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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 754

**OVERSIGHT HEARING ON
DEMURRAGE AND ACCESSORIAL CHARGES**

**COMMENTS OF
DIVERSIFIED CPC INTERNATIONAL, INC.**

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May 8, 2019

I. Introduction

Diversified CPC International, Inc. (Diversified CPC) respectfully submits these comments regarding the Board's review of Demurrage and Accessorial Charges. My name is Sandra Dearden; I am President and Executive Consultant at Highroad Consulting, Ltd. (Highroad), headquartered in Highland, IN, which is part of the Chicago metropolitan area. Highroad has managed rail transportation for Diversified CPC for more than 21 years. Diversified CPC has asked me to present testimony in this proceeding.

We thank the Board for opening this proceeding. Demurrage and Accessorial charges are a significant source of revenue for the railroads, and the charges are having a major impact on Diversified CPC. As you know, some of the Class I railroads have submitted reports to the Board, detailing millions of dollars generated in 2018 for demurrage and accessorial revenue. CSXT generated a total of \$365.7 million in demurrage and accessorial revenues. Norfolk Southern was a close second at \$335.68 million, followed by BNSF Railway at \$279.06 million, and Union Pacific Railroad at \$232.36. US Class I railroads assessed demurrage and accessorial charges in 2018 of close to \$1.3 billion.¹ Without a doubt, that number will increase in 2019, as a result of the changes that became effective January 1, 2019.

Diversified CPC International, Inc. (Diversified CPC) is headquartered in Channahon (rail station, Lorenzo), IL and it has six manufacturing and distribution facilities in North America. Diversified CPC manufactures propellants for aerosols. In 2018, they entered the LNG market, so we are in the process of locating a transload in Texas to serve those customers that do not have access to rail. The gas will be produced at the Channahon plant and shipped to the transload. Even though Diversified CPC is considered a leader in the aerosol propellant industry, it is a relatively small shipper. Our largest customer receives more than 225 carloads annually; however, for every gallon of finished product, we receive an equal amount of raw materials inbound for production.

¹ "Class I railroads report 2018 earnings from demurrage, accessorial charges," Newsletter, Transportation by Randy Gordon, President & CEO, NGFA, February 1, 2019.

Diversified CPC relies on Class I railroads for inbound shipments of raw materials and to deliver products to customers. All of Diversified CPC's inbound and outbound rail shipments move in private tank cars. While we also ship by truck for shorter distances, some of those customers request rail deliveries, and truck transportation is not always a practical alternative for long haul moves. Therefore, rail is a critical part of our operation, providing the ability for Diversified CPC to be competitive.

Diversified CPC's plant at Petal (rail station, Dragon), MS is local on NS. Prior to NS establishing its Pace Setter program, Diversified used its credits and incurred demurrage charges. Due to increased demand for the commodity produced at Dragon, and increased demurrage, Diversified CPC recently contracted a company that operates a transload terminal and provides track storage at Lumberton, MS (also local on NS) to manage inbound shipments of raw materials and to mitigate demurrage. The serving yard for Dragon and Lumberton are the same. NS service at Dragon is "on par" primarily because Diversified CPC transitioned to open gate status. However, rail service at Lumberton is not as consistent as service at Dragon. The railroad frequently misses switches resulting in a backup (bunching) of cars received at interchange from a connecting carrier at Birmingham.

II. NORFOLK SOUTHERN CONGESTION CHARGE

A new charge added to the NS tariff is a "congestion charge" of \$100/day for all cars destined to a location that in the sole judgement of Norfolk Southern has an excessive quantity of cars that congests NS facilities resulting in operating problems. NS may hold these excess cars at "various locations" and assess the charge for cars that exceed two times the average number of cars that the consignee received at that location during the previous two weeks.

Diversified CPC's plant at Petal has experience dealing with congestion in NS yards. Currently, the Birmingham yard where NS receives Diversified CPC cars at interchange, is consistently congested. In 2016, the NS yard at Dragon, MS was extremely congested, resulting in missed switches and the interruption of inbound product needed for Diversified CPC's operations. As a result, NS assessed demurrage

charges of more than \$70,000. If this rule had been in effect at that time, the congestion charges would be in addition to the demurrage charges.

