

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 754**OVERSIGHT HEARING ON RAILROAD DEMURRAGE AND ACCESSORIAL
PRACTICES**

WRITTEN SUBMISSION OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Pursuant to the Notice served in this docket on April 8, 2019, the National Grain and Feed Association (“NGFA”) hereby files its written submission in this oversight hearing proceeding.

The NGFA commends the Board for conducting this oversight hearing proceeding. As the Board is aware from prior correspondence and communications from NGFA and several of its member companies, the majority of Class I railroads have elected over the past several years to drastically change their respective operating plans and business models to adopt so-called “precision scheduled railroading” (also known as “PSR”) – systemic and drastic changes to railroad operating plans to reduce expenses and increase revenues, resulting in lower operating ratios. Under the guise of PSR, many of the Class I railroads arbitrarily have imposed new service schedules that often run counter to the needs of their customers; and in some cases have undercut and largely negated billions of dollars in investments made by rail customers based upon previous service expectations (e.g., unit train service), investments often made with the strong encouragement and at the behest of the very same railroads that subsequently made 180-degree changes in their service plans under PSR. Relevant to this proceeding, the implementation of PSR

concepts by some Class I railroads has been accompanied by highly questionable practices regarding the assessment of demurrage, as well as conditions and charges associated with so-called “accessorial” services.¹ These practices and their implementation have imposed operational, commercial and economic harm on many agricultural commodity shippers.

Therefore, this oversight hearing is very timely and appropriate. The NGFA hopes the result of this process will be real and effective modifications to Class I railroad demurrage and accessorial tariff² terms to make them more commercially fair, operationally practicable for rail customers, and reciprocal, meaning (1) that provisions of the tariffs of the issuing railroad make it accountable for delays or other actions it causes that give rise to particular charges and incentivize the carrier to avoid being the cause of such delays or other actions in the future; and (2) railroads properly are incentivized to efficiently use private railcars and other rail assets constructed and operated by their customers.

I. Identity and Interest of NGFA

Established in 1896, the NGFA consists of more than 1,100 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers;

¹ NGFA concurs that “Accessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges.” Notice at 1. See also, *Georgia Power Co., v. Southern Railway Co. and Norfolk Southern*, 1991 WL 228043 (I.C.C.) (“these charges, however, plainly involve traditional accessorial services, which are separate from the underlying line-haul transportation services. Although these accessorial services and charges normally cannot be incurred without a line-haul movement, a line-haul movement (indeed, usually will) occur without them.”). Consequently, charges associated with accessorial services are not part of the line-haul rate.

² The legal requirement that railroads file formal tariffs with the agency was eliminated years ago but most Class railroads still refer to the documents that contain the terms and conditions by which they provide common carrier service as “tariffs.” For convenience, this Petition refers to such terms as “tariff” terms.

exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. The NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association ("NAEGA"), and has a strategic alliance with the Pet Food Institute.

II. Support for NGFA Statement from Other Collaborating Organizations:

The NGFA has been authorized to convey that its statement is supported by and includes examples of commercially unfair and non-reciprocal demurrage and accessorial charge tariffs provided to NGFA by members of the National Oilseed Processors Association ("NOPA"), North America Freight Car Association ("NAFCA") and North American Millers' Association ("NAMA").

NOPA is a national trade association that represents 13 companies engaged in the production of food, feed and renewable fuels from oilseeds, including soybeans. NOPA's member companies process more than 1.8 billion bushels of oilseeds annually at 69 plants located in 21 states throughout the nation, including 59 plants that process soybeans. NAFCA consists of 37 member companies that collectively own or lease more than 700,000 privately marked freight cars. NAFCA members consist of private (non-railroad owned) rail car manufacturers, owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. NAMA is the national trade association of the wheat, corn, oat, and rye milling industries. Its member companies operate mills in 38 states, Canada and Puerto Rico, representing more than 90 percent of total industry production capacity.

III. Background

A. General Definitions and Applicable Rules

Railroad practices and related charges for demurrage and assessorial services and activities have been part of the railroad industry for decades. Section IV of this statement contains a more detailed discussion of the applicable law and rule, which the NGFA summarizes here.

Demurrage historically has been defined generally as being “a charge that both compensates rail carriers 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).”³ It often has been characterized by the Board as “quite simple” in principle:⁴ “When a shipper utilizes a railcar, that shipper is taking up a railroad asset — the use of that railcar. As a result, a railroad has a right to set a reasonable time for a 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 railcar — in other words, for demurrage.”⁵ But “[e]qually simple, however, is the notion that a shipper should not be required to compensate a railroad for delay in returning the carrier’s asset if the delay is the fault of the railroad, not the shipper.”⁶

While demurrage originally applied only to a shipper’s detention of loaded railroad-owned railcars, it has been expanded to permit railroads to assess demurrage for privately owned railcars detained on railroad-owned tracks because such charges “compensate the railroad for use of its

³ 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).

⁴ STB Docket No 42068, *Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co.*, (served April 12, 2004) at 1 (“*Capitol Materials*”).

⁵ *Id.*

⁶ *Id.* at 2; accord, *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges* (served July 20, 2010) at 4.

assets (i.e., the space on its track or at its yards), and they encourage more efficient use of freight cars on its system.”⁷ In 2014, the Board followed prior precedent and adopted 49 C.F.R. §1333.1, which defines demurrage as a “charge that both compensates rail carriers for the 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.” 49 C.F.R. §1333.1. Railroad demurrage practices are governed by 49 U.S.C. §10702, which requires railroad practices to be reasonable, as well as §10746, which states, in relevant part, that “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.”

Meanwhile, **accessorial charges** are not defined specifically by any statutory provision or regulation, but are defined as charges for services and activities that are not included in the line-haul movement of freight, other than demurrage charges. The railroads’ practices concerning accessorial services and activities, and the charges associated therewith, also are subject to the Board’s jurisdiction under 49 U.S.C. §10702.⁸ The Board recently affirmed that it has jurisdiction to determine the reasonableness of accessorial charges under this provision.⁹

⁷ *NAFCA at 6*. A category of charges that are very similar to demurrage charges are car storage charges, by which a railroad assesses its customers monetary penalties if empty privately-owned railcars resided on railroad-owned track beyond a period of time set by the railroad. *Id.*

⁸ *Georgia Power Co., v. Southern Railway Co. and Norfolk Southern*, 1991 WL 228043 (I.C.C.) (stating “these charges, however, plainly involve traditional accessorial services, which are separate from the underlying line-haul transportation services. Although these accessorial services and charges normally cannot be incurred without a line-haul movement, a line-haul movement (indeed, usually will) occur without them.”).

