maintenance at the shipper's facility. Although the shipper is responsible for the bunching, to CP it will appear that the party responsible for bunching is the originating carrier; the shipper's or receiver's hand in causing the delay is often obscured.

Moreover, the shipper or receiver also often has the tools to manage and adjust its pipeline in response to delays due to upstream events. For example, if the shipper identifies a bunching event, it may be able to modify the timing to shipments from other origins. By contrast, the delivering carrier has little or no influence over upstream carriers, including which carriers the shipper uses. But under the proposed policy, it would be the delivering carrier that must bear the costs for these offline events.

Notably, the Board's proposed policy effectively removes the incentive for the shipper or receiver to be proactive in managing its pipeline and protecting itself against demurrage caused by an upstream carrier. Instead, it makes delays due to bunching more likely and forces the delivering carrier to bear the costs of such delays. Accordingly, the proposed policy is inconsistent with both the efficiency and compensation purposes of demurrage. *See NAFCA*, slip op. at 12.

The proposed policy is also inconsistent with the RTP. In particular, it fails "to ensure the development and continuation of a sound rail transportation system" 49 U.S.C. § 10101(4). Likewise, it undermines rather than fosters "sound economic conditions in transportation and ...

effective competition and coordination between rail carriers and other modes.” 49 U.S.C. § 10101(5). Instead, it makes the delivering railroad pay for the failures and decisions of other participants in the supply chain whom the railroad did not choose, does not have a contractual relationship with, and of which the railroad may not even be aware.

C. Access To CP Customer Station Should Be Sufficient To Meet Shipper(s) Need For Underlying Billing Detail.

CP agrees with the Board in principle that shippers and receivers should be provided with the information necessary to review demurrage invoices and that the dispute resolution process should be accessible and timely. CP disagrees that a policy statement to this effect is warranted or appropriate. As explained in CP’s opening comments filed in *Demurrage Billing Requirements*, Docket No. EP 759 and in Pam Arpin’s written and oral testimony to the Board in *Oversight Hearing on Demurrage and Accessorial Charges*, Docket No. EP 754 (all of which are incorporated herein by reference), CP has invested in developing web-based tools that shippers can use to access demurrage related data and manage their inbound car pipeline and inventory. Other carriers have developed similar tools. These efforts reflect competition by and among rail carriers. Consistent with Congress’s directive to minimize the regulatory burden (49 U.S.C. § 10101(2)), the Board should defer to market forces to address shipper concerns with railroads who may be behind the curve. Regulatory action is both unnecessary and could have the unintended effect of discouraging continued innovation.

D. Proposed Policy Promotes Gaming Of The Credit System Undermining The Effectiveness Of Demurrage In Promoting Efficient Use Of Rail Assets And Car Availability.

The Board’s proposed policy statement as to credits states, “The Board is troubled by this lack of reciprocity, particularly where the expiration date of a credit, in effect, undermines the value of a credit or credits that were allocated for a problem or delay that was not within the

reasonable control of a shipper or receiver.” NPSBP at 18. This statement fundamentally misconstrues the purpose of demurrage generally, and the purpose of credits specifically.

The dual purpose of demurrage is to promote efficient use of rail assets and to compensate railroads for the use of their assets. *See, e.g., NAFCA*, slip op. at 1, n.2. Not only is compensating the shipper or receiver for delays beyond their control not a recognized purpose of demurrage, it is at odds with both the actual purposes of demurrage. *See id.*, slip op. at 13, n. 46.

The purpose of awarding a credit for railroad-caused problems or delay is not to compensate the shipper. Rather, it is to give the shipper or receiver a reasonable opportunity to load/unload a car without penalty when the delivery of the car was delayed due to the delivering rail carrier’s fault. For example, if CP causes bunching, the shipper or receiver may not be able to accept all of the cars at once. CP awards credits to provide the shipper or receiver the opportunity to load or unload the cars affected by the bunching without incurring demurrage. Because credits are intended to be used to address the specific problems associated with the carrier-caused delay for which they were awarded and are not intended as compensation, unused credits expire at the end of the month.