In the new rule, NS did not establish standards for the definition of a congested facility and material operating problems; however, it has been our experience that the congestion at Birmingham and Dragon was not caused by Diversified CPC cars. Instead, the congestion is/was the result of limited capacity of the yards, receiving cars destined for Diversified CPC, and numerous other customers. (Emphasis added.)

This rule appears to be arbitrary and may result in double-dipping, as the congestion charge is applied in addition to the demurrage/storage charge. Diversified CPC has no control over the flow of traffic from numerous shippers that may lead to yard congestion, it is arbitrary, and we question the reasonableness of this charge.

III. DEMURRAGE/STORAGE CHARGES

Railroads have relied on storage and demurrage charges for over a hundred years to encourage efficient utilization of their rail cars, to free up track space, and to compensate them for holding cars. Historically, these charges were imposed on loaded freight cars, whether railroad supplied or private cars, and whether held on railroad track or industry tracks; and on empty railroad supplied cars held on railroad track. Until about 2001, these charges were not applied to empty private cars. Then, railroads began to apply the charges to empty private cars, normally with two days free time or credit days. Prior to January 1, 2019, NS followed this standard practice of handling empty private cars, providing two credit days. However, effective January 1, 2019, the credit days for empty and loaded private cars was reduced from two days to zero credit days.

Most railroads use the term *demurrage* when describing the charges for using railroad-owned cars too long while loading and unloading, and for private cars held on railroad property too long. Some railroads use the term *private car storage* instead of demurrage. NS uses the term *storage* for private cars instead of demurrage.² Cars subject to storage include “[l]oaded Private Cars and Empty Private Cars on NS

² *Id.* at Item 550. A Private Car is “[a] car bearing other than railroad reporting marks and which is not a Railroad Controlled Car.”

tracks under constructive placement after notice of arrival is given to the Consignor or Consignee. Time accrues until the car is 'ordered placed' ... on private tracks.³

Constructive placement is defined as follows: "[w]hen a car cannot be placed because of any condition attributable to the Consignor or Consignee, such car will be held at an available hold point and notice will be given to the Consignor or Consignee that the car is held awaiting instructions. However, cars actually placed on customer's siding will be considered constructively placed and no notification provided. *Car Days* will begin if instructions to NS are not received before 0000 hour of the day following notification."⁴

Car Days are "[a] twenty-four hour period or fraction thereof commencing 0000 hours (Local Time) after actual placement until the car is released and available to NS."⁵ However, for private cars, the [t]ime accrues until it is ordered ... placed on private tracks.⁶ (Underscore for emphasis). A *Credit Day* is a non-chargeable day."⁷

Most Class I railroads start the demurrage/storage clock at 12:01 a.m. of the day following placement. If you return the railroad-owned railcar or order in your private car at 12:02 a.m., one day of demurrage/storage is accrued. If it is after 12:01 a.m. you have until 11:59 p.m. before another day is accrued. This appears to be the way NS calculates storage charges.

A free day is a day of grace, a particular day of the week or holiday where you are not charged demurrage/storage. If, for example, you are given two free days to get your private load off the railroad's track after it has been constructively placed and order it in after just one day, you are assessed no charges. *Credit Days* work differently. Using the same example, the customer would get one-day credit to apply to other demurrage/storage charges. The credits can only be applied to charges at

³ *Id.* at Item 550(1).

⁴ *Id.* at (1).

⁵ *Id.* at (1).*Id.* at (4).

⁶ *Id.* at 550 (1).

⁷ *Id.* at (9).

the same location, but credits for loading and unloading can be combined.⁸ NS uses credit days to calculate storage charges.

IV. THE CASE AT ISSUE

On October 1, 2018, NS issued Freight Tariff 6004-D (Tariff), which relates to demurrage/storage rules and charges. Effective January 1, 2019, the Tariff cancels the previous Freight Tariff 6004-C. The Tariff provides various changes to the canceled tariff, including charges that apply on private cars, which are the matters at issue here.