⁹ *Central Valley AG Grinding v. Modesto & Empire Traction Co.*, NOR 42159 (STB served July 25, 2018)

B. The Rules and Policies Governing Demurrage and Accessorial Charges Have Not Been Updated to Reflect Changes to the Nation's Freight Railroad System

Most of the rules and principles governing the reasonableness of demurrage and accessorial practices and charges were developed when railroads supplied most of the rail cars in service nationwide and performed most of the services related to freight transportation. They also were based upon the assumption that railroads would do so into the future. Consequently, such rules and policies focused on protecting the railroads' investments in cars and rail assets and promoting their efficient use.

However, the industry has undergone significant change. Currently, more than 70 percent of all railcars in service nationwide are owned or leased, as well as maintained, by non-railroad entities. For their part, agricultural shippers own or lease 100 percent of their tank car fleets. In addition, according to 2017 waybill data, privately owned or leased cars comprise approximately 78 percent of the grain hopper car fleet – a percentage that continues to increase. For many companies, the cost of owning or leasing and maintaining a private railcar fleet amounts to millions of dollars a year – an expense previously borne by the Class I railroads.

In addition, railroad customers have invested billions of dollars to acquire, expand, operate, and maintain track and other assets and related personnel to perform tasks previously performed by Class I railroads. Such tasks include loading and unloading of cars, inspecting cars and trains prior to departure, intraplant switching of railcars, building of unit and manifest trains, siding tracks construction and maintenance for car storage on rail customer side tracks, and other tasks. In today's railroad industry, the functions performed by Class I railroads essentially are limited to providing locomotive power and crews to transport primarily privately owned or leased cars over railroad rights-of-way between origin and destination. Shippers increasingly are performing functions that previously were the responsibility of the railroads. For example, the

Union Pacific Railroad (“UP”) starting earlier this year under its so-called “Unified Plan 2020” version of PSR began requiring some rail customers to even pre-block (group together) cars to the same destination and level-load identical numbers of cars on a weekly basis in manifest trains despite some of these same customers’ objections that manifest service is not conducive to their business operations or service requirements.

C. The Recent Proliferation of Common Carrier Demurrage and Accessorial Practices and Charges as Part of the Class I Railroads’ Implementation of PSR

Even though the vast majority of railcars now are privately owned, and that rail customers also have invested billions of dollars in the construction and maintenance of railroad assets to perform many of the tasks previously done by the Class I railroads, the number of tariff provisions pertaining to demurrage, car storage and assessorial charges has expanded significantly over the last six years. In addition, the levels of the charges associated with such tariffs have increased dramatically. Such provisions can and do penalize rail customers severely for failure to comply.

In the past, the NGFA from time-to-time fielded complaints from its members regarding the demurrage and accessorial practices and charges of the Class I railroads, among other railroad practices. However, during the past two years – and particularly over the past seven months – the number and frequency of contacts from NGFA member companies regarding the sudden implementation by railroads of onerous tariff provisions concerning demurrage and charges for accessorial services – imposed unilaterally with little advance notice or consultation – has increased exponentially.

Since December 2018, NGFA’s Rail Shipper/Receiver Committee¹⁰ has been collecting and documenting examples of Class I railroads’ demurrage and accessorial charges and practices that are particularly egregious from the standpoints of commercial fairness, operational practicality and achievability, and lack of reciprocity. Frankly, one of the challenges has been the dizzying frequency¹¹ with which these charges and practices are being imposed by many of the Class I carriers, sometimes with less than the 20-day tariff notification required by 49 U.S.C. §11101 and the Board’s regulations.¹² This submission contains several of these examples, including some provided by milling and oilseed processing member companies of NAMA and NOPA.

To summarize at the outset, the majority of the recent offensive practices and tariff provisions have been associated with actions of the UP and Norfolk Southern Railway (“NS”) to implement some form of PSR in the past two years. However, the previous implementation of versions of PSR by the Canadian National Railway (“CN”), Canadian Pacific Railway (“CP”) and CSX Transportation, Inc. (“CSX”) also has resulted in similar modifications to those railroads’ demurrage and accessorial tariff provisions and programs. A common feature of each Class I railroad’s implementation of PSR has been the wholesale modification of existing tariff provisions pertaining to railcar and rail asset use to rapidly force changes in customer behavior to assist the railroads’ goal of rapidly slashing their operating ratios. Many of the new tariff provisions of these railroads have been implemented on short notice and with strict deadlines for compliance for the

¹⁰ The committee is comprised of 33 representatives of a diverse and geographically representative range of NGFA-member companies (including country elevators, feed manufacturers, grain and oilseed processors, millers and exporters) who deal with railroad issues daily.

¹¹ CSX Transportation Co. published 19 changes to its CSXT 8100 tariff effective July 1, 2018, followed by **an additional** 17 changes to the same tariff effective Jan. 1, 2019.

¹² For example, on Dec. 10, 2018, the NS published new locomotive-detention charges of \$800 per train per hour that became **effective immediately** for any cars not emptied, released and available after a 24-hour free unloading period.

express purpose of forcing rail shippers to facilitate the tariff-issuing railroad's execution of operating-plan changes required by PSR's tenets. These demands frequently are made with little or no regard to the ability of rail customers' facilities to operationally comply with the timeframe established by the railroad, or the effects of such changes on the customer's business or supply chain commitments to downstream customers. As a result, a byproduct of these harsh practices has been a significant increased revenue stream to the Class I railroads from new and increased charges assessed for non-compliance with tariff terms.¹³

While the justification of such provisions typically is explained to shippers in terms of promoting the efficient use of rail equipment and assets, the tariff provisions implemented by railroads uniformly require the *rail customer* to take action. But there is no reciprocity in the tariff that requires or incentivizes *the railroad* to act in a correspondingly efficient manner regarding rail customers' railcar fleets and other rail assets, including by being held to some measure of service predictability. Indeed, as explained in more detail below, some Class I railroads have removed from their demurrage and accessorial tariffs language that previously provided some relief to the rail customer if the railroad was at fault for the delay or other action that triggered the assessment of the charge. Class I railroad tariffs now are devoid of any provisions that (1) specifically and reciprocally describe when the railroad is at fault for the inefficient use of railcars and other rail assets; (2) provide effective relief from charges or other penalties to the rail customer when the railroad is at fault; (3) provide equitable dispute-resolution procedures at most Class I railroads; or (4) incentivize the railroad to change its behavior in the future. This huge imbalance is reinforced and compounded by the lack of rail-to-rail competition

¹³ Reports submitted at the direction of the Board revealed that in calendar year 2018 alone, the seven Class I railroads operating in the United States generated more than \$1.43 billion from demurrage and accessorial charges, suggesting an attempt to create an additional revenue stream to reward shareholders and impress Wall Street investors.

(with rail duopolies existing in both the Eastern and Western United States). The current policies of the Board also contribute to the imbalance, as explained below.

