

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**Docket No. EP 757
Policy Statement on Demurrage and Accessorial Rules and Charges**

**OPENING COMMENTS OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

Pursuant to the Notice of Proposed Statement of Board Policy served by the Surface Transportation Board's ("STB" or "Board") in this docket on October 7, 2019 ("*Policy Statement*"), the North America Freight Car Association ("NAFCA") hereby submits its opening comments on the *Policy Statement* and the various proposals contained therein. For the reasons set out below, NAFCA continues to applaud the Board for its attention to these critically important industry issues, and NAFCA offers several suggestions for improving and clarifying the various components of the *Policy Statement*. At the same time, NAFCA again strongly implores the STB to be more aggressive and proactive in controlling Class I railroad demurrage and accessorial charges and related practices.

I. Identity and Interest of NAFCA

As stated in NAFCA's opening and supplemental comments in EP 754, *Oversight Hearing on Demurrage and Accessorial Charges* ("*Oversight Hearing Proceeding*"),¹ NAFCA is an organization made up of private (non-railroad owned) rail car manufacturers, owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. NAFCA's

¹ NAFCA's submissions in EP 754 are appended to these Opening Comments for the Board's convenience and ready reference.

members include some of the largest railcar manufacturers and lessors in the industry as well as rail shippers who collectively lease and/or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.² Combined, NAFCA's members own and/or lease in excess of 700,000 private railcars, which constitutes approximately 60% of the entire national private railcar fleet of approximately 1,200,000 cars.³ NAFCA is dedicated to promoting the safe, efficient and economical ownership and use of private railcars. To achieve these goals, NAFCA and its members rely on their extensive collective knowledge of the railcar industry to investigate relevant issues and to educate public policy makers, regulators and the media regarding operational, regulatory, economic, and legal matters that affect private railcars. NAFCA also strives to ensure its members and all private car owners and operators are subject to reasonable, equitable and lawful practices and rules affecting the use, repair, and principles of compensation for private railcars.

II. NAFCA's Opening Comments on the *Policy Statement*

A. General Comments

NAFCA believes it is evident from the *Policy Statement* that the Board carefully listened to the industry stakeholders who submitted comments and oral testimony during the *Oversight Hearing Proceeding*, and that the Board has set out some proposed guidelines that can be clarified and expanded upon to somewhat improve the current imbalances in the rail industry concerning demurrage and accessorial charges and practices. This being said, the *Policy Statement* falls well short of fully addressing a core issue identified by Chairman Begeman very early in this process that is of keen interest to NAFCA and private car owners and lessees: the lack of reciprocity between the charges and rules imposed by railroads to incentivize efficient railroad operations and

² <http://www.nafcahq.com/home>.

³ NAFCA Written Submission in Oversight Hearing Proceeding, dated May 8, 2019 at 2.

car usage and the measures private car owners and lessees can take to try to similarly incentivize railroads to maximize their efficient use of privately-owned railcars, which now constitute approximately 74% of the entire national railcar fleet.⁴ As explained by NAFCA in its written comments in the *Oversight Hearing Proceeding* true reciprocity – meaning ensuring there are sufficient incentives for all parties to use *all* railcars in the Nation’s fleet efficiently – means that the charges and rules the railroads apply to their customers should also be applied to the railroads’ use of private cars, and this should be reflected in railroad tariffs and other common carrier documents. It should be plainly evident to the Board from the *Oversight Hearing Proceeding*, and the fact that the Class I railroads have for the most part made no substantive changes to their demurrage and accessorial charge practices since the hearing, that the Class railroads will not take such action voluntarily. NAFCA respectfully asks the Board to reconsider its decision to not address this important issue in the proposed *Policy Statement* and provide much needed guidance to industry stakeholders on it in the final version of the *Policy Statement*.

B. Comments on the Proposed General Guidelines and Policies

1. The Board Should Provide Additional Details and Discussion on the General Principles that Apply to Accessorial Charges and Practices

Although Docket EP 757 is entitled *Policy Statement on Demurrage and Accessorial Rules and Charges*, the majority of the discussion and proposed policy guidelines address only the demurrage practices of the railroads. There is comparatively little discussion about accessorial charges and practices. Moreover, in what NAFCA presumes is an oversight, the Board has used a definition of “accessorial charges” for purposes of the *Policy Statement* that does not reflect the true breadth and scope of such charges, and indeed is narrower than the definition used by the

⁴ Letter from Chairman Ann Begeman to Mr. Kenny Rucker of Union Pacific Railroad Company, dated November 20, 2018.

Board when seeking industry stakeholder input in the *Oversight Hearing Proceeding*. Specifically, in the *Oversight Hearing Proceeding* the Board stated that “[a]ccessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges.”⁵ NAFCA concurs with this definition.⁶ In the hearing notice, the Board elaborated that “[a]s used herein, the term ‘accessorial charges’ includes, *without limitation*, charges for such things as diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering on railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions.”⁷ However, the Policy Statement inexplicably excludes the broader definition first stated and it omits the critical phrase “without limitation” from the Board’s examples, thereby producing a narrower definition of “accessorial charge” to which the proposed principles and guidelines could apply.⁸ NAFCA submits that the Board correctly recognized the broad scope of scope of accessorial charges in today’s rail industry in the *Oversight Hearing Proceeding*, and this should be consistently reflected in the final version of the *Policy Statement*.

Additionally, the Historical Overview and General Principles section of the *Policy Statement* is almost exclusively a discussion of the history and general rules governing demurrage. There is no discussion about the rules and policies governing accessorial charges and practices, and no definitive declaration that any of the general guidelines or principles the STB proposes would apply to demurrage disputes would also be applied in disputes over accessorial practices and charges. NAFCA submits that if the STB intends for some or all of the proposed general

⁵ EP 754, *Notice of Public Hearing* at 1, note 1.

⁶ NAFCA Opening Submission in EP 754 at 1, note 1.

⁷ EP 754, *Notice of Public Hearing* at 1, note 1 (emphasis added).