The first revision at issue is Item 600, Rules Governing Cars Held for Loading, which reduces the number of credit days from two to zero credit days for each empty or loaded private car under constructive placement. This item provides in pertinent part:

Release:

- (a) A car is released as of the date and time NS receives advice that the car is available and forwarding instructions are provided.
- (b) When Consignor does its own switching, the time a car is held for loading will commence once empty car(s) are placed on interchange tracks, and will continue until (i) car(s) are returned to an industrial interchange track, and (ii) NS receives forwarding instructions.
- (c) Cars found to be overloaded or improperly loaded while at origin will not be considered released until the load is adjusted.

Computation

- (a) Car days will be computed from the first 0000 hours (see Car Days, Item 200) after tender (i) until released with forwarding instructions for Railroad Controlled Cars, or (ii) until placement is made for Private Cars. In the case of Private Cars, the separate calculation for originating storage charges will be computed from the time the loaded car is pulled and held on railroad tracks by NS without forwarding instructions to time of receipt of required forwarding instructions.
- (b) On car placed prior to date for which ordered, Car Days will be considered as having been ordered and actually placed that day.
- (c) Empty cars placed without being ordered, will be considered as having been ordered and actually placed that day.

⁸ *Id.* at 950 (2).

Credits

- (a) One (1) Credit Day will be earned for each Railroad Controlled Car released, or which forwarding instructions have been received.
- (b) **Zero (0) Credit Days will be earned for each empty private car under constructive placement.**
- (c) **Zero (0) Credit Days will be earned for each loaded private car pulled for which forwarding instructions have not been received.**

(Emphasis added to tariff changes.)

The second pertinent change NS made in the Tariff is in Item 1010, which reduces Private Car Storage from two loading and unloading credits to Zero loading and unloading credits. This item provides a table with these reductions in credits for private cars all to zero. As a result, railroad-controlled cars are given one credit day for loading and unloading while private cars are given zero credit days for loading and unloading.

These changes will result in storage charges being assessed regardless of whether the shipper is diligent in its loading and unloading operations. Under this new plan, the storage charge for a private car begins to accrue at 12:01 after constructive placement of the car, i.e. after NS notifies the shipper the loaded or empty car is ready to deliver to the shipper, and continues until the shipper directs NS to deliver the car to its facility and it is placed. NS's storage charge for private cars is an average assessment: upon constructive placement, each empty car will receive zero credits, and each day thereafter that the car remains on the track one car day is assessed until the shipper orders the car delivered and it is placed. Total credit days for private cars are subtracted from total car days for the month, and the shipper is charged \$60 for each net car day.

Here, there can be no credits because of the zero credit days set forth in Tariff. If a private car is constructively placed, that means a storage charge will likely be applied. For example, if a car is brought to the shipper at 11:59 p.m. that means the railroad will only have one minute to enter the delivery in the system, and the customer will only have one minute to accept the car and have it placed, leaving no time to remedy a situation. In other words, this change related to private cars will

likely result in situations where a customer cannot possibly avoid storage charges being assessed no matter how efficient it is.

V. DEMURRAGE CHARGE STATUTE

We respectfully submit that changes in the Tariff, as they relate to private cars, is a violation of 49 U.S.C. §10746, which provides:

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.

The zero-credit rule for private cars fails to fulfill either of these national needs. The concept of private cars is important because it allows continued service when there are periods of greater need during peak seasons.⁹ This new policy will deter private car owners from using these cars because demurrage costs will skyrocket where a shipper has limited control over these charges because there is no room for any error, like bunching or congestion at a shipper facility. Of course, customers that ship product in tank cars will have no option because railroads do not have tank cars. Absent a reasonable period to accept the cars when delivered, the ability to avert storage fees is lost. This new policy simply appears to be a revenue generator for NS, and in no way does it satisfy the two national needs for freight cars.