D. How Carriers Contribute to Inefficiencies and the Assessment of Charges Against Shippers

Today, rail users make investments in railcar fleets and other rail assets based upon their business needs, representations made to them by Class I railroads about expected service levels and cycle times, and their actual experiences in receiving rail service. Many rail users have experienced a lack of predictability or regularity of railroad service, which makes acquiring and maintaining the proper-sized private car fleet very difficult. When rail carriers fail to provide freight transportation consistent with their announced service plans, or otherwise operate unpredictably, inefficiently or sporadically, that existing investment in private railcars is affected adversely (by being used inefficiently through lost revenues from foregone opportunities to move traffic and serve downstream customers) and rail shippers are forced to incur *additional* investment costs for *more* railcars and other assets to maintain business levels and customer demands. Not only is this a considerable cost to shippers, the additional railcars in circulation can add to the congestion confronting rail carriers, thereby potentially undermining the carrier's network fluidity while triggering even more onerous tariff charges targeted at rail customers.

Further, the impacts are not limited to the financial effects on shippers' and receivers' rail assets. For instance, there are significant adverse impacts on business operations and efficiencies (e.g., curtailed production and plant shutdowns); the need to "buy-in" commodities or raw materials from other sources; resorting to higher-cost and less-conducive alternative modes (e.g., trucks) to keep facilities operating, animals fed and comply with contract obligations to downstream customers; and more.

Some examples of how railroads can cause or contribute to delays or harm to rail shippers include the following;

1. In-Transit Delays: Expected car usage, business expectations, plant production, and other business considerations can be affected adversely and severely by the railroad's unilateral decision to remove locomotives and park a car or train on a railroad siding for operational or other reasons, the railroad misplacing or "losing" a loaded railcar or misdelivering it, or mistakenly diverting a train or car.
2. Spot-and-Pull Delays: Railroad operating instructions typically require a rail customer to unload cars or trains within a specific time, prepare the empty car or train to be picked up, and then "release" the train. However, harm to the rail customer and inefficient use of private (and railroad) railcars results when the rail user adheres to all of the railroad's demands only to have the railroad fail to arrive to pick up the "released" train for an extended period of time. When that occurs, such cars and trains create congestion at the rail user's facility by tying up track space and preventing the rail customer from receiving/unloading and/or loading/shipping other cars or trains. This harm is compounded when the train or car is owned or leased by a rail shipper or receiver, and is delivered to the facility of the shipper's customer and then sits for an extended period of time on the customer's tracks.

Conversely, rail customers' operations are disrupted when rail carriers do not switch a loaded or unloaded train – again consisting primarily of private cars – into a customer's facility to be unloaded/loaded. This, too, undermines the efficient utilization of rail assets – in this case, the shipper's/receiver's – and disrupts the efficiency of its business operations.

3. Bunching: Shippers generally plan and order rail service to accommodate the capacity of their plant tracks and their production schedules and business operations. These plans are consistent with the demands of their rail carriers to plan deliveries on a regular, measured basis. However, such plans are significantly and adversely affected by the railroads' practice of "bunching" cars¹⁴– delivering a batch of cars to a rail customer's facility or its rail siding for loading or unloading that exceed what the rail customer ordered, required or expected to handle based upon the anticipated service schedule of the carrier. Bunching results solely because of the action of the railroad, at times because of weather delays or attempts by the carrier to "catch up" on previous missed switches and delivery of cars.

¹⁴ Bunching also can occur with unit trains, when one unit train is occupying an unloading track and the railroad decides to deliver one or more other unit trains, despite a schedule that called for spacing out the deliveries.

Producers, shippers and receivers ultimately bear most of the cost of freight (including freight rates, demurrage, accessorial and other charges) in the highly competitive global market for grains, oilseeds and their derived products. As NGFA has documented in previous proceedings before this Board, shippers and receivers have limited ability to pass costs forward to the end-user or buyer given the fungibility and multiple sources of origins globally for grains, oilseeds and grain products.

E. Specific Tariff Terms Lacking Sufficient Reciprocity and Commercial Fairness

NGFA-member companies participating in this proceeding will be documenting specific examples of demurrage and accessorial charges that are commercially unfair and impractical, as well as non-reciprocal. But NGFA wishes to highlight several that have been identified by its member companies as being particularly egregious because they clearly lack sufficient reciprocity and commercial fairness, and for use by the Board in informing its action as a result of this oversight hearing.

1. Union Pacific Railroad Company

a. UP Accessorial Tariff 6004 Item 9055, “Not Prepared for Service.”

This provision charges customers \$400 per car “per occurrence” if UP is unable to pull or spot cars because of the “customer’s actions,” examples of which are included in the Item’s language.¹⁵ NGFA understands Item 9055’s purpose is to penalize rail shippers for not being

¹⁵ On May 8, 2019, the due date for written submissions in this proceeding and two weeks before UP’s Kenny Rocker is scheduled to testify before this Board, UP issued an amendment to Item 9055 “Effective immediately,” which changed this charge from *per car per occurrence*, to just *per occurrence*. Item 9055 also was changed to establish a minimum threshold of three occurrences per month. The timing of this change is peculiar, and conceivably may have been done for the purpose of blunting criticism of UP’s application of 9055 to date (and therefore an affirmation of UP customer complaints). In any event, its effect is obviously unknown and the NGFA notes that Item 9055 still does not address situations where UP is the cause of the customer not being ready for service. NGFA also believes this amendment would not

“ready for service,” when UP arrives, thereby incentivizing them to be ready. This item imposes additional monetary penalties on customers by explicitly stating “[w]hen this charge is applied, release of the car will not stop accrual of demurrage charges or other charges that are based on release of the car.” Thus, the \$400 charge is *in addition to demurrage or any other charges* UP chooses to assess pursuant to Tariff 6004.

Previously, it was NGFA’s understanding that this charge applied only to situations where a loaded car was released in error as an empty car, requiring the UP to return the car to the facility. But its members inform NGFA that UP has expanded the application of this charge to seemingly any “delay” that it unilaterally determines is attributable to the shipper. It can be argued that the \$400-per-car charge is not commercially fair or reasonable given that the impact on UP is the same, regardless of whether it is unable to pull one or multiple cars.

Further, Item 9055 is silent regarding its application (or waiver) where a railcar cannot be pulled or spotted because of an action by UP.¹⁶ While the shipper is penalized heavily if it is not ready for service, UP does not commit to arriving at any particular time; indeed, UP states it cannot inform shippers within eight hours of when its crews will arrive to pull or spot a car. Consequently, NGFA is informed of instances where its member companies have had loaded cars billed out on

have been made without the Board’s keen interest in this overall issue and the Chairman’s past correspondence with UP on this tariff provision. NGFA further notes that UP could revert to its previous or an even a more draconian policy at some point in the future merely by issuing a tariff notice.

