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Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Ex Parte No. 754—Oversight Hearing On Demurrage And Accessorial Charges

Dear Ms. Brown:

The Institute of Scrap Recycling Industries, Inc. (“ISRI”) hereby supplements its written testimony filed in this proceeding in order to follow up on several key issues discussed during the Board’s oversight hearing on railroad demurrage practices. ISRI first commends the Board for holding the hearing and providing ISRI and its members, along with other rail customers, with the opportunity to share their serious concerns with existing railroad tariff rules governing free time, demurrage, storage and accessorial charges. The Board’s preparation and diligence in their questioning of all panelists was greatly appreciated. Additionally, the hearing revealed a number of common concerns regarding the reasonableness of railroad demurrage rules as applied to both private and railroad owned cars. The collective testimony by rail customers justifies prompt action by the Board to address such concerns to ensure that demurrage-related rules are more reciprocal and commercially fair. Following are the key principles that ISRI believes should underlie “reasonableness” determinations.

Zero Free Days is *Prime Facie* Unreasonable. ISRI strongly believes that the Board should declare certain railroad practices as *prime facie* unreasonable, such as zero free days for private cars. This rule unfairly penalizes many rail customers because it fails to account for inefficient and widely variable railroad service and requires rail customers to operate 24/7 to avoid the charges. The railroads provide erratic service that results in operational difficulties for rail customers. These include bunched delivery of rail cars, missed switches or unpredictable service windows, including weekends. As a result, rail customers face aggravated demurrage bills that are caused by railroad-origin events. The zero-time approach provides no buffer for rail customers to accommodate the railroad service deficiencies.

As discussed during the hearing, some railroad customers also cannot avoid demurrage or storage charges even when they and the railroads operate nearly on maximum efficiency because they are not able to increase the track capacity in their yards, or to secure track storage nearby their facilities. As explained by Ben Abrams of Consolidated Scrap Resources, Inc. (“CSR”), the

lack of space in CSR's Harrisburg facility impedes their ability to increase their storage track capacity.¹ Bobby Triesch, of SA Recycling LLC, also explained that they are not able to secure additional track storage in order to mitigate the charges due to the shortage of feasible track space nearby. The overly restrictive one-size-fits-all free time approach creates unreasonable and unduly punitive consequences, as it fails to incentivize the efficiency of the rail network particularly for rail customers that are unable to change their behavior to mitigate the charges. ISRI believes that railroads must provide at least 72 hours of free time to account for inefficient rail service and other operating variables at customer facilities. Anything less results in a revenue stream for the railroads without the necessary efficiency gains. As explained below, the railroads should provide additional credits that would extend this free time period when the detention of cars resulting in charges is beyond the control of the shipper.

Customer Costs to Avoid Demurrage Should Not Outweigh the Efficiency Benefits.

There are other circumstances where the only option for the rail customers to mitigate the demurrage charges is to bear significant investments or operating expenditures. To the extent that these costs are higher than the expected efficiency gains to the railroad's network, this situation is neither commercially fair nor reasonable. ISRI believes that, when determining the reasonableness of a particular demurrage rule, the Board should consider the relationship between the costs imposed on rail customers to avoid or mitigate demurrage/storage charges and the efficiency benefits/gains to the railroad's network. If the costs are higher than the efficiency gains, the demurrage rule should be deemed unreasonable for that particular rail customer.

Demurrage Should Not Be More Severe For Private Cars. Furthermore, demurrage rules should not subject private cars to more stringent rules than railroad-owned cars. Despite being encouraged and incentivized to invest in private cars, ISRI's members that own private fleets are being penalized for simply being good actors. Historically, the railroads have had significant shortages of gondola cars and many of ISRI's members have made investments in order to accommodate the railroads' own service deficiencies. However, today, the owners of private fleets are subject to more stringent tariff rules, compared to users of system cars.² Railroads have reduced their car fleets based on internal factors to maximize their own operating ratios without proper consideration of their customer's needs. Shippers have increased their fleets based on the railroads' representation and reliance on that representation that increasing private car fleet will improve the service. However, railroad service continues to be widely variable which is disruptive to its customers' operations and results in demurrage charges.

Detention Beyond the Customer's Control. Additionally, there are circumstances where the rail customers may be liable for demurrage fees caused by an event not within the control of the shipper. Although the majority of the railroads claim that they issue credits for demurrage charges incurred due to railroad-caused events (e.g., missed switches or bunching), the tariff rules are not sufficiently clear or credits may expire (e.g. at month end) before they reasonably can be used. While some railroads issue credits for late and early deliveries (See e.g., NS-6004 Item 950), others have rules that provide for relief in the event the demurrage is caused

¹ See Testimony of Ben Abrams filed with the STB on May 8, 2019, at p. 5.