VI. NORFOLK SOUTHERN'S CONGESTION CHARGE AND DEMURRAGE/STORAGE RULES IN TARIFF CONSTITUTE AN UNREASONABLE PRACTICE.

We submit the changes to Tariff as they relate to private cars constitute an unreasonable practice. 49 U.S.C. § 10702(2) provides:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable –

⁹ *North America Freight Car Ass'n, et al. v. BNSF Railway Co.* ("NAFCA"), 529 F.3d 1166, 1174 (D.C. Cir. 2008).

- (1) Rates to the extent required by Section 10707, divisions of joint rates, and classifications for transportation and service it may provide under this part; and
- (2) Rules and practices on matters to that transportation or service.

"[I]n Section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable. Instead, it gave the Board 'broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety ¹⁰ of factual circumstances encountered.'" "This broad discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts."¹¹

The reasonableness standard can apply to demurrage. "The principle underlying demurrage is straightforward: when a shipper holds a rail car beyond a **reasonable time**, it is taking up a railroad asset for which the railroad should be compensated. Demurrage charges therefore serve two purposes: (1) to compensate the railroad for added costs (e.g., for car hire charges it pays to the carrier owning the equipment being held) or loss of use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient."¹²

See Norfolk Southern Ry Company v. Judge Warehousing, LLC, 2018 WL 5258621, 1 n. 1 (S.D. Ga 2018), ("Demurrage compensates the rail carrier for expenses from and penalizes the receiver for the undue detention of its rail cars.") (citing 49 C.F.R. §1331.1); *Field Container Corp. v. I.C.C.*, 71 F.2d 250, 252 (7th Cir. 1983) (*Demurrage in railroad parlance is a charge for a shipper's holding the railroad's cars for loading or unloading beyond a specified time (usually two days) thereby depriving the railroad of their use.*"); *Savannah Port Term., Inc. – Pet. for Decl. Order – Certain Rates and Practices as Applied to Capital Cargo, Inc*, STB Docket No. 34920, slip op. at 10-11 (STB served March 29, 2008)("demurrage charges serve two functions. First, demurrage serves as a penalty for undue car detention,

¹⁰ *NAFCA*, STB Docket No. NOR 42060 (Sub-No. 1), slip op. at 8 (STB served January 26, 2007)(quoting *Granite State Concrete Co. v. STB*, 417 F.3rd 85, 92 (1st Cir. 2005)).

¹¹ *Id.*

¹² *Id.* (Bold font for emphasis)

encouraging the efficient use of rail cars in the rail network. [cite omitted] *Second, demurrage compensates rail carriers for expenses incurred when rail cars are detained beyond a reasonable period of "free time"*"); *Capital Materials, Inc. – Pet. for Dec. Order – Certain Rates and Practices of Norfolk So. Ry Co.*, STB Docket No. 42068, slip op. at 2 (STB served April 12, 2004) citing *Chrysler Corp. v. New York Central R. Co.*, 234 I.C.C. 755, 759 (1939) (same). With respect to the Tariff changes by NS at issue, *"when a shipper's privately owned rail cars are idled on railroad's tracks, it is depriving the railroad of the use of that track."* *R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges*, STB Docket No. 42102, slip op at 4 (STB served July 20, 2010).

In *Capital Materials* at 2, the STB explained the principle of use of rail assets as follows:

When a shipper utilizes a rail car, that shipper is taking up a rail asset – the use of that rail car. As a result, a railroad has the right to set a reasonable time for shipper to finish using that asset and return it to the railroad. If a shipper keeps the asset for too long, then it should compensate the railroad for the extended use of its rail car – in other words, for demurrage.

The STB has issued regulations regarding demurrage that address the matter of time for a customer to use a car. The STB defines demurrage as, *"a charge that both compensates rail carriers for expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network."*¹³

It also defined who is subject to demurrage: "Any person receiving rail cars from a railroad for loading or unloading who detains the cars beyond **the period of free time** set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of rail cars. This notice required by this section shall be in written or electronic form." 49 C.F.R. § 1331.3

¹³ 49 C.F.R. §1331.1 (emphasis added)

(emphasis added). Notably, both definitions acknowledge “a specified period of time” for a shipper to use the railroad’s assets.