⁸ *Policy Statement* at 2.

principles it has articulated for demurrage to also apply to accessorial charges and practices - a position NAFCA fully supports - the *Policy Statement* should specifically articulate this intention so as to eliminate uncertainty going forward. The Board should therefore include in the final version of the *Policy Statement* a more robust discussion of how its general principles for demurrage apply to accessorial charges and practices in the final version of the *Policy Statement*.

As far as the specific areas in which the Board discussed applying its general principles, the sections on Free Time and Bunching in the *Policy Statement* are again exclusively tailored to demurrage charges and practices. The Board should clarify the extent to which such policies also apply to accessorial charges and practices, since many such charges and practices are also tied to free time and bunching principles.

While the Invoicing and Dispute Resolution section does mention accessorial charges to some degree, it too is focused primarily on demurrage billing and invoicing practices. This singular focus on demurrage billing is reinforced by the accompanying rules proposed in EP 759, *Demurrage Billing Requirements*, which are utterly silent on railroad accessorial charge billing practices. The Board does provide some proposed guidance regarding accessorial charges in the Overlapping Charges and Credits section of the *Policy Statement*, but these discussions are also tied to the general principles governing demurrage charges and practices. NAFCA reiterates that the general principles the Board has articulated for demurrage charges and practices also apply to accessorial charges and practices, and the Board should clarify and reinforce this in the final version of the *Policy Statement*. To the extent the Board believes different general principles apply to accessorial charges and practices, it should clearly identify and explain these differences.

Finally, the Board received a significant amount of written and oral testimony in the *Oversight Hearing Proceeding* about the extremely high level of some accessorial charges and

how they have enhanced Class I railroad profits. Accordingly, the final *Policy Statement* should provide stakeholders with a summary of the legal rules that would be applicable in disputes over the level of accessorial charges and the reasonableness of accessorial practices. For example, the Board should elaborate on its general statement that “issues relating to accessorial charges may arise in proceedings before the Board in a variety of contexts”⁹ by providing a summary of each of the contexts and the legal rules applicable to challenging the reasonableness of accessorial charges. In particular, the Board should provide guidance on the standards it would apply to resolve allegations that the level of a particular accessorial charge is unreasonably high.

2. The Board Should Expand on the Circumstances Where Variations in Rail Service Mean Demurrage and Accessorial Charges May Not be Assessed

NAFCA fully supports the STB’s proposed policy guideline that “[w]here demurrage charges are imposed for circumstances beyond the shipper’s or receiver’s reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency – the stated rationale for and objective of the rail carriers’ demurrage rules and charges – and the purpose of demurrage is not fulfilled. Charges assessed for circumstances beyond the shipper’s or receiver’s reasonable control would, as a general matter, not fulfill the purpose of demurrage.”¹⁰ In the first place, the Board should clarify that this principle applies to accessorial charges as well. Also, as the Board heard from many of the shippers and receivers participating in the *Oversight Hearing Proceeding*, railroads often indiscriminately charge and then aggressively seek the collection of demurrage and accessorial charges regardless of whether the shipper is capable of changing its behavior to accommodate the railroad’s desire for efficiency. This inability can be through

⁹ *Policy Statement* at 2, note 2.

¹⁰ *Id.* at 7.

physical capacity constraints, bad weather conditions, or inconsistent and unreliable railroad service that includes carrier-caused “bunching” of railcars, among other reasons. NAFCFA fully supports the Board’s recognition in the *Policy Statement* that railroad service variability can be and often is a major, if not the sole reason in many cases, why demurrage and accessorial charges are assessed by railroads despite the unsuccessful (and oftentimes significant and costly) efforts taken by shippers or receivers to try to avoid them. The STB’s recognition of the current industry reality of unreliable and variable rail service, and the development of clear policies to account for it, is critical. NAFCFA offers the following suggestions to clarify and implement such policies:

- a. Since the validity of demurrage and accessorial charges turns in part on whether they arise out of circumstances that are within the reasonable control of the shipper or receiver, each Class I railroad should be required to (1) include in each invoice a brief explanation of the basis for the charge and (2) adopt and maintain a dispute resolution procedure that clearly sets out an expedited means by which its customer may contest whether the circumstances giving rise to the charge were within its reasonable control.
- b. The Board should elaborate in the final version of the *Policy Statement* on what it would consider to be examples of railroad-adopted “reasonable rules and practices for dealing with, among other things, variability in service and carrier-caused bunching . . . and for ensuring that shippers and receivers have a reasonable opportunity to evaluate and order incoming cars before demurrage begins to accrue.”¹¹
- c. In addition to the “carrier-caused circumstances” that might give rise to situations beyond the shipper’s reasonable control where demurrage would not be appropriate, the Board should add such circumstances as excess transit days for cars or trains of cars, “lost” cars, unwarranted crew shortages, locomotive breakdowns, and similar carrier-caused sources of delay that are outside the control of the shipper or receiver.

¹¹ *Policy Statement* at 11.

3. The Board Should Provide More Guidance for Carrier Invoicing and Dispute Resolution Procedures

NAFCA supports the STB's focus on improving railroad invoicing and dispute resolution practices. The Board has correctly recognized that such practices are the source of many of the current serious problems with railroad demurrage and accessorial charges. The combination of opaque, inconsistent, and inaccurate invoicing, and complex, unclear and protracted dispute resolution practices has made it virtually impossible for shippers and receivers to effectively assert their legal rights to challenge the validity of such charges. Primary among those rights is the undisputed legal principle that shippers may not be charged demurrage or accessorial charges if the railroad is at fault for the charges being assessed. However, current billing and dispute resolution procedures prevent shippers and receivers from proving railroad fault in an efficient and timely manner. For this reason, NAFCA believes the STB should go beyond the very general guidance on dispute resolution principles provided in the *Policy Statement* and more clearly define what are reasonable and appropriate invoicing and dispute resolution practices. For example, if the Board "expects rail carriers to bill for demurrage [and NAFCA would add accessorial charges] only when the charges are accurate and warranted, consistent with the purpose of demurrage [and accessorial charges]," then the Board should provide further, specific guidance on how a railroad's rules and invoices should fulfill this expectation. In addition to the brief statement of the basis for the charge described above, the Board could require that all invoices contain a brief but clear explanation of how the railroad calculated the charges, and even who within the railroad is responsible for defending the accuracy of the calculation.

