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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**POLICY STATEMENT ON DEMURRAGE AND
ACCESSORIAL RULES AND CHARGES**

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Docket No. EP 757

**REPLY COMMENTS OF
ARCELORMITTAL USA LLC**

By: John H. LeSeur
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
ArcelorMittal USA LLC

Dated: December 6, 2019

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ArcelorMittal USA LLC (“AM”) submits these Reply Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Policy Statement served on October 7, 2019 (“NPPS”).

SUMMARY

Earlier this year, the Board instituted a proceeding to address shipper concerns about rampant carrier abuses of their demurrage collection practices. *See Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754 (“EP 754”).¹ In EP 754, shipper after shipper provided compelling evidence detailing these abuses, many of which were the product of new carrier “precision railroading” operating plans. The Board listened carefully to shippers’ concerns and, in its NPPS, proposed to address them by adopting new demurrage policies.

AM submitted comments in response to the NPPS on November 6, 2019 (“AM Comments”). In its Comments, AM supported the Board’s proposed policies –

¹ In EP 754, the Board received written comments and conducted a two-day public hearing on May 22-23, 2019. AM filed its Written Comments in EP 754 on May 8, 2019.

policies designed to address some of the carriers' worst demurrage practice abuses – but asked the Board to do more. Specifically, AM requested that the Board not only adopt its proposed policy prohibiting carriers from collecting detention charges for train or car delays beyond a shipper's reasonable control, but also take more proactive action by issuing a final decision finding that it is an unreasonable practice for carriers to collect detention charges for train or car delays beyond a shipper's reasonable control and ordering carriers to conform their tariffs to this directive. AM also requested that the Board institute a proceeding to adopt reciprocal rules requiring carriers to pay “detention” charges to shippers for train and car delays caused by the carriers.

The Board received many comments in this proceeding from other shippers. These comments are closely aligned with AM's Comments. Like AM, shippers generally support the Board's proposals governing responsibility for demurrage, overlapping charges, invoicing, credits, broad tariff changes and third-party billing. Many shippers also joined AM in requesting the Board to put more “teeth” into its proposals and to address reciprocal detention obligations.

For their part, the railroads, led by the Association of American Railroads (“AAR”), argue that the Board lacks the legal authority to adopt a policy that excuses shippers from paying detention charges beyond their reasonable control. However, the Board clearly has the legal authority – and should exercise that authority here – to adopt this policy. The railroads' comments also indicate that individual railroads will not voluntarily comply with those portions of the proposed Policy Statement they disagree

with, a position that underscores the need for the Board to direct carriers to adhere to its proposed demurrage policies.

**I.
OTHER SHIPPERS AGREE WITH AM’S COMMENTS**

Most shipper commenters agree with the positions taken by AM in its Comments in this proceeding.

A. The Board’s Proposed Policies Benefit Rail Shippers

In its Comments, AM thanked the Board for proposing a set of new demurrage policies designed and intended to help protect shippers from many current carrier demurrage charge abuses. *See* AM Comments at 8 (“AM supports the . . . proposed Board policies [governing overlapping charges, invoicing, credits, tariff changes and third-party billing] and urges the Board to adopt them”). Other shippers agreed with AM that the Board’s policy proposals were ones that, if adopted, would inure to the benefit of the shipping community. *See, e.g.,* Comments of the American Iron and Steel Institute (“AISI Comments”) at 1 (“AISI supports the Board’s proposals to ensure that railroad demurrage and accessorial practices are reasonable and fairly applied”); Joint Comments of the Western Coal Traffic League and Seminole Electric Cooperative, Inc. (“WCTL/Seminole Comments”) at 4 (WCTL/Seminole “welcome the Board’s proposed Policy Statement in EP 757”); Comments of the National Industrial Transportation League at 2 (“The League thanks the Board for promptly issuing the proposed policy . . . and, overall, it supports the Board’s approach and proposals.”); Comments of the American Forest & Paper Association (“AF&PA”) at 2 (“AF&PA