In *NAFCA*, 529 F.3rd 1166, the court ruled on a similar case to one at hand with one significant difference. The court upheld the STB’s decision rejecting the complainant’s claim for an unreasonable practice based on a demurrage policy that applied on empty private cars. The significant difference was the shipper had two free days to accept the car. The STB stated, “*case turns on who should bear the expense of holding empty shipper-supplied freight cars beyond a **reasonable period.***” *NAFCA*, slip op. at 6 (emphasis added). The complainant argued that the two-day free time was shorter than necessary to solve track congestion problems which the railroad argued was the reason for its new demurrage charge and requested a five-day period. However, the court noted the STB’s position that having the two-day free time was adequate for most private car shippers to not incur demurrage charges. *NAFCA*, 529 F.3d at 1174. Having two-days free time to accept cars was important to the decision of the court.

The question then becomes what is a “reasonable period?” Undoubtedly, it is more than zero. Zero is not a period of time. Zero credit days is unreasonable considering the nature of the rail industry, which has, “many variables outside a railroad’s control that may affect delivery ... [A] railroad cannot reasonably be expected always to meet an ideal delivery timetable.” *Capital Materials*, slip op. at 7. Moreover, the case law consistently notes that free time is a specific period, which implies that there must be some time in order to satisfy the reasonableness test.

See *Illinois Central Gulf R. Co. v. I.C.C.* 702 F.2d 111, 113 n. 1 (7th Cir, 1983) (“Railroads assess demurrage charges when shippers hold railway cars for loading and unloading longer than a specific period, called “free time”); *Portland & Western R.R., Inc. – Pet for Dec. Order – RK Storage & Warehousing, Inc.*, STB Docket 35406, slip op. at 4 (STB served July 27, 2011) (“A railroad has a right to set a reasonable time – free time – for a shipper/receiver to finish using a car and return it to the railroad.”) In fact, the STB has stated that “[p]roviding 48 hours free time for unloading is standard practice in the railroad industry.” *Id.* at 5.

See e.g. *R.R. Salvage & Restoration, Inc.*, slip op. at 3; *Capitol Materials*, slip op. at 3.

VII. CONCLUSIONS

Based on the STB's repeated reference to a reasonable time period for acceptance of a car for loading and unloading, without charge, it is difficult to fathom how a zero time period fits within this definition. It certainly cannot encourage a shipper or receiver to be more efficient because the time for storage here could begin in minutes. Moreover, the use of zero credit days appears to be more of a revenue producer for NS than a deterrent for use of its tracks by private cars. See *Iversen v. U.S.*, 63 F. Supp. 1001 (D.D.C. 1946) *aff'd* 327 U.S. 767 (where demurrage charge that required unloading during certain Christmas holidays which would have been impossible due to the labor situation so it could not accomplish objective of unloading cars and only result was to cause payments to railroads by shippers, rule was found to be arbitrary). Consequently, zero credit days for private cars cannot be a reasonable time because it is not even a period of time. Also, application of the new rule to apply only on private cars appears to be discriminatory, if NS's actual objective is to improve productivity of its assets.

In view of the foregoing, we respectfully submit the following recommendations for your consideration:

- We question the reasonableness of the Congestion Charge as there were no standards established to define what constitutes a congestion. Also, this charge results in double-dipping, and it should be terminated.
- Ideally, the zero credit days for empty and loaded private cars would be restored to five days, which applied in 2017. However, considering the current industry standard for private cars, shippers should be allowed two credit days for loading and unloading.
- When railroads miss switches and bunching occurs, railroads should give demurrage relief on all cars impacted, including those already enroute.

Demurrage and Accessorial charges are a very important issue as they can have a major impact on shippers (in this case, private car shippers). We commend the Board for opening this proceeding, and we appreciate the opportunity to present our views.

Respectfully submitted,

A handwritten signature in black ink, reading "Sandra J. Dearden", written over a horizontal line.

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