The Board should also provide industry stakeholders with more details as to what it would consider to be a reasonable dispute resolution process. Specifically, NAFCA concurs that "rail shippers and receives should be given a reasonable time period to request further information and

to dispute charges, and the rail carrier likewise should respond within a reasonable time period.”¹² However, this statement is too vague, considering the extensive written and oral testimony the Board received in the *Oversight Hearing Proceeding*. For example, NAFCA suggests that the Board should take a more definitive position that railroad dispute resolution processes should be streamlined and expedited, and that any such process that extends beyond a certain time period such as 60 days from start to finish is presumptively unreasonable.

Finally, the Board rightfully “has serious concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim.” The Board learned of numerous examples of such charges in the *Oversight Hearing Proceeding*, including tariff provisions whereby the railroad gave itself the right to seek reimbursement of attorneys’ fees, expert costs and all other costs associated with a shipper’s challenge to the assessment of a demurrage or accessorial charge. Such provisions clearly and intentionally deter shippers from pursuing a disputed claim, and the Board may easily determine that there is no justification for such costs or charges without reviewing “argument and evidence.”¹³ Accordingly, the Board should declare such provisions to be presumptively unreasonable and unlawful.

III. Conclusion

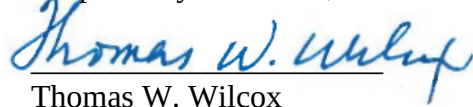
NAFCA supports the Board’s efforts to try and correct the unreasonable and unfair practices of the Class I railroads concerning the assessment of demurrage and accessorial charges, and the practices related to such charges. The *Policy Statement* is a good start, but it should be expanded and clarified as suggested in these Opening Comments. NAFCA also strongly believes that the extensive record in the *Oversight Hearing Proceeding* provides the Board with ample reasons and justification to take more aggressive steps to correct the severe lack of reciprocity

¹² *Policy Statement* at 17.

¹³ *Id.*

between railroad demurrage and accessorial charge practices and the ability of private car owners to incentivize railroads to maximize their efficient use of private railcars supplied to them by their customers.

Respectfully submitted,



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APPENDIX

NAFCA EP 754 Opening and Supplemental Comments

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**WRITTEN SUBMISSION OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

Pursuant to the Notice served in this proceeding on April 8, 2019, the North America Freight Car Association (“NAFCA”) provides this written submission to the Surface Transportation Board (“STB” or “Board”) on the issues set forth in the Notice. NAFCA commends the Board for its ongoing concern with the practices of Class I railroads concerning demurrage and “accessorial”¹ services and charges and for the Board’s decision to hold an oversight hearing on May 22-23, 2019. NAFCA believes that the hearing is a very good first step in a process that should culminate with the Board acting affirmatively and directing the Class I railroads to modify their current railroad demurrage and accessorial service practices and common carrier circulars and tariffs (all generally referred to in this submission as “tariffs”). NAFCA also believes that the Board should update its rules and policies governing the use of freight rail cars in today’s rail industry in light of the fact that around 73% of the railcars in service today nationwide are owned by non-railroad

¹ NAFCA concurs with the Board’s Notice that “accessorial” practices and charges are not specifically defined by any statute or regulation, but they have historically been understood to include services and charges that are other than line-haul services and rates (meaning they are not directly related to the line-haul movement), and they do not include demurrage and storage practices and charges. *Notice* at 2, Note 1. Consequently, accessorial charges do not include fuel surcharges, which are by definition charged as part of the line-haul movement.

entities who have collectively invested tens of billions of dollars to acquire and maintain them in large part for their use by the Class I railroads.

I. Identity and Interest of NAFCA

NAFCA is an organization made up of private (non-railroad owned) rail car manufacturers, owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. Its members include some of the largest railcar manufacturers and lessors in the industry, as well as rail shippers who collectively lease and/or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.² Combined, NAFCA's members own and/or lease in excess of 700,000 railcars. While it is difficult to precisely determine the number of railcars in service nationwide and their respective ownership at any one point in time, NAFCA estimates from various industry data sources and its member companies that there are around 1.6 million railcars in service in the Nation's railcar fleet and approximately 1.2 million of them are privately owned. NACFA's members own and/or control around 60% of those cars. In contrast, the American Class I railroads now directly own and maintain railcar fleets that in aggregate make up less than 20% of the railcars in service nationwide.³

NAFCA is dedicated to promoting the safe, efficient and economical ownership and use of private railcars. To achieve these goals, NAFCA and its members rely on their extensive collective

² <http://www.nafcahq.com/home>.

³ The remaining railcars, approximately 160,000 in number, are contained in a pool of railcars under the control of TTX Company. <https://www.ttx.com/>. TTX is in turned owned by the seven American Class I railroads and other railroad entities, so these cars are not directly owned and maintained by any one Class I railroad. According to TTX's website, approximately 130,000 of TTX's cars are "flat cars and intermodal wells," and the remaining cars are boxcars. TTX's pool does not include covered hopper cars, gondola railcars, tank railcars, or other car types used to move freight such as agricultural commodities, chemicals, coal, etc.

knowledge of the rail car industry to investigate relevant issues and to educate public policy makers, regulators and the media regarding operational, regulatory, economic, and legal matters that affect private railcars. NAFCA also strives to ensure its members and all private car owners and operators are subject to reasonable, equitable and lawful practices and rules affecting the use, repair, and principles of compensation for private railcars. To this end, NAFCA directly interacts with the Association of American Railroads (“AAR”) to seek commercial solutions for railcar issues. However, NAFCA has not hesitated to institute formal proceedings before this Board (and previously before its predecessor the Interstate Commerce Commission (“ICC”)) for the purpose of obtaining policy guidance and precedent that maximizes the safe, efficient, and commercially fair use of private railcars by the Class I railroads.⁴

II. Background and Summary of Recommendation

Rail car demurrage, storage and accessorial services and charges have been a part of railroading for decades. As the Board notes, demurrage has been a relatively simple concept historically: a customer should be incentivized to return a railroad’s railcars back to it as quickly as possible, and so railroads have been permitted to assess charges for demurrage that permit the railroad to recover its costs of the delay and to include a “penalty” to incentivize the shipper to reduce or eliminate delays in the future. “Demurrage is a charge that both compensates rail carriers for the expenses