strongly supports the Board’s proposed Policy Statement”); Opening Comments of the National Grain and Feed Association (“NGFA Comments”) at 21 (“NGFA appreciates the Board’s multiple actions to date [to address carrier detention practice abuses]”); Written Testimony on Behalf of National Coal Transportation Association (“NCTA Comments”) at 2 (“NCTA is encouraged by the Board’s demurrage policy guidance”); Comments of The Fertilizer Institute (“TFI Comments”) at 3 (“TFI strongly supports the Board’s proposed Policy Statement.”); Comments of The Corn Refiners Association (“CRA Comments”) at 3 (“CRA believes that the proposed Policy Statement will prove to be a valuable guidance for both the railroads and shippers”); Comments of the National Mining Association (“NMA Comments”) at 1 (“NMA is encouraged by the Board’s demurrage policy guidance”); Comments of The Chlorine Institute (“CI”) at 4 (“CI encourages the Board to stick to the views it expressed in the *Policy Statement*”); Comments of the Freight Rail Customer Alliance (“FRCA Comments”) at 1 (“FRCA very much appreciates the Board’s willingness to focus on the issues surrounding demurrage and accessorial charges at this time.”); Comments of the American Chemistry Council (“ACC”) at 1 (“ACC strongly supports the proposed policy statement”); Comments from the Private Railcar Food and Beverage Association (“PRFBA”) at 1 (“PRFBA supports the policy statement”); Comments Submitted by National Association of Chemical Distributors (“NACD”) at 2 (“NACD strongly supports the Board’s Policy Statement”); Comments of the Portland Cement Association (“PCA Comments”) at 3 (“PCA believes that . . . the guidance provided by the Board [in the NPPS] is helpful.”); Opening Comments of the Omaha Public Power District (“OPPD Comments”) at 7

(“OPPD generally supports the general principles and guidance set forth in the Policy Statement”); Opening Comments of Dow, Inc. at 4 (“Dow commends the Board’s efforts to provide guidance on the scope of acceptable demurrage and accessorial rules and practices”); Comments of Archer Daniels Midland (“ADM Comments”) at 1 (“[ADM] thanks [the Board Members] and the STB staff for your ongoing focus on the railroad industry’s policies on *demurrage and accessorial charges*.”); Comments on Behalf of Barilla America, Inc. at 1 (“we support the Board’s proposals”); Comments of the Industrial Minerals Association – North America (“IMA-NA”) at 2 (“IMA-NA greatly appreciates the STB’s issuance of the Policy Statement on Demurrage and Accessorial Rules and Charges”); Comments on Behalf of Diversified CPC International, Inc. at 5 (“[w]e support the Board’s proposed Policy Statement”).

B. But the Board Can and Should Do More

In its Comments, AM informed the Board that the Board’s proposed policies were a step in the right direction, but urged the Board to take additional actions. Specifically, AM requested that the Board “issue an order in its final decision in this proceeding finding that it is an unlawful practice for carriers to collect detention charges for train or rail car delays beyond the shipper or receiver’s reasonable control, and to order carriers to conform their detention pricing documents and collection practices to the Board’s order within ninety days.” AM Comments at 5. AM also requested that the Board address reciprocity concerns by “institut[ing] a proceeding to . . . adopt[] rules that require carriers to pay ‘detention’ charges to shippers for train delays caused by the carriers.” *Id.* at 7.

Other shippers agreed with AM that the Board can and should take additional actions to ensure carrier compliance with its proposed policies. *See, e.g.*, AISI Comments at 6 (“AISI respectfully submits that the Board should require railroads to implement appropriate tariff changes and certify compliance with the Board’s Policy Statement within a reasonable period of time (60 or 90 days)”); WCTL/Seminole Comments at 5 (“railroads should be required to adopt and incorporate the Policy Statement as part of their tariffs and certify their compliance with its guiding principles”); NGFA Comments at 3 (“the STB [should] utilize its statutory authority and Agency precedent to determine proactively that certain railroad rules governing demurrage and accessorial practices and charges are unlawful, and direct that railroads comply by amending their tariffs accordingly”); NCTA Comments at 5 (“the STB [should] use its existing authority to adopt specific rules governing demurrage and accessorial practices, and require railroads to modify their tariffs accordingly”); CRA Comments at 11 (“the Board should consider taking a stronger position against the reasonableness of the recent changes in demurrage and accessorial rules and practices and initiate an investigation to review these changes and ultimately declare them unreasonable consistent with the Board’s views discussed in the proposed Policy Statement”); NMA Comments at 2 (“the STB [should] use its existing authority to adopt specific rules governing demurrage and accessorial practices, and . . . require rail carriers to modify their tariffs accordingly”); FRCA Comments at 5 (“the Board should require carriers to certify that their rules and practices comply with the Board’s standards, and then impose fines or other penalties if noncompliance is demonstrated”); PCA Comments at 3-4 (“PCA suggests that the Board

