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November 6, 2019

VIA ELECTRONIC FILING

The Honorable Ann D. Begeman, Chairman
The Honorable Patrick J. Fuchs, Vice Chairman
The Honorable Martin Oberman, Commissioner
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Re: Docket No. EP 757 – Policy Statement on Demurrage and Accessorial
Rules and Charges

Dear Board Members:

Enclosed please find Comments of BNSF Railway Company to the Board's
Notice of Proposed Statement of Board Policy decided on October 4, 2019 in the above-
referenced docket.

Very truly yours,

A handwritten signature in purple ink, appearing to read "jkm", with a large loop at the end.

Jill Mulligan

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 757

POLICY STATEMENT ON DEMURRAGE AND
ACCESSORIAL RULES AND CHARGES

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway (BNSF) submits these comments in response to the Surface Transportation Board's (STB) proposed policy statement issued on October 7, 2019 in the above captioned proceeding providing guidance on "certain principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges" in future cases. BNSF appreciates the dialogue that the STB initiated with its public hearing and has reviewed the written and live comments of shippers and the Board members, as well as the draft policy statement sharing the current perspectives of the Board. As the Board recognizes in its proposed policy statement, "demurrage serves an important purpose, namely, incentivizing the behavior of rail users to encourage the efficient use of rail assets, which benefits rail carriers and users alike." As detailed at the hearing and in our written testimony and supplemental comments, BNSF believes that demurrage is an essential tool promoting the efficient use of railroad capacity and equipment, and is critical to our partnership with our customers and our joint interest in delivering on the operational and competitive potential of the rail network. BNSF agrees with the Board that railroads, shippers and receivers are all jointly responsible for promoting these essential efficiencies. BNSF endeavors to maintain a program that balances the efficiency of the overall network necessary to meet the needs of the shipping community in general with the circumstances and needs of individual facilities and shippers. While BNSF's demurrage

program is mature and composed of fairly static rules built around the principles of transparency, simplicity and predictability, BNSF has undertaken considerable internal efforts to develop tools and technology, supporting teams and pre- and post-billing processes to help customers avoid triggering demurrage charges in the first place. BNSF is mindful of the considerations that the Board has outlined in its October 7, 2019 decision and, in considering any future changes to rules or underlying tools and processes, will review the guidance the Board provides in any policy statement that it issues at the end of this proceeding as well.

BNSF believes that any final policy statement issued by the Board should preserve two important principles that are advanced in the October 7, 2019 decision. First, the Board has sought to provide meaningful guidance rather than articulating inflexible, binding bright-line rules implemented through a standardized demurrage program. The Board's proposed policy statement makes clear the Board's intention to allow carriers to maintain unique and independent demurrage programs. BNSF believes this is of critical importance—BNSF works hard to have a balanced demurrage program that is equally tailored to the needs of our own customers, our own network realities and the markets we serve. We believe that the vast majority of our customers not only routinely comply with, but in fact rely on, our demurrage program to provide the efficiencies supportive of the service levels required to compete effectively in their own markets. We appreciate the Board's focus on the important statutory purposes served by demurrage, while maintaining the ability of rail carriers to craft and enforce reasonable demurrage programs responsive to those purposes.

Second, the proposed policy statement makes it clear that the Board will continue to rely on individual proceedings to review the appropriateness of a particular railroad demurrage rule in the context of a full demurrage program and the specific facts involved in the disputed

application. The Board’s policy statement articulates viewpoints and principles that would likely be part of any ultimate deliberation “together with all of the evidence and argument that is before it, in evaluating the reasonableness of demurrage and accessorial rules and charges in future cases.” BNSF believes that approach is consistent with the law but also the best framework to ensure fidelity to the statutory role of demurrage, the agency’s precedent, and the important balancing of the needs of the network, the railroad, the broader shipping community and an individual facility.

BNSF is not submitting separate comments in response to the companion notices of proposed rulemakings issued on October 7th in Ex Parte No. 759, *Demurrage Billing Requirements*, and Ex Parte 760, *Exclusion of Demurrage Regulations from Certain Class Exemptions*. However, with regards to Ex Parte 759, BNSF does note that the STB’s 2007 decision in Ex Parte No. 707, *Demurrage Liability* (STB served April 11, 2014), supported the underlying statutory goals of demurrage by allowing rail carriers to charge demurrage to warehousemen and transloaders when notice and other requirements were met. This is particularly important given the large role played by transloaders and warehousemen in the rail network, and the fact that they are the only party to a transaction with key information critical to avoiding demurrage incurred on shipments held outside their facility—namely, how many spaces they have available to land freight and who among their various customers that space is allocated to. As BNSF shared at the hearing, these facility operators also have full access to the suite of BNSF tools, including the ability to track all shipments destined to their facility, manage their pipeline and to connect with dedicated, live BNSF demurrage and equipment personnel. We have numerous receiving facilities that make very effective use of these tools to avoid demurrage resulting from imbalances between releases at origin and the actual destination capacity. For

these reasons, BNSF believes that it remains appropriate to preserve a railroad's ability to recover demurrage charges from the facility owner for freight delivered for transload and/or warehousing.