⁴ Over the years NAFCA has challenged the reasonableness of railroad demurrage, storage and accessorial charges in multiple formal proceedings before the ICC and the Board. Presently, NAFCA is a complainant in Docket No. NOR 42144, *North America Freight Car Ass’n, et al v. Union Pacific Railroad Co.*, challenging the lawfulness of UP’s adoption of a tariff provision by which it charges shippers for certain movements of empty tank cars to and from car repair shops. This pending complaint has been consolidated with similar complaints filed in Dockets NOR 42150, 42152, and 42153. NAFCA’s submission in this oversight proceeding, which requests the Board to modify its policies concerning the appropriate levels of reciprocity and commercial fairness in railroad tariffs for the purpose of incentivizing Class I railroads to maximize their efficient use of private railcars, in no way concedes the reasonableness of UP’s or any other Class I railroad’s practice or charge, or the level of any charge or rate.

incurred when rail cars are detained by shippers and serves as a penalty for undue car detention (to encourage the efficient use of rail cars in the rail network).”⁵ In more recent years the ICC and the STB have allowed railroads to assess demurrage and storage charges on private cars that reside on tracks on railroad property.⁶

Charges for accessorial services are similar in that they are understood to include a component that covers the cost of the service being provided, and also a “penalty” which may be designed to disincentivize the shipper from frequently requesting the service. Accordingly, for example, rail carriers routinely impose charges on rail customers for delays in loading or unloading both railroad-owned and private equipment at origin and destination, and for diversions of trains, changing loading origins, and many other actions not directly related to the line-haul movement.

In virtually every case, current railroad common carrier demurrage, storage, and accessorial practices and charges are implemented and drafted for the purpose of incentivizing the railroad’s customers and other parties to maximize *their* efficient use of railroad and private rail cars (and, tracks and locomotives).⁷ However, most railroad tariffs do not contain provisions that incentivize the *railroad* to maximize the efficiency with which it possesses and uses private railcars, such as penalties when the railroad is the cause of the delay giving rise to a charge, or a penalty if a railroad holds on to a private car on its system for an extended period of time. As such, railroads have little

⁵ STB Docket No 42068, *Capitol Materials Incorporated - Petition for Declaratory Order - Certain Rates and Practices of Norfolk Southern Railway Co.*, (served April 12, 2004)(“*Capitol Materials*”), citing *Chrysler Corp. v. New York Central R. Co.*, 234 I.C.C. 755, 759 (1939).

⁶ Docket NOR 42060 (Sub – No.1), *North America Freight Car Assn v. BNSF Railway*, (served January 26, 2007).

⁷ Railroads also have been increasing fees and costs associated with private rail cars that move on and off their respective systems in through service through charges and other terms in AAR Circular OT-10.

or no incentive (other than revenue generation) to maximize the efficient use of private railcars in their possession. This imbalance has resulted in the costs from the inefficient use of private railcars by railroads being borne entirely by the parties who in some cases have invested hundreds of millions of dollars in capital investments to acquire and maintain them. As set forth in more detail below, NAFCA submits that the time has come for the Board to update its policies and rules to fully incentivize the nation's Class I railroads to more efficiently utilize the private railcars in their possession in order to protect that significant investment that in many cases they have forced their customers to supply. NAFCA maintains that the Board can take a significant first step toward accomplishing this objective at the conclusion of this oversight proceeding simply by requiring Class I railroads to amend their common carrier tariffs governing demurrage, car storage, and accessorial charges so that they reciprocally apply to instances where the railroad's actions cause the inefficient usage of private railcars and other non-railroad assets through delays or other actions for which rail customers are presently penalized.

III. Factual and Legal Support for Position

A. The National Rail Car Fleet is Now Mostly Private Cars

Many of the rules governing demurrage and accessorial charges and other mechanisms to increase efficiency of car usage were developed when the railroads provided the majority of railcars for service nationwide. Consequently, an overall policy goal was to first, encourage railroads to invest in railcars and build up the critical shortages in the national fleet after World War I⁸, and then to protect the railroads' collective investment in the national railcar fleet and

⁸ In *U.S. v. Allegheny-Ludlum Steel Corp.*, 92 S. Ct. 1941 (1972), the United States Supreme Court provides an extensive summary of the history of the development of the national railcar fleet after World War I and how Congressional intent behind laws governing car service and use was to incentivize railroads to purchase more railcars and then to protect their investment.

associated tracks. The underlying policy assumption was that railroads had always supplied the majority of the railcars in service, and they would continue to do so into the future.⁹

However, over time rail shippers and other non-railroads have invested far more in railcars used by the Class I railroads than the railroads themselves. Investment in private railcars is often made as a condition for receiving rail service at particular rates and other terms. It is also made to ensure that adequate railcars are available to meet production or other business requirements. In the case of tank cars, nearly 100% are provided to the Class I railroads by shippers in order to receive any service at all, since railroads have not provided tank cars since the turn of the 20th century. In 2011 NAFCA commissioned a study of the ownership distribution of the nation's car fleet.¹⁰ Among the study's many findings, which covered the period from 2000-2008 were:

1. Private railcars represented 87% of the new investment in the 453,495 railcars put into service between 2000 and 2008.
2. Between 2006 and 2008 alone, non-railroads invested over \$14 billion in 169,644 private railcars.
3. The total replacement cost (in 2011 dollars) for the entire private fleet of freight carrying railcars in 2008 was estimated to equal approximately \$90 billion (using an average replacement cost of \$87,065 per car).

⁹ See *e.g.*, *Allied Corp. v Union Pacific Railroad Co.*, Docket No. 38921, 1 I.C.C.2d 480 (1985), where the ICC stated (emphasis supplied):

Underlying our SCOT-5 conclusion [in 1981] is the fact that railroads have always been and will likely continue to be the principal source of rail cars for the shipping public. The statute is in fact designed to ensure that they recover their investment in rail cars [See 49 U.S.C. 11121(a)(1)(B)]. Allied's approach, by putting UP's costly car fleet on standby status, would make it virtually impossible for the railroad to obtain a reasonable return on its investment. That would be unfair to UP and contrary to sound public policy.