should consider requiring carriers to (1) implement changes to comply with the Board's Policy Statement within 90 days and (2) specifically incorporate into their rules, at least by reference, the Board's Policy Statement").

Other shippers also agreed with AM that the Board should proactively address shipper reciprocity concerns. *See, e.g.*, TFI Comments at 9 (Board should adopt rules "hold[ing] railroads accountable for their service failures disruptive to railroad customers"); NMA Comments at 2 ("railroads [should] pay for any delays they have caused"); FRCA Comments at 3 ("[w]hen the carrier itself fails to provide appropriate service, it should not then be able to inflict additional harm on the shippers by imposing and collecting additional charges"); OPPD Comments at 5 (Board should "provide guidelines and principles that would aid industry stakeholders in remedying situations where a lack of reciprocity exists"); ADM Comments at 2 ("[r]eciprocity serves the shipper's interest of ensuring quick turnaround on [the] shipper's assets," and "[s]hould a railroad fail to meet the reciprocity standard, the shipper should be compensated in a manner and form commensurate with that enjoyed by the railroads"); Comments of Growth Energy at 2 ("[t]he STB should revise its policy to truly address reciprocity and consider methods in which shippers can be compensated for the inefficient use of their assets").

II. REPLY TO THE RAILROADS' COMMENTS

A. AAR's Comments

AAR's Comments focus on the Board's proposed policy that carriers cannot collect detention charges that are beyond the shipper's reasonable control. AAR argues that the Board should not adopt this policy because (i) the proposed policy is not supported by prior agency and court decisions and (ii) the Board lacks the legal authority to utilize a policy statement "to change the law." *Id.* at 5. Neither assertion is correct.

(i) AAR cites a line of cases that, it asserts, hold in situations where neither the shipper nor the carrier was at fault for train or car delays, the carrier is permitted to collect detention charges. *See id.* at 2-4. However, this is just one line of cases.² There is a second line of cases holding that a carrier cannot collect detention charges for train or car delays where neither the carrier nor the shipper was at fault for the delays. *See, e.g., Chi., Burlington & Quincy R.R. v. Edward Hines Lumber Co.*, 320 F. Supp. 194, 196 (N.D. Ill. 1970) ("[t]he duty to pay demurrage being imposed as a matter of law, an intervening act of God excuses the duty"); *St. Louis, Sw. Ry. v. Mays*, 177 F. Supp. 182, 184 (E.D. Ark. 1959) ("In order for a liability for demurrage to exist, . . . the failure to load or unload the cars within the free time must be the fault of the shipper or

² "Demurrage collection cases may only be brought in court, and thus much of the law governing the imposition of demurrage liability has been established judicially[.]" but "[t]his agency has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges." *Demurrage Liability*, Docket No. EP 707, slip op. at 2-3 (STB served May 7, 2012).

consignee”); *S. Ry. v. White*, 284 F. 560, 561 (6th Cir. 1922) (carrier cannot collect demurrage charges for car unloading delays caused by an “act of God”). And, there is a third line of cases holding that a carrier cannot collect the “penalty” portion of detention charges in situations where neither the carrier nor the shipper was at fault for the train/car delays. *See, e.g., Prince Mfg. Co. v. Norfolk & W. Ry.*, 356 I.C.C. 702, 705 (1978) (the “penalty [portion of demurrage] charges have been found unreasonable and remitted upon a showing by the shipper (or consignee) that it was not the proximate cause of the detention”); *Ormet Corp. v. Ill. Cent. R.R.*, 341 I.C.C. 647, 651 (1972) (same).