¹⁶ On Nov. 20, 2018 Chairman Begeman sent a letter to UP after it announced it would be implementing some form of PSR and mentioned this tariff provision. Chairman Begeman expressed her concern that this announced revision “lack(s) appropriate reciprocity.” The Chairman noted that in its letter to the Board announcing such changes, UP had not addressed “how UP would handle situations where UP is unable to pick up or deliver a rail car due not to a *customer’s* actions, but rather *UP’s*.” (emphasis in original). UP responded to the Chairman’s question in letter dated Nov. 27, 2018 stating vaguely and without citing any tariff language that in such instances UP would “give the customer two offsetting credits for our operational failures” under UP’s “standard demurrage program.” However, what constitutes a UP “operational failure” is not defined in any UP tariff, and the purported offsetting credit remedy is not spelled out – either explicitly or implicitly in Item 9055.

the UP, released and ready for service on a given day pursuant to UP's rules, but then UP has not arrived for several days – even a week or longer – after the release date.¹⁷ In the meantime, the shipper's departure track could be blocked by an unbilled or partially loaded car (or other reason). Upon UP's subsequent arrival without advance notice, the shippers had insufficient time to move the car blocking the service prior to UP's arrival. Further, the shipper may well have incurred increased labor costs associated with paying employees overtime to load cars based upon anticipation of UP service and to avoid imposition of a UP "not-ready-for-service" charge. Even though UP's failure to arrive until well after the release date and its lack of prior notice contributed to or caused the inability to be "ready for service," UP has charged such shippers \$400 for each released car that is blocked, plus refused to move the car blocking the service so that the cars can be pulled. Appropriate reciprocity and commercial fairness require that this provision include specific language, such as waiving the \$400 per-car charge, issuing additional credits, or requiring UP to pay the shipper the \$400-per-car charge if it does not arrive within a certain number of days after the cars are billed or if UP does not provide sufficient advance notice. Such provisions would provide UP's customers with clarity on their liability and would incentivize UP to act in a more efficient and commercially fair and responsible manner.

b. General Rule Item 9613 – Unit Train Service Terms

Under Item 9613, unit train customers (except UP grain shuttle customers) are required to submit a 30-day unit train forecast. In paragraphs 3 and 4, the customer (other than coal and grain shuttle customers) further is required to confirm each unit train forecasted by pre-releasing the unit train no later than 72 hours before forecasted date of release. If the forecasted date of release is

¹⁷ In addition, shippers sometimes incur costs associated with overtime charges paid to employees to load or unload the cars based upon the anticipated arrival or pull schedule by UP in an effort to avoid demurrage charges.

canceled within 48 hours of the forecasted date of release, the customer is charged \$10,000 per occurrence by UP.¹⁸

However, the UP tariff contains no language describing the relief UP will provide to the shipper if it complies with every aspect of Item 9613, but then UP crews and locomotives do not arrive to pick up the billed and released train. To the contrary, Item 9613 states only that “The charges provided in this Item do not apply to and will not accrue during circumstances beyond the Customer’s reasonable control, *as determined by UP.*” (emphasis supplied). Thus, any relief for delays or other UP-caused circumstances are left entirely to the discretion of UP. To be appropriately reciprocal and commercially fair, Item 9613 should contain specific language stating that if UP does not arrive to pick up the released train within 48 hours of the forecasted date of release, UP shall be required to pay the shipper the same \$10,000-per-occurrence charge. This would provide a reciprocal incentive for UP to optimize the efficient use of private cars and assets and provide the shipper with some protection from downstream economic harm from lost business opportunities or damages associated with UP’s delay.

¹⁸ More broadly, UP unit train customers were required to commit in the fall of 2018 to a specific number of railcars they would utilize during 2019 based upon UP’s then-historical service levels and operations plan. This level of long-term forecasting is incongruous with the grain and grain products marketplace, where shipping patterns are dictated by weather conditions, both within the United States and globally (e.g., crop yields and quality), market demand, trade disruptions, varying origin-destination pairs and other factors that NGFA has articulated in previous statements to the Board. Having to provide a forecast a year out on a crop that hasn’t even been planted, with penalties applied if the rail customer does not meet its forecast is commercially unfair and unreasonable. Further, no such reciprocity exists when rail carriers implementing PSR, or otherwise, arbitrarily and with little notice change their service plans and schedules, such as through ever-changing requirements for unit-train sizes, replacing unit train service with manifest service (as UP did starting in April 2019 for soybean meal, distillers grains and corn gluten feed/meal, except for certain gateways, despite the tremendous negative impact on rail customers’ business operations, service obligations and infrastructure investments).

Other provisions of Item 9613 that should be modified to contain specific language that describes when either charges are waived or UP is subject to a penalty to incentivize it to utilize private railcars more efficiently and to be commercially fair include:

- Unit Train Lay Down Charges. UP imposes a unit train “laydown charge” of \$2,000 for the first hour (or fraction thereof), and \$500 per hour for each subsequent hour (or fraction thereof) that a unit train is held at the customer’s request after release, even though UP does not guarantee the specific times when it will provide the service. To be commercially fair and reciprocal, in the event trains are held because of UP’s actions (e.g., service failures, failure to meet the train’s estimated-time-of-arrival, etc.), UP either should waive these charges or pay the shipper/receiver an identical fee.
- Asset Utilization Charge: Under this same tariff item, UP assesses charges against customers if they take more than 24 hours to unload a train. However, UP imposes no time requirements on itself to pick up the empty train. To be reciprocal, these charges should not apply or identical hourly charges (and fractions thereof) should be assessed against UP if its trains arrive more than 24 hours behind schedule (e.g., based on the negotiated spot time) or if UP pulls trains later than 24 hours after they have been billed and released by the customer.
- Deadhead Charges. Under Item 9613, UP reserves the right to remove locomotives from a unit train “at any time.” But if the locomotive is removed at the request of the customer, UP imposes a \$3,200 charge per unit train per occurrence at origin or destination. This charge is in addition to any UP “asset utilization” charge that may have accrued. In addition, the same \$3,200 charge is assessed by UP when it returns the locomotive to the unit train. These charges are commercially unfair because UP already imposes demurrage and accessorial charges to incentivize or penalize customers for loading and unloading cars. In essence, these deadhead charges are a form of “double-dipping” and result in additional penalties without any expectation of correspondingly improved asset utilization. Further, to be reciprocal, the UP customer should be compensated with equivalent monetary refunds if the UP decides to pull a locomotive from a unit train, which has the effect of tying up the customer’s track space and railcar assets, as well as delaying the rail user’s ability to ship or receive cars. Some NGFA-member companies report they’ve waited for more than a week for UP to arrive with a locomotive to pull a unit train.

2. Norfolk Southern Railway

a. NS’s Flawed and Commercially Unfair Debit and Credit System

In a letter to NS dated Nov. 27, 2018, Chairman Begeman expressed her “strong concern about the potential dislocation” that can result from the operational changes demanded by PSR,

and added that it was her belief that while NS desired to “optimize asset utilization, it is important that *tariffs are balanced* and create appropriate incentives for both the customer *and the railroad*.” (emphasis supplied). In its response to the Chairman’s letter, NS simply responded – without substantiation – that changes to its demurrage program “are in fact balanced.” NS assured Chairman Begeman that this “balance” had been achieved by “increasing certain demurrage charges” and “reducing certain credits related to the loading, unloading, and storage of freight in rail cars” on the one hand, and “increasing the demurrage credits earned for certain NS failures.”

The NGFA believes it is important to note that a properly constructed debit-and-credit system can, to some limited extent, alleviate harm to rail customers by offsetting demurrage charges and accounting somewhat for instances where the railroad is the cause of a charge being assessed. However, for the most part “credit days” only offset a railroad’s demurrage charge, and under current tariffs the conditions that led to the demurrage being assessed in the first place may well have been caused by the railroad. Credits do not compensate the rail customer for the actual costs borne by the customer for railroad service failures, which as discussed previously include loss of business opportunities, harm to investment in railcars and other assets, and reduced production.

In any event, NS’s statements about its demurrage practices being “balanced” are belied by the terms of NS Tariff 6004, and disputed by NS customers.¹⁹ Contrary to NS’s representations NS’s credit system is far from balanced and commercially fair, and is skewed heavily toward the customer always paying demurrage charges to NS, no matter the circumstances. Two examples are provided below:

¹⁹ NS customers also have vigorously disputed that NS’s demurrage program is “balanced.” See letter to STB from Consolidated Scrap Resources, dated March 6, 2019; and Letter to STB from Brunk Plastics Services, dated April 12, 2019

- **Credit Days for Private Cars Held for Loading/Unloading:** Under NS Tariff 6004D, Item 600, effective Jan. 1, 2019, the number of credit days on private cars held for loading or unloading was reduced from two credit days to zero. Thus, NS shippers are provided no free time to load or unload railcars once the cars are on NS's system. As recently as 2017, private cars received *five* free storage days from NS, which was reduced to two days in 2018. Not only is this operationally impractical, it has the effect of eliminating any credits that can be applied to offset demurrage charges. In addition, Item 900 of the same NS tariff reduced credit days to zero from the previous one day for revenue private empty cars held on NS tracks.²⁰
- **Storage Charges on Private Cars Held for Loading/Unloading:** Under NS Tariff 6004D, Item 1010, NS imposes a \$60-per-day charge for any debit days for a private car – empty or loaded – sitting in a serving yard that are not called in by the service window specified by NS for a given facility. But NS places no obligations on itself to serve the facility within a particular time frame. If NS fails to serve the plant within the service window it specified, the cars remain in the serving yard. The rail customer on the next day is required to call all of those cars into the facility *plus* any cars that arrive that day before the call-in time for that facility. In this situation, the NS rail customer is supposed to receive a free day (credit) on the cars not delivered from the previous day, since the non-delivery was the fault of NS. However, in reality, those cars become lumped in with the newly arriving cars, and now the total number of cars must be called in within the new time window or the cars are assessed the storage charge for *both days*.

In this situation, the rail customer not only has lost a day of production because of NS's service failure, it also does not receive any additional credits to assist in getting two days of cars off in one day. As a result, through no fault of the shipper, demurrage and storage charges are assessed. To be reciprocal and commercially fair, the NS should be required at a minimum to provide two credits for each car it failed to deliver from the previous day. Further, the tariff should state that if NS fails to pull all billed outbound-loaded cars from a facility, credits also should be awarded to the rail customer to offset the inability of the facility to accept empty cars awaiting placement because the necessary track capacity is occupied by the cars NS did not pull.

²⁰ By contrast, in NS Tariff 6004D, Item 650, NS preferences its own equipment with differentiated treatment. Specifically, NS provides one credit day for NS railcars held for unloading (still down from the previous two days), and provides one additional credit day when the same car is reloaded.

b. Charges for “Congestion” in NS Rail Yards.

Under NS Tariff 8002-A, issued on Oct. 10, 2018 and made effective Jan. 1, 2019, NS under Item 6265 unilaterally is empowered to determine, at its sole discretion, when an “excessive quantity of cars for a given consignee” congests NS facilities “causing material operations problems.” Upon making these determinations and providing five days’ notice NS, begins imposing a \$100-per-car-per-day or fraction of a day charge against all of the consignee’s cars destined for the congested location for each day within the previous two weeks. Although Item 6265 clearly refers only to cars “destined to a congested location,” which are held “at various locations” before the congested location and assessed the charge, NS in practice has imposed this charge on cars already present in a yard when the Item went into effect on Jan. 1. Thus, in effect, it has doubled-up on storage and congestion charges. This is unreasonable and commercially unfair.

c. Demurrage Assessed for Seven-Day-a-Week Service.

In a notification to customers issued on Jan. 3, 2019, NS unilaterally announced that it would increase switching service frequency to rail customers to seven days a week, regardless of whether the rail customer requested this service frequency or its operations physically were equipped for it. Further, NS announced it would impose an \$800-per-train demurrage charge after providing 24 hours of free time for unloading or loading. The tariff provision applies even if the facility is not open or staffed to load or unload trains (e.g., over a weekend). This is a commercially unfair practice, since it forces the rail customer to modify its business operations to handle daily service and to arrange and pay overtime for work crews to unload or load trains on a 24/7 basis to avoid incurring demurrage charges. NS’s tariffs should state that it will not charge demurrage to

customers that either don't need or desire service on a seven-day-a-week basis, or are operationally not equipped to accommodate NS without incurring additional costs.

3. Canadian Pacific Railway

a. Demurrage and Private Car Storage Fees.

Under its Tariff 2, CP imposes demurrage and private car storage fees on the shipper even on days when CP does not serve the facility. For instance, cars placed by CP in the serving yard on a Friday are assessed a demurrage or private car storage fee on Friday, Saturday and Sunday, even though CP does not serve the facility until Monday. These charges are commercially unfair when imposed on days CP service is not provided to the facility.

b. Minor Adjustment or Inspection Charge.

Under Tariff 2, Item 53, CP imposes a “minor adjustment or inspection” charge of \$302 per car when it finds an empty rail car that has an open gate after it was released and moved as an empty from a destination. This charge is commercially unfair for two reasons. First, CP assesses the fee on the shipper listed on the original loaded bill of lading, which oftentimes does not own or control the operation of the facility that released the car as empty at the destination. The appropriate party against which the charge should be assessed is the destination facility for actions it may or may not have taken that led to releasing an empty car allegedly with an open gate. Second, when the destination-serving railroad returns the empty car to CP, CP's “evidence” for identifying if a car has an open gate is done by CP inspecting the railcar after it is in its possession after the car has moved hundreds, if not several hundred miles, as an empty car. When disputed, NGFA is informed by its members that CP has not been able to provide any inspection reports that show a car had an open gate when it was at the destination-unloading facility. CP's process of assessing a charge after a railcar has been in the railroads' possession for days and moved hundreds of miles

is not commercially fair, as many things could have happened to the car while it was in CP's possession.

4. BNSF Railway

a. Shuttle and Unit Train Demurrage:

The BNSF Railway, in its Demurrage Book 6004-C, Section 4, issued on Feb. 15, 2019 and effective March 7, 2019, provides 24 hours of free time for loading and unloading grain shuttle trains. Under its Certificates of Transportation ("COT") Program, these shuttles consist of 100 to 120 individual covered hopper cars obtained by BNSF customers through an auction process with dedicated locomotives for a specific period of time. The successful COT bidders determine the origin-and-destination pairs for the train consecutively throughout the duration of the shuttle COTs as auctioned. The origin-and-destination facilities are not necessarily owned or otherwise under the control of the successful bidder.

BNSF imposes a \$600-per-hour demurrage charge for each subsequent hour or fraction of an hour exceeding the 24-hour free period, with that charge escalating to \$1,000 per hour or fraction of an hour beyond 48 hours. Accordingly, if it takes three days to load a shuttle train, the demurrage charge alone is \$38,400 on one train²¹, which BNSF assesses against the COT owner, which may not be the shipping or receiving facility. BNSF's tariff contains no provisions that offer reciprocal demurrage payments or credits to shuttle COT owners for delays in processing the shuttle trains caused by either the loading or unloading elevator or for BNSF's own non-performance, such as when shuttle COTs are billed and released back to BNSF, but BNSF fails to pick up the train for an extended period of time. For BNSF demurrage charges to be reciprocal

²¹ Based upon the following example calculation: A BNSF shuttle COT is placed at a facility at 6 am on day one and billed at 5:59 am on day three (72 hours total). The total demurrage would be calculated at a rate of \$600 per hour on day two (\$14,400) and \$1,000 per hour for 24 hours on day three (\$24,000).

and to properly incentivize BNSF to efficiently utilize shuttle trains, BNSF should create a schedule of demurrage rebates or payments to be made to the shuttle COT owner for BNSF's lack of performance based upon a similar time schedule (24-hour grace period) assessed on the loading/unloading agricultural facility.

In addition, BNSF has sole authority to lay down a COT train in a rail yard for several days, with no compensation or reciprocity provided to the COT owner for the inefficient utilization of the shuttle train(s) purchased under the COT.

5. CSX Transportation Co.

The reductions in credit days (or free days), particularly for private fleets that are typical in agricultural rail transportation, has resulted in unavoidable demurrage charges for shipper origins as cars ultimately are bunched upon empty return. Destinations from a single origin are numerous, all with specific transit time, shipment volumes and shipment frequencies. However, railroads continually and without notification frequently change service plans for origin-and-destination pairs, resulting in cars arriving early or late based upon average historic transit times. The daily car flows from origins ultimately will return in bunches. Although bunching in these occurrences is not the fault of the shipper, the fluctuations in transit times automatically cause cars to sit and the railroads invariably assess demurrage invoices. In short, in these circumstances, railroads impose congestion charges if cars bunch, but they are the cause of the bunching.

In this regard, it is revealing that CSX Transportation Co. in its accessorial charge tariff for agricultural products that became effective on Jan. 1, 2015 removed "bunching" from its glossary of terms, which had the effect of eliminating its free-time commitments for loading and unloading that previously had applied since at least July 1, 2009 under Tariff CSXT 8100. Tariff CSXT 8100 previously had contained the following provisions:

“Cars Tendered for Loading – When cars are bunched and placed for loading in accumulated numbers in excess of the normal daily placing as ordered, because of delay or irregularity in filling orders, the shipper shall be allowed the free time for loading he would have received had the cars been placed for loading as ordered.

“Cars Tendered for Unloading – When cars are bunched and placed for unloading in accumulated numbers in excess of daily shipments as a result of: (1) the act, or neglect of any railroad; (2) flooding, earthquakes, hurricanes or tornadoes; (3) conditions in devastated areas resulting from any of the above, the consignee shall be allowed, for those cars tendered for delivery by this railroad in accumulated numbers in excess of daily shipments, the free time for unloading that he would have received had the cars not been bunched.”

While this CSXT tariff did impose certain conditions based upon the origin, route and location of the consignee, it did at least provide free time for loading and unloading to the rail customer. But no longer; that reciprocity has been revoked by CSXT.

F. Commercial Unreasonableness of Charges

The NGFA also believes – and would urge the Board to use this oversight proceeding to consider whether – the level of demurrage and accessorial charges now imposed by many rail carriers far exceed what is necessary to incentivize the efficient utilization of rail assets. Rather, many NGFA members suspect these charges now are being used by railroads as a method to generate additional revenue for the principal purpose of rewarding shareholders and impressing Wall Street investors.

The following chart depicts the escalation in demurrage charges being assessed by the seven U.S. Class I carriers, as well as the credit days provided by each of the carriers, for the period 2016-19. Further, the chart demonstrates that several railroads differentiate charges between railroad-owned versus private cars:

DEMURRAGE - A penalty charge assessed by railroads for the detention of cars by shippers or receivers of freight beyond a specified free time

* As on Jan. 1 each year, except where noted

	RR Cars to be Loaded					PVT Cars to be Loaded			
	2016	2017	2018	2019		2016	2017	2018	2019
BNSF	\$75	\$75	\$75	\$75		\$150	\$150	\$150	\$150
CN	\$100	\$100	\$110	\$200		\$60	\$60	\$65	\$75
CN				\$130	Eff 4/28/19				
CPRS	\$100	\$100	\$110	\$110		\$60	\$60	\$60	\$60

CPRS has a fleet demand status that determines rates for RR cars. Above based on Balanced status

Low = \$80/car Balanced = \$110 High = \$200 (as of 1/1/19)

	RR Cars to be Unloaded					PVT Cars to be Unloaded			
	2016	2017	2018	2019		2016	2017	2018	2019
CSXT	\$105	\$105	\$150	\$150		\$60	\$60	\$75	\$75
KCS	\$90	\$90	\$90	\$130		\$50	\$50	\$50	\$110
NS	\$100	\$100	\$100	\$150		\$60	\$60	\$60	\$60
UP	\$100	\$100	\$200	\$200	@ UP yard	\$100	\$100	\$100	\$100
UP			\$100	\$100	@ PVT industry				
	RR Cars to be Unloaded					PVT Cars to be Unloaded			
	2016	2017	2018	2019		2016	2017	2018	2019
BNSF	\$150	\$150	\$150	\$150		\$150	\$150	\$150	\$150
CN	\$100	\$100	\$110	\$200		\$60	\$60	\$65	\$75
CN				\$130	Eff 4/28/19				
CPRS	\$100	\$100	\$110	\$110		\$60	\$60	\$60	\$70

CPRS has a fleet demand status that determines rates for RR cars. Above based on Balanced status

Low = \$80/car Balanced = \$110 High = \$200 (as of 1/1/19)

	Credit for Loading					Credit for Unloading			
	2016	2017	2018	2019		2016	2017	2018	2019
BNSF	1	1	1	1		2	2	2	2
CN	1	1	1	1		2	2	2	2
CPRS	0 PVT 1 RR	0 PVT 1 RR	0 PVT 1 RR	0 PVT 1 RR		0 PVT 1 RR	0 PVT 1 RR	0 PVT 1 RR	0 PVT 1 RR
CSXT	2 PVT 1 RR	2 PVT 1 RR	1 PVT 1 RR	1 PVT 1 RR		2 PVT 1 RR	2 PVT 1 RR	1 PVT 1 RR	1 PVT 1 RR
KCS	1	1	1	1		1	1	1	1
NS	5 PVT 1 RR	5 PVT 1 RR	4 PVT 1 RR		Eff 12/1/17	2 PVT 2 RR	2 PVT 2 RR	2 PVT 2 RR	0 PVT 1 RR
NS			3 PVT 1 RR		Eff 3/1/18				
NS			2 PVT 1 RR		Eff 6/1/18				
NS				0 PVT 1 RR	Eff 1/1/19				
UP	1	1	1	1		2	2	2	1

The chart shows how demurrage charges have increased while the tariff terms that trigger demurrage charges have become stricter. This has resulted in significant increases in charges when in prior years demurrage charges were low or non-existent. One NGFA flour company member served by the UP reports that during the past two fiscal years, it saw its demurrage costs increase 15 percent to more than \$500,000 despite having a 3 percent decline in grain carloads. Over this

time, the shipper did ***not make any significant changes*** to its milling, purchasing or operating operations or practices, which were already at maximum efficiency. Several NGFA members have reported they now pay in excess of \$1 million annually in demurrage and accessorial charges at some of their facilities.

Further, while by no means unique, comparing the level of increases in CP's accessorial charges for carload traffic in its Tariff 2 in just the past year – January 2019 versus January 2018 – also is illustrative of what's happening in today's rail industry, where the Class I railroads have tremendous market power over their customers:

- CP's accessorial charge for changes and corrections to bills of lading now is \$400, up 280 percent from \$105 a year ago.
- The demurrage charge for private railcars on CP track increased by 17 to 37 percent, and now ranges from \$70 to \$130 per car.
- CP in Tariff 2 assesses a \$1,000-per-car charge for such minor issues as a "slightly torn placard that still is completely legible, railcar stenciling that is faded and a damaged or missing safety appliance not relevant to product containment."
- CP also imposes a \$535 per car charge, up to \$8,025 per block, for shipments that cannot continue in transit, often when the fault is CP's, not the shipper.

Similarly, CSXT's demurrage and private-car storage charges have increased significantly since January 1, 2017:

- The demurrage charge per day for unloading/loading increased from \$105 to \$150 per car – a 43 percent increase.
- The private car storage rate increased from \$60 to \$75 per car per day, and, as noted previously, the number of credits was reduced from two to one. Reciprocity would entail CSXT paying the rail customer \$150 per day if it fails to pull, move or deliver cars after an equal number of credit days.

G. Disparity Between Railroads and Shippers in Dispute-Resolution

By omitting or eliminating tariff language that described when demurrage and/or accessorial charges would be waived, credits issued, or the lack of customer fault would otherwise be recognized, the Class I railroads have given themselves the sole discretion to make these determinations in the event of a dispute. This shift has been coupled with Class I railroad billing practices under PSR. Specifically, implementation of PSR by each railroad invariably has entailed the drastic reduction of customer-service personnel and the corresponding use of automatic invoicing by railroad accounting departments. Pursuant to the terms of most rail tariffs and practices, rail customers are invoiced immediately for payment of penalties for non-compliance with tariff terms, regardless of whether they are at fault. The issuance of the invoice triggers other tariff terms regarding payment and collection, including further penalties for nonpayment, such as loss of credit and high interest charges.

NGFA's member companies also report that some Class I railroads prolong and make excruciatingly difficult the entire process for presenting facts documenting erroneous demurrage and accessorial charges. Indeed, according to one NGFA-member company, NS calls its team that is responsible for this process its "Revenue Defense Group." The back-office personnel in charge of collecting these invoices typically work under clear direction to do exactly that – to collect receivables. They exhibit neither the patience, inclination, nor desire to favorably resolve invoicing errors that shippers have identified, including demurrage and accessorial claims. Not surprisingly, the vast majority of shipper disputes are denied, and the invoice is enforced as issued initially. In UP's case, for example, it denied 96 percent of the disputed claims of its customers. Upon the inevitable denial of its claim, the customer is faced with a daunting choice: either wait for the railroad to file suit for collection in federal court pursuant to 49 U.S.C. §11705(a) and

assert a counterclaim, or file a formal unreasonable practice complaint or petition for declaratory order with this Board. Both proceedings, which often are combined because issues frequently are referred to the Board by the Court, are expensive and time-consuming.

More recently, some Class I railroads have chilled even further any challenges from their customers by implementing tariff provisions that unilaterally permit the railroad to recoup from its customer all of the costs it expends in defending against a challenge, including its attorneys' fees, expert fees and any other costs. In some cases, the railroad has given itself this benefit regardless of whether it wins or loses.²²

The following chart illustrates that disputed charges must be submitted to the railroad in as little as five days after the date a railroad invoice is issued. Yet, most railroads take as much time as they can in responding to rail customers' challenges. Frequently, the railroads' response is simply, "dispute denied" and the rail customer normally incurs a finance charge added to the originally assessed demurrage or accessorial charge.

²² Norfolk Southern Railway, in its **Conditions of Carriage #1E, Rule 300**, states: "...NS shall have the right to recover from the payor all reasonable costs of collection (including, but not limited to reasonable attorneys' fees, investigation costs, expert fees, and litigation costs), and assess finance charges against unpaid linehaul freight charges, switching charges, demurrage and storage charges, accessorial charges, and any other amounts owed under the governing rate authority, transportation contract, these Conditions, or any other document referenced in Rule 110."

UP Tariff 1000 at 2 - **Suit to Collect Charges**. If UP must file suit to collect any amounts owed by Customer, Customer will be responsible for interest from the date of shipment at the maximum rate of interest allowed by law, UP's court costs, and UP's reasonable attorney's fees

Demurrage Dispute	BNSF	CN	CPRS	CSXT	KCS	NS	UP
Time frame/Days to file	30 calendar days from invoice date	30 calendar days from invoice date	15 calendar days from invoice date	30 calendar days from invoice date	Within 5 days of each event of the Car Cycle Event date and time	5th calendar day of the month following the date cars are released	15 calendar days from invoice date
Condition			If Customer disputes any portion of invoice, Customer shall pay invoice by due date shown on invoice less the disputed amount, indicating reason for the adjustment.		If not done within 5 days, the event is considered accepted by customer and charges will be billed	Any demurrage disputes received after 30-day time limit will be rejected	
Charge for dispute	Not defined	Not defined	Not defined	Not defined	\$50/car for each incorrectly disputed car	\$500/dispute if disputed outside above timeframe or done outside AccessNS	Not defined
RR days to respond	Not defined	Not defined	Not defined	Not defined	Within 5 days of receipt of customer dispute	Not defined	Not defined
Authority	BNSF 6100, Item 3400	CN Website	CPRS 1, Item 200	CSXT 8100, 6.1 & 6.2	KCS 6000, Item 60	NS 6004, Item 950 (9)	UFC 6000, Rule 62

In summary, the customer is at a severe disadvantage if it objects to the charge being assessed given the absence of tariff provisions that spell out remedies when the railroad is at fault (or the customer is otherwise not responsible for the charge) or that penalize the railroad for inefficient use of private rail cars or rail assets.

There is one important exception: The NGFA is pleased that BNSF Railway – dating as far back as 2000, if not before and retained in its tariffs since then – has included an arbitration provision that commits it to resolve “all disputes, claims, questions or controversies arising out of any charges assessed under the provisions of this book in the transportation of grain or grain products shall be resolved by binding arbitration under the Arbitration Rules of the National Grain and Feed Association unless the parties agree to some other arbitration procedure.”

The UP, in its filing on May 1, 2019 in response to the Board’s April 8, 2019 data request pursuant to this docket, maintains that it allegedly, “has agreed to arbitrate contested demurrage and accessorial charges using a number of commodity or mode-specific rules (e.g., the National Grain and Feed Association’s Rail Arbitration Rules, the Association of American Railroads’

Interchange Rules) as well as the Surface Transportation Board’s arbitration program at 49 C.F.R. Part 1108.” However, the NGFA has never been notified by the UP of its agreement to do so. Nor has NGFA been able to uncover language in any of UP’s related tariffs in which it commits to do so.

IV. NGFA Recommendations to the Board

The NGFA respectfully offers the following recommendations concerning actions that it believes can and should be taken by the Board to address these and other manifestations of commercially unfair and non-reciprocal demurrage and accessorial charges imposed by Class I railroads.

A. The Board Has Ample Authority to Require Railroads to Modify Their Tariffs to Make them More Reciprocal and Commercially Fair

First and foremost, the fundamental standard applicable to all railroad practices is that every rail carrier “providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable . . . rules and practices on matters related to that transportation or service.” 49 U.S.C. §10702. The Board has extremely broad discretion to review railroad carrier practices for compliance with §10702 and find them to be unreasonable based on the facts and circumstances before it and/or the public interest generally. This broad authority includes the authority “to adopt rules of general applicability for future conduct to address an unreasonable practice, even though our ability to award shipper-specific remedies is limited to formal complaint proceeding.” Docket EP No. 661, *Railroad Fuel Surcharges* (served August 3, 2006)(“*Railroad Fuel Surcharges*”) at 4 note 6. The Board also has jurisdiction under §10702 to review the reasonableness of accessorial charges and practices. *Central Valley AG Grinding v. Modesto & Empire Traction Co.*, NOR 42159 (STB served July 25, 2018).

Railroad demurrage practices are governed by §10702 and 49 U.S.C. §10746,²³ the latter of which states in relevant part that “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.” Notably, §10746 by its express terms requires a railroad’s demurrage rules and practices to fulfill the *national* needs related to freight car use and supply, not just the perceived needs of a single railroad *vis-a-vis* implementation of its individual operating plan, such as some version of PSR. The intent of §10746 to fulfill the nation’s needs concerning freight car use and supply particularly is significant in today’s industry, in which, as noted previously, more than 70 percent of all railcars are privately owned and many rail customers have made investments totaling billions of dollars in tracks and other assets to obtain freight rail service. Accordingly, in the current rail industry environment, the establishment by Class I railroads of demurrage charges and practices in tariffs that penalize and incentivize rail customers and other non-railroad parties to be efficient, but do not penalize or incentivize the railroad for its inefficient use of private cars and shipper-owned railroad assets, is contrary to the language and intent of §10746.

In demurrage, it is well established that shippers are not liable when the railroad is the cause of the problem giving rise to the charge. See STB Docket No. 42068, *Capitol Materials Inc.*, – *Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co.*, (served April 12, 2004) at 2 (“*Capitol Materials*”)(“In general, the principle underlying demurrage is quite simple Equally simple, however, is the notion that a shipper should not be required to compensate a railroad for delay in returning the asset if the delay is not the shipper’s

²³ See, STB Docket EP 707, *Demurrage Liability* (served May 7, 2012) at 2.

but the railroad's fault."); accord, *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges* (served July 20, 2010) at 4.²⁴ However, onerous charges, combined with vague or non-existent tariff language as to railroad fault, arbitrary enforcement, and many carriers' extremely one-sided dispute-resolution processes has made it extremely difficult for shippers to successfully assert this defense.. See *Capitol Materials* at 2. ("no-fault" provisions and non-uniform enforcement makes demurrage cases "very difficult to resolve"). It is noteworthy for purposes of this oversight hearing proceeding that as far back as 2004, the Board recognized that demurrage practices under which a railroad charged its customers regardless of fault and then forced the customer to run a gauntlet to prove the railroad was the cause of the delay giving rise to the charge were inappropriate:

In light of the technological advances that have been made with respect to railroad operations in recent years, it might be appropriate for railroads to reconsider some of their longstanding demurrage practices under which delivering railroads charge their customers demurrage regardless of the reasons for delays. The widespread use of computers and sophisticated tracking systems now allow railroads to determine the location of rail cars in the rail system with more precision. It would seem that in-transit delays and other anomalies that could interfere with time-of-delivery expectations would likely be known as well.

Id. at 2-3.

The efficient use of railcars used in the nation's fleet also is governed by §11121(a) and §11122²⁵, the latter of which was originally enacted in 1917 as 49 U.S.C. §1(14) of the Interstate

²⁴ See also, *Ormet v. Illinois Central RR*, 341 ICC 657,651 (1972)(“Ormet”)(“Where the shipper has exercised due diligence and the cause of the detention of the cars is attributable solely to the carrier, the measure of damages has been that the demurrage charges should be remitted [to the shipper] in their entirety.”), and “Obviously, railroads should not be permitted to make sizeable profits at the expense of a shipper who is powerless to act.” *Id.*, citing *Balfour, Guthrie & Co. v. Chicago M., St. P.R.Co.* 235 ICC 437.

²⁵ Courts have found that car supply is also governed in part by §11101 (the common carrier obligation to provide transportation or service on reasonable request).

Commerce Act in 1917 in reaction to the critical shortage of railcars experienced after World War I. The Congressional intent behind passage of the predecessor to §11122 (Section 1(14)) was to incentivize railroads to purchase more railcars to serve their shippers, and thereby bolster the national railcar fleet. *U.S. v. Allegheny-