¹⁰ Economic and Environmental Benefits of Private Railcars in North America, Thomas Corsi and Ken Casavant (January 2011) ("Corsi Casavant Study"). This study is available on NAFCA's website.
https://celectcdn.s3.amazonaws.com/files/0019/6182/economic_and_environmental_benefits_of_private_railcars_in_north_america.pdf.

Id. at 4-5. The huge investment in private cars detailed in the study has continued unabated over the past 10 years as the percentage of private cars making up the national railcar fleet has steadily grown to the approximately 73% figure today. Applying the foregoing average replacement cost to the roughly 1,200,000 private cars in service today produces a total replacement cost of private railcars of nearly **\$105 billion**. However, the total cost of owning or leasing private railcars is more than just the purchase price or rental payment. Private railcar investment costs also include (1) the annual cost of maintaining the rail cars; (4) storage costs; and (5) additional costs assessed by the Class I railroads for the transportation of newly manufactured cars to their first loading location as well as more recent rates and charges assessed for movement of empty private railcars to repair shops, a cost that shippers do not incur if the railroad is moving its own empty railcars.

B. The Inefficient Use of Private Cars by Railroads is Harmful to Private Car Owners and Lessees

Rail shippers invest in railcars and size their fleets carefully, taking into account such factors as plant production rates for inflow of raw materials, output of finished commodities or other production (such as electricity generation by a coal fired power plant), and most importantly, the estimated schedules provided by the serving railroad and overall cycle times between origins and destinations. Shippers constantly strive to size their railcar fleets and operate and maintain them in a manner that minimizes the overall cost and enables the shipper to earn a return on its investment in railcars. If there are too many rail cars in a fleet for the shipper's production rates and transportation needs, they constitute expensive unused assets that incur costs not associated with any revenues. By the same token, a fleet that is too small can result in missed sales opportunities caused by less than optimal production since insufficient raw materials are received and finished outbound products cannot be made and delivered to end-use customers. In the worst case, a lack of sufficient railcars, whether through too small a fleet or a railroad's failure to pick

up or deliver railcars for an extended period of time, can result in plant shutdowns and layoffs. Accordingly, shippers strive to acquire and maintain optimal sized fleets of railcars based on their production and other business needs, the railroad's scheduling and other demands, and the time in which the railroad expects to need to pick up the cars, deliver them to their destination, and return the empty car to the origin or to a different location.

The Class I railroads all impose rigid requirements on their customers to schedule pickups and deliveries at specific times (often days in advance of the railroad's estimated arrival time), load or unload cars, forecast volumes and numbers of railcars, and be ready for service, among many other demands. Each demand is typically accompanied by a hefty monetary penalty for non-compliance in the form of a demurrage or accessorial charge. The charges are intended in part to provide significant incentives for a *shipper* to ensure it uses railroad assets efficiently and facilitate the railroad's operating plan. At present, however, there are few, if any, reciprocal provisions in railroad tariffs that incentivize the *railroad* to operate in a manner that maximizes its efficient use of private cars while they are in its possession. This imbalance creates significant hardship on private car owners and lessees and harms their massive investment in private railcar fleets. Specifically, when rail carriers fail to pick up and deliver private railcars or otherwise transport them in accordance with their purported operating plan despite the shipper's compliance with the railroad's scheduling, readiness, and other demands, (1) the shipper's investment is adversely affected because its cars are not being utilized; and (2) the shipper is often forced to invest in *additional* railcars in order to try to overcome the railroad's failure to provide timely service, mitigate lost business opportunities and to try to maintain plant production levels or other output (such as electricity generation). Compounding the harm to the shipper's investment in its railcar fleet and to its business is that the additional cars on the railroad's system can cause congestion

which potentially exacerbates the railroad's inability to provide reasonably timely service. The problem is only worsened if multiple rail customers are experiencing similar service failures.

Some examples of how railroads inefficiently utilize private railcars without meaningful repercussions include the following:

1. Current demurrage tariffs do not contain explicit terms that penalize railroads for being the cause of the delays triggering demurrage charges, which would incentivize the railroad to take steps to avoid such delays.
2. Railroad tariffs require shippers to provide notice of when a loaded car or train will be ready and to prepare and formally "pre-release" the loaded car or train to the railroad, but the tariff contains no penalties on the railroad no matter how long it takes the railroad to arrive after the car or train has been pre-released under the required process.
3. While shippers are held to specific time frames to load and unload and prepare railcars for rail service, there are no provisions in railroad tariffs that penalize the railroad for parking a private car or a train on a rail siding on its system for an extended period of time, thereby depriving the shipper of that railcar asset to run its business.
4. Tariffs now include specific provisions permitting railroads to remove locomotives from trains of railcars while railcars are in transit, with no penalties if locomotives are not returned for extended periods of time, which also deprives the shipper of the use of its private railcar asset.

NAFCA's members have other examples of how current railroad demurrage, storage, and accessorial practices and charges have resulted in the aggressive assessment of significant charges for non-compliance with onerous tariff terms, but the cause of the event triggering the charge was the behavior of the Class I railroad. These examples include the practice of some railroads to impose demurrage on railcar repair facilities when such facilities have historically not been assessed demurrage or storage charges. Relevant Board demurrage precedent and regulations were developed based on the traditional relationship between the railroad and the relevant consignors and consignees to expedite loading and unloading of rail cars, and compensating railroads when rail cars are not used efficiently. Railcar facilities are quantitatively different for many reasons,

not the least of which they do not engage in loading or unloading, do not hold a transportation contract with the railroad and are not shipping or receiving freight.

Moreover, railcar repair facilities have no reason or incentive to hold cars or delay repair of cars. The assessment of an additional demurrage or storage charge against a repair facility is therefore unproductive and advances no public policy or traditional justification for demurrage/storage charges. In addition, rail car repair facility members report that some railroads have stopped recognizing First In First Out (“FIFO”) practices such that the railroad will not even discuss how to better streamline cars through the repair facility. Without FIFO, the railroad controls which cars stay in storage charge status even though the repair facility could move cars through the repair facility quicker if the railroad worked with the facility regarding car delivery. Furthermore, even where the railroad acknowledges in writing that FIFO was a recognized practice by the railroad at the facility during a prior period, the railroad would not consider the failure of the railroad to follow FIFO during the applicable time period to negate storage charges that incurred during the time that FIFO was acknowledged but the railroad failed to follow its practice.