Allowing a customer to bank unused credits to use at its convenience would both encourage inefficient use of rail assets and deny railroads compensation for use of railroad assets. A shipper or receiver with banked credits will use those credits when it best suits that customer’s needs without regard to the impact on fluidity of CP, the rail network, or the needs of other rail customers. The shipper or receiver might opt, for example, to use its credits to store cars in the railroad’s serving yard which could cause congestion and interfere with efficient rail operations and could threaten the adequacy of car supply for other customers. Moreover, it would allow the shipper or receiver to use rail assets rent free. A credit and debit system that facilitates inefficient use of rail

assets and does so without compensation is irreconcilable with the dual purposes of demurrage and the statutory requirement that railroads “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.” 49 USC § 10746.

Allowing shippers and receivers to monetize such credits penalizes the carrier. It also raises similar concerns as banked credits. A shipper that monetizes credits may still use the monetized credits to fund otherwise avoidable future demurrage incurred for the shipper’s convenience.

Simply put, the concept of reciprocity in demurrage finds no perch in the demurrage statute or precedent. *See NAFCA*, slip op. at 13 n.46 (explaining that a service failure “does not warrant overturning the railroad’s entire storage or demurrage program, as there are other remedies available for that situation”).

E. The Proposed Change To Policy And Rules On Warehousemen Is Impracticable And Unsound Policy.

The proposed policy statement touches on the proposed rule in *Demurrage Billing Requirements*, Docket No. EP 759 (STB served October 7, 2019). That proposed rule would require a delivering carrier to directly bill a shipper for demurrage incurred at a warehouseman’s facility where the warehouseman and shipper have agreed to direct billing and would prohibit the carrier from billing the warehouseman. *Id.* at 11. In this docket, the Board appears to be proposing a related policy statement that, among other things, states that “Nor should rail carriers be able to hold warehouseman responsible when a shipper that has agreed to accept responsibility for demurrage does not pay.” NPSBP at 20. CP believes that this proposed policy statement and the proposed rule are both impracticable and unsound policy. CP is submitting separate comments in EP 759 which are incorporated herein by reference.

In sum, the policy statement and rule ignore the fact that the delivering railroad carrier may not have a relationship with the shipper. This is particularly true of CP whose traffic typically either originates or terminates offline. The lack of a relationship can make it difficult, if not all but impossible as a practical matter, for the delivering carrier to hold the shipper responsible for demurrage. By contrast, warehousemen do have relationships with their shippers and are best positioned to establish the necessary terms with their shippers to recoup any demurrage deemed attributable to the shipper actions. Likewise, typically warehousemen are best positioned to avoid or mitigate demurrage or to influence its shipper's behavior, but the proposed policy and rule reduce if not eliminate warehousemen's incentive to do so.

F. The Board's General Concluding Considerations Are Inconsistent With The Purpose Of Demurrage.

The Board proposes "two fundamental principles." The first proposed principle is that "demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets. In other words, charges should not be assessed in circumstances beyond the shipper's or receiver's reasonable control." NPSBP at 21. This "fundamental" principle is fundamentally flawed in that it ignores the fact that demurrage also serves to compensate carriers for use of their assets. Instead, under the proposed principle, rail carriers would be required to bear the cost incurred due to events that occur beyond their control.

The proposed principle is also internally inconsistent in that it ignores the fact that the payer of freight is in the best position to protect itself against demurrage caused by upstream carriers and events and to adjust its inbound pipeline in response to delays due to upstream events. As discussed in section III.B. above, the Board's proposed principle effectively relieves the shipper from taking

any action to proactively manage its pipeline or protect itself against demurrage caused by an upstream carrier. Instead, it forces the delivering carrier to bear those costs.

The first proposed principle includes a corollary “that revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose.” *Id.* Again, this proposed principle ignores the fact that demurrage serves the dual purpose of compensation and penalty. As Pam Arpin testified at the hearing before the Board on May 23, 2019 in Docket No. EP 754, the demurrage that CP collects does not fully compensate CP for its ownership costs. While CP uses demurrage primarily as a tool to influence shipper behavior, the reasonableness of the amount that CP charges should not be determined solely by whether or not the amount is more than what the STB may determine is needed to accomplish that second objective. Rather, cost recovery must also be taken into account.

CONCLUSION

For the reasons stated above, CP believes that the proposed policy statement on demurrage is inconsistent with the statute, precedential authority and the RTP. CP further believes that the statement is unnecessary. At the very least, the proposed policy statement should be revised to be consistent with the law.

Respectfully submitted,

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