² Currently, railroads generally provide two days of free time for loading and unloading system cars, but only zero days for private cars. See e.g., NS-6004 Items 600 and 650 See also, UP 6004 Items 9605 and 9890 (\$100 per car per day for railroad controlled cars spotted at private industry tracks, and \$140 per net chargeable storage day); BNSF 6004-C Section 2 (\$150 per day for loaded cars waiting to be unloaded, \$75 per day for empty system cars waiting to be loaded, and \$150 per day for private controlled equipment held for loading and unloading.).

by railroad errors. (See e.g., UP 6004 Item 9870). ISRI believes that the Board should take steps to establish more uniform credit standards to allow for demurrage relief when the detention is caused by the delivering railroad or an upstream carrier, including credits for missed switches on empties.³ This action would be consistent with ICC precedent that commands relief from demurrage charges, or a portion thereof, considered as a penalty, if the proximate cause of the detention is not within the control of the shipper and if due diligence was exercised toward avoidance or abatement of the detention.⁴

Reciprocity. ISRI believes that reciprocity is another significant element the Board should consider in establishing its policy. As we detailed in our written submission on May 8, 2019, “[t]rue reciprocity should entail compensating shippers for railroad actions that disrupt their supply chain and operations, similar to charges aimed to compensate the railroads for shipper actions that adversely affect the rail system...”⁵ ISRI maintains that the Board should establish certain reciprocity principles that would allow for compensation to rail customers if the private cars are detained by the railroads beyond a reasonable time period.

Notice. As explained by various panelists during the hearing, the 60 days’ notice given by the railroads in connection with the changes in demurrage and accessorial tariffs are insufficient for the rail customers to plan and adjust to avoid or mitigate the charges. During the hearing, railroads argued that the 60 days’ notice is higher than the regulatory requirement.⁶ However, some of the recent changes are so significant that the rail customers simply cannot adjust their operations, build additional tracks, secure alternative storage or downsize their private fleets within 60 days in order to avoid the demurrage charges. ISRI strongly believes that the Board should require the railroads to provide more reasonable and sufficient notice, which should not be less than 180 days, and in cases where track or other infrastructure will be constructed even longer, if the railroads make major changes in their demurrage tariffs.

Invoicing and Dispute Resolution. Finally, ISRI members and many other railroad customers are concerned about demurrage billing and dispute resolution practices. Some have complained about meritless demurrage bills sent by the railroads, others are concerned about the difficulties and disincentives to challenge demurrage/storage fees. For instance, NS assesses \$500 as a handling charge if a demurrage dispute claim is not received by the fifth calendar day of the following month (See NS-6004 Item 950).

Other charges, such as the UP’s “not ready for service” fee, should be justified with documentary support in order to be valid. To avoid protracted disputes, the railroad should have time and date stamped photos with a clear explanation of which car was not ready for service.

As to billing, ISRI believes that the Board should require railroads to verify and audit their demurrage bills before sending them to their customers to ensure greater accuracy and

³ Majority of the railroad tariffs provide that credits earned in month cannot be carried over to the next month. See e.g., UP 6004 Item 9610-a; NS 6004 Item 950.

⁴ See e.g., *Davison Chemical Co. v. N.Y.C.R.R.*, 298 ICC 191, 193; *National Trucking & Storage Co., Inc. v. P.R.R.*, 294 ICC 605, 615.

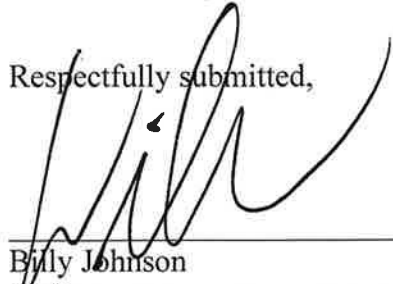
⁵ See Written Submission of the Institute of Scrap Recycling Industries, Inc. filed with the STB on May 8, 2019 at p. 11.

⁶ See 49 CFR §1300.4 (“A rail carrier may not increase any rates or charges, or change any service terms (except for changes that are equivalent to rate reductions), unless 20 days have expired after written or electronic notice has been provided to all persons...”).

reduce disputes. Railroads should also be required to improve and clarify their dispute resolution practices which are cumbersome and time-consuming. The Board should establish clear timelines for the filing and resolution of demurrage claims and require railroads to make the data needed to verify a demurrage charge available to rail customers.

In conclusion, ISRI reiterates its thanks and appreciation to the Board for initiating this proceeding on railroad demurrage practices and accessorial charges. We also urge the Board to take the steps outlined in this submission and ISRI's prior written statement, and we stand ready to provide any further assistance to the Board as may be needed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Billy Johnson', is written over a horizontal line.

Billy Johnson

Institute of Scrap Recycling Industries, Inc. (ISRI)