Similarly, in other instances where the railcar repair facility attempts to work with the railroad on efficiency issues, such efforts result in unilateral action by the railroad that hurt efficiency. For example, the railcar repair facility may request 17 cars but only 13 will arrive. Or the railroad might pull a car out of the facility by mistake and it can take days for the railroad to find it again. The railroad has sometimes missed two switches in one week. Or in another instance, the railcar repair facility and the railroad operational teams agreed to a plan to reduce the number of cars in the rail yard to 30 and then someone else at the railroad unilaterally changed it to 15 then to 10 cars. Likewise, the repair facility was told that becoming a closed gate facility would allow the facility to select the order in which the cars were brought into the facility. But when the facility

asked to apply for closed gate status, the request was denied. These examples clearly show that the demurrage/storage charge is a pure revenue source for the railroad and another example where the railroad's actions cause the inefficient delay in the usage of private railcars. NAFCA urges the Board to take appropriate action to address this unreasonable practice. Specifically, we seek the STB to rule that carriers may not put in their tariffs or otherwise assess or interpret their current tariffs to access, directly or indirectly, demurrage or storage or similar charges on either repair facilities or railcars that are to be delivered to or constructively placed at railcar repair facilities.

C. The Board Has the Authority to Direct Railroads to Adopt Tariff Provisions that Encourage the Efficient Use of Private Railcars

Although over 70% of the national rail car fleet is now privately owned, and the Class I railroads themselves own and maintain less than 20% of the nation's fleet, current railroad demurrage, storage and accessorial practices and charges are one-sided and commercially unfair in that they do not sufficiently protect the huge investments in private railcars described above. NAFCA believes that the composition of the national railcar fleet in today's rail industry requires that the Board aggressively apply to private cars the rules and policies that were initially adopted for the salutary purpose of protecting the railroads' investments in railcars and encourage the expansion of the national fleet. NAFCA maintains that a meaningful first step towards accomplishing this policy objective, stated generally, is for the Board to (1) conclude that it is an unreasonable practice under 49 U.S.C. §10702 for a railroad's tariffs to exclude provisions that adequately incentivize the issuing railroad to use private railcars in a manner that protects the shipper's investment in such cars by using them efficiently and reasonably; and (2) direct the Class I railroads whose tariffs do not contain provisions that advance this policy goal to revise them to incorporate such provisions. NAFCA does not believe this exercise needs to be complicated or entail a great deal of analysis. Rather, NAFCA believes that the goal can largely be accomplished

by simply requiring railroads to apply to themselves the same conditions and charges governing car usage that they apply to rail shippers, to the extent they can be tailored to the railroad's usage of the cars.

Protection of the significant investment in the private railcar fleet through agency policies is not a new or novel concept. In 1989, the ICC found certain practices of the Class I railroads that restricted their acceptance of private covered hopper railcars into interstate service were unlawful because "the ability of carriers to exclude private cars from their lines through the OT-5¹¹ process has created needless uncertainty for private car owners that discourages capital investment in private cars that may be useful in meeting the nation's transportation needs."¹² While the ICC changed the OT-5 rules to help private car owners, it also adhered to a historical policy that railroads had the right to use their own cars in preference to private railcars in order to protect the investment in their fleets.¹³ By 1989, private hopper cars had reached nearly half of all hopper cars in service, well below the 78% currently. Nevertheless, the trend of increased private car ownership at that time led Commissioner Lamboley to state in a concurring opinion his concern that this trend should have prompted the ICC to conduct a periodic review of its railcar use policies to examine whether the policies favoring the protection of railroad ownership of cars needed to be reexamined. Specifically (emphasis supplied):

While I generally agree with the result reached, I believe continued, formal oversight on these matters would have been appropriate. . . . While we, of course, have the authority to entertain complaints at any time, I believe an established, periodic review would be helpful. *I believe such review is also important because*

¹¹ See Circular No. OT-5-K, published by the Association of American Railroads, and entitled Rules Governing Assignment of Reporting Marks, Mechanical Designations, and Applications for the Use of Private Equipment. Circular OT-5 is an industry rule but the STB retains authority over the reasonableness of railroad practices governing car use.

¹² *Shippers Committee, OT-5, v. The Ann Arbor RR Co., et al.* 5 I.C.C.2d 856 (1989).

¹³ *Id.* at 859.

of future projections of car ownership, shortages, etc. The present statistics and trend lines presented here are sobering. If it comes to pass that shippers will soon own the bulk of covered hopper cars in use, some of our conclusions here regarding common carrier obligations and corollary carrier rights of “first-use” may need to be reexamined. If this degree of private ownership occurs, then at a certain point, shippers will begin to have similar economic, investment, and/or risk considerations for car purchases as carriers, arguably making railroad “first-use” claims less persuasive.”

NAFCA maintains that the amount of private car ownership and its associated massive investment (which is increasing annually) requires the Board to reexamine the rules governing demurrage and accessorial charges and to modify them and the Class I railroad’s tariffs to better protect the investment and other economic considerations associated with private cars. Requiring the railroads to apply similar rules to themselves in order to incentivize their efficient use of private railcars would protect the tens of billions of dollars in investments made by rail shippers who now supply the vast majority of railcars in service today.

In addition to the foregoing precedent, there is ample legal authority for the Board to adopt rules and policies that are intended to incentivize railroads to facilitate the optimal composition and use of the nation’s private rail car fleet. For example, 49 U.S.C. §10746 governing demurrage states (emphasis added):

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.

Section 10746 as written clearly directs railroads to look beyond their own operating plans and business needs specific to their systems and shareholders, and to adopt rules and charges that fulfill

the *national needs* related to freight car use and distribution and promote an adequate car supply.¹⁴ Moreover, the principles developed by the ICC and the STB when construing railroad demurrage practices adopted pursuant to §10746 are equally applicable to the goal of requiring railroads to adopt and maintain practices that protect shipper's investment in private rail cars by encouraging their efficient use through penalties. For example, the STB has determined that under 49 U.S.C. §10746: "Demurrage is a charge that both compensates railroads for the expenses incurred when rail cars are detained by shippers and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network."¹⁵ This rule can easily be applied reciprocally to private cars, meaning that tariffs should include similar charges paid by the railroad that compensate the shipper who acquired and supplied the car to the railroad for the costs incurred due to the railroads detention of the cars, and a penalty to encourage the railroad to use the private car more efficiently in the future.

The STB has also determined that "When a shipper uses a railroad-owned rail car, it is depriving the railroad of an asset – the use of that rail car," and "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."¹⁶ The very same thing can be said for when a railroad keeps a private railcar for too long or leaves the private car on its tracks or the tracks of third party for an extended period of time: it is depriving the shipper of an important asset – the use of its railcar.

¹⁴ See, e.g., *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42012 (STB served July 20, 2010) at 10.

¹⁵ *Id.* at 4, citing *Chrysler Corp. v. N.Y. Cent. R.R. Co.* 234 I.C.C. 755, 759 (1939).

¹⁶ *Id.*

Similarly, the Board has held that “A railroad has a right to set a reasonable time – free time – for a shipper to finish using rail assets and return them to the railroad. If it keeps an asset for too long . . . it should compensate the railroad for the extended use of its asset (rail cars or track).”¹⁷ NAFCOA does not disagree with this principle, but in today’s rail industry where, shippers own or lease the vast majority of railcars in service, the shipper should have a right to expect the railroad to use its private car and return it within a reasonable time or compensate the shipper, and that this should be set out in the railroad’s tariff terms.

And while the Board has held that demurrage charges may not be assessed when private rail cars are held on private track, because the railroad is not being deprived of any of its assets, the same cannot be said for the owner or lessee of the private railcar that has been loaded or unloaded but remains on a third party’s private track for an extended period of time despite being released to the railroad to return to origin or another loading point. In that instance the owner or lessee of the car is being deprived of its asset and the third party whose tracks are being used/blocked is being deprived of the utilization of its facility to receive raw material, manufacture products and ship to its customer.

Requiring reciprocity and commercial fairness in demurrage, storage and accessorial tariffs would be consistent with other statutory authority and Board precedent. First it has been long established that the Board’s authority over rail car supply and compensation set forth in 49 U.S.C. §11122 and its predecessor applies to both railroad-owned and private railcars.¹⁸ Section 11122 specifically states (emphasis supplied):

¹⁷ *Id.*

¹⁸ The ICC, construed 49 U.S.C. §1(14), the predecessor to §11122 to apply to private cars in *In re Private Cars*, 50 I.C.C. 652 (July 31, 1918), stating “[t]he Congress has thus recognized

the regulations of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include— . . . (2) the other terms of any arrangement *for the use by a rail carrier* of a locomotive, *freight car*, or other vehicle *not owned by the rail carrier* using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and (3) sanctions for nonobservance.”

The Board has also previously exercised its authority to direct railroads to amend their tariffs if §10702 has been violated in the absence of a formal complaint or petition for declaratory order.¹⁹ The STB has also repeatedly held that tariffs are not lawful if they are vague and ambiguous.²⁰

Finally, requiring railroad tariffs to include provisions that incentivize them to use private cars more efficiently is not inconsistent with the Board’s ruling in *NAFCA v. BNSF Railway Co.*²¹ In that proceeding, the Board concluded, based on the specific facts of that case, that BNSF Railway did not need to include provisions in its demurrage policies that penalized the railroad for service variability. The Board concluded, “In light of the complexity and variety of many car movements, it would be inappropriate to hold that a railroad’s tariffs are unlawful because they do not penalize the railroad for service variability unrelated to fault.”²² NAFCA recognizes that the Board could

the use of privately owned cars in transporting the commerce of the country, and has provided for their control by the Commission through rules and regulations of carriers hauling them.

¹⁹ EP 661, *Railroad Fuel Surcharges* (served August 3, 2006)(“*Fuel Surcharges*”) at 4, note 9, citing *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 128-29 (3d Cir. 1993) (referencing ICC’s adoption of rules governing carrier practices for processing of claims for loss or damage to cargo).

²⁰ Docket NOR 42119, *North America Freight Car Association v. Union Pacific Railroad Co.* (served March 12, 2015) at 8-9; Docket FD No. 35557, *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions* (served Dec. 17, 2013); Docket FD 35504, *Union Pacific Railroad Co. – Petition for Declaratory Order*, (served April 30, 2013).

²¹ Docket NOR 42060 (Sub No. 1)(served January 26, 2007) *aff’d*, *NAFCA v. STB*, 529 F.3d 1166 (D.C. Cir. 2008).

²² *Id.* at 12, citing, *Capitol Materials*, *supra*.

not direct the Class I railroads to revise their tariffs to meet every shipper's ideal delivery timetable. NAFCA also recognizes that some "service variability" is unavoidable, and so some concession to this must be made when directing railroads to modify their tariffs to be more reciprocal and commercially fair. However, as the STB recognized in *NAFCA*, railroads do not escape responsibility for delays or inefficiencies when they are at fault for the cause of the delay or inefficiency. NAFCA accordingly proposes that the Class I railroads' tariffs be required to describe instances where the railroad is at fault for the inefficient use of private railcars, and penalize this behavior accordingly so as to incentivize the more efficient usage of private railcars.²³

IV. Conclusion

NAFCA again commends the Board for holding this oversight hearing proceeding to review and hopefully take affirmative steps to correct the current disparities regarding Class I railroad demurrage and accessorial charges and practices. As set forth in this submission, NAFCA believes the Board can begin to correct the lack of reciprocity and commercial fairness in Class I railroad tariffs and practices by directing the Class I railroads to amend their tariffs to require the railroads to apply to themselves the same requirements for efficiency that they demand of their customers. Such a step would help protect the substantial investments made by rail shippers and

²³ NAFCA recognizes that the Board could address the issues it faces in this docket via a formal rulemaking proceeding that adopts industrywide rules concerning reciprocity and commercial fairness in railroad common carrier tariffs. In Docket No. EP 707, the STB instituted an Advance Notice of Proposed Rulemaking on Demurrage Liability "in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area." The rulemaking proceeding was prompted by several court cases on warehousemen liability for demurrage. That proceeding culminated in the formal regulations that have been codified at 49 C.F.R. Part 1300.

other parties to acquire and maintain railcars in order receive rail service. NAFCA believes it would also improve the overall operation of the national rail system.

Respectfully submitted,



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May 8, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 6, 2019
Part of
Public Record

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

**SUPPLEMENTAL SUBMISSION OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

Pursuant to the Decision served in this proceeding on May 24, 2019, the North America Freight Car Association (“NAFCA”) provides this supplemental written submission to the Surface Transportation Board (“STB” or “Board”) on the issues covered by this oversight hearing proceeding. NAFCA again commends the Board for its ongoing and intense concern with the practices of Class I railroads concerning demurrage and accessorial services and charges and for the Board’s decision to hold an oversight hearing on May 22-23, 2019. By all accounts, the hearing was a huge success in terms of the Board learning of the issues currently facing private car owners and lessees as they try to deal with patently unreasonable demurrage and accessorial service practices and common carrier circulars and tariffs (all generally referred to in this submission as “tariffs”).

In these supplemental comments NAFCA reiterates its request that the Board update its rules and policies governing the use of freight rail cars in today’s rail industry in light of the fact that around 73% of the railcars in service today nationwide are owned by non-railroad entities who have collectively invested tens of billions of dollars to acquire and maintain them in large part for their use by the Class I railroads. The rules and policies governing demurrage and accessorial

charges and practice that were originally adopted and enforced to protect the investment made by railroads in their fleets must change to protect the significant investments in railcars non-railroads have made. During the hearing, the Board heard multiple suggestions on how to advance the salutary goals of “reciprocity” and “commercial fairness.” These included taking steps to fix the “credit” and “debit” practices of the Class I railroads. Pursuant to such practices, shippers and receivers are given “credits” in the form of days or hours to unload or load railcars, or store a railcar, and then “debits” when the free time is exceeded. Stated simplistically, charges are assessed to the extent debits exceed credits. At the hearing, the Board heard testimony from shippers and railroads about various credit and debit programs and practices, and the Board members engaged in dialogues about how they could be fixed to account for instances where the railroad was at fault for the free time being exceeded and debits and associated charges accrued. NAFCA concurs that many, if not all of the Class I railroad’s credit and debit practices are not reciprocal and are commercially unfair for a variety of reasons, not the least of which is that today’s rail tariffs do not explicitly explain how the programs function in practice. By lacking such detail, they provide the issuing railroad with a tremendous amount of discretion to arbitrarily grant or deny additional credits when the railroad is at fault, and then they place 100% of the burden on the shipper to prove the charge was wrongly assessed. Moreover, echoing the sentiments of numerous other participants in this proceeding, NAFCA does not believe a railroad providing zero credit days for demurrage and storage charges on private equipment after a car is constructively placed is a commercially reasonable or fair practice, and NAFCA urges the Board to direct the Class I railroads to provide at least one credit day for private cars. For these and other reasons, NAFCA supports the Board taking a very close look at the Class I railroads’ practices concerning debits

and credits, and then directing the railroads to amend their demurrage and accessorial practices to make them more reasonable and commercially fair.

However, the Board also heard from numerous witnesses that for private car owners true “reciprocity” and “commercial fairness” regarding demurrage and accessorial charges and practices goes beyond merely waiving charges and/or issuing loading or unloading credit days. Such measures will relieve the shipper/car owner of wrongly assessed charges or perhaps give credits against future charges, but they will not either (1) provide compensation for the inability to use the private car to conduct the shipper’s business operations; or (2) provide sufficient incentives for the railroad to use the private equipment more efficiently. As NAFCA roughly estimated in its opening submission, just the cost of replacing the national private car fleet of approximately 1.2 million cars would be well over \$100 billion. This does not count the (1) the annual cost of maintaining the rail cars; (2) storage costs; and (3) additional costs assessed by the Class I railroads for the transportation of newly manufactured cars to their first loading location as well as more recent rates and charges assessed for movement of empty private railcars to repair shops, a cost that shippers do not incur if the railroad is moving its own empty railcars. And these costs do not include the significant business costs incurred by shippers who suffer harm from lost business opportunities, plant and labor costs, and other costs incurred solely because the railroads to whom the shipper provides cars for transportation do not provide dependable rail service.

NAFCA reiterates that the time has come for the Board to update its policies and rules to fully incentivize the nation’s Class I railroads to more efficiently utilize the private railcars in their possession in order to protect that significant investment (that in many cases they have forced their customers to supply). NAFCA maintains that the Board can take a significant first step toward accomplishing this objective at the conclusion of this oversight proceeding simply by requiring

Class I railroads to amend their common carrier tariffs governing demurrage, car storage, and accessorial charges so that they reciprocally apply to instances where the railroad's actions cause the inefficient usage of private railcars and other non-railroad assets through delays or other actions for which rail customers are presently penalized. More specifically, in addition to fixing the problems with the current debit and credit systems utilized by the Class I railroads, the Board should adopt policies and guidelines that establish demurrage, storage, and accessorial charges and practices are not reasonable unless they include measures by which the railroad pays to the shipper/private car owner the same or similar charge that the railroad would assess the shipper for the same action.

In conclusion, NAFCA thanks the Board for instituting this oversight hearing proceeding. NAFCA submits that achieving meaningful reciprocity and commercial fairness for private car owners and lessees requires the Board to go beyond simply addressing the flaws in railroad debit and credit procedures, and to directing the Class I railroads to amend their tariffs to require the railroads to apply to themselves the same requirements for efficiency that they demand of their customers. As NAFCA stated in its prior written submission in this proceeding, one result of the Board's pursuit of reciprocity and commercial fairness in this more aggressive manner will be an improvement the overall efficient operations of the national rail system because railroads will be properly incentivized to use over 70% of the cars on their system more efficiently.

Finally, NAFCA suggests that the Board should retain oversight authority over this proceeding and the modifications made by Class I railroads to their tariffs and practices.

Respectfully submitted,



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