(ii) The Board’s new policy does not “change the law” since there is no settled law here. The Board simply informs the public that it has decided not to hold shippers responsible for demurrage charges in situations beyond a shipper’s reasonable control. *See* NPPS at 21 (demurrage and accessorial charges “should not be assessed in circumstances beyond the shipper’s or receiver’s reasonable control”). This is an eminently reasonable policy because, as the Board emphasizes, charging a shipper for demurrage in situations where delays are beyond the shipper’s reasonable control does not advance the purposes of demurrage – to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets. *Id.* at 7, 11, 13, 14, 15, 18, 21.³

³ AAR maintains that requiring a shipper to pay detention charges – even when train or car delays are beyond the shipper’s reasonable control – advances the serving carrier’s interest in receiving car rental payments. *See* AAR Comments at 4. However, the Board properly determined that it is unfair for shippers to have to pay car rental payments when it has no reasonable ability to avoid them, and such payments do not advance the overarching purpose of detention charges – “to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets.” NPPS at 21.

Moreover, even if the Board was “changing the law” here (which it is not), in this instance, it is legally permissible for the Board to do so in a policy statement. The governing law authorizes the Board to determine the reasonableness of rail carrier demurrage charges and practices.⁴ The Board (and the Interstate Commerce Commission (“ICC”) before it) made these determinations based on policies developed in its decided cases. The Board has the legal authority to change these case law policies via promulgation of a policy statement.⁵

B. Individual Large Carrier Comments

Several Class I carriers filed individual comments supporting AAR’s position that shippers should be required to pay detention charges, even in situations where the cause of the car/train delays is beyond the shipper’s reasonable control. *See* Opening Comments of Canadian Pacific (“CP Comments”) at 10; Comments of the

⁴ *See Demurrage Billing Requirements*, Docket No. EP 759 (STB served Oct. 7, 2019) (“Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill national needs related to freight car use and distribution and maintenance of an adequate car supply.”).

⁵ *See, e.g., Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301 (7th Cir. 1980) (affirming ICC’s decision to utilize a policy statement to modify regulatory standards established in prior case law); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369 (11th Cir. 1983) (same). *See generally* Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 4:22(4) (3d ed. 2010) (a policy statement “serves the . . . purpose of informing the public of the agency’s future plans and priorities for exercising its discretionary power”) (internal quotations omitted).

Kansas City Southern Railway Company (“KCS Comments”) at 3; Comments of CSX Transportation, Inc. (“CSXT Comments”) at 1.

As discussed above, AAR’s positions are incorrect – it is fundamentally unfair to require shippers to pay detention charges for train/car delays beyond their reasonable control – a position that one major carrier has informed the Board it will adhere to voluntarily. *See* Comments of Union Pacific Railroad Company (“UP Comments”) at 3 (“UP customers do not and will not incur accessorial and demurrage charges for circumstances beyond their reasonable control.”).

Several large carriers also take issue with some of the Board’s other specific policy proposals. *See, e.g.*, CSXT Comments at 3-4 (criticizing the Board’s proposals concerning expiration of credits); UP Comments at 5-6 (criticizing the Board’s proposals concerning reconciliation of debits and credits); CP Comments at 7-11 (criticizing the Board’s free time and bunching proposals). The Board should reject these criticisms for the reasons set forth in its NPPS.

Finally, several railroads appear to be informing the Board that they will voluntarily adhere to only those portions of the proposed Policy Statement they agree with. *See, e.g.*, KCS Comments at 5 (“KCS’s policies might not mirror, precisely, the Policy Statement”); Comments of BNSF Railway Company at 2-3 (“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 individual large railroads' comments concerning compliance underscore the need for the Board to take more proactive measures now to adopt and enforce its proposed policies because it appears unlikely many carriers will voluntarily comply with those portions of the proposed Policy Statement they disagree with (or contend the Board has no authority to promulgate).

CONCLUSION

AM respectfully requests that the Board take actions in this proceeding consistent with its Comments and Reply Comments.

Respectfully submitted,

By: /s/ John H. LeSeur
A. Rebecca Williams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
ArcelorMittal USA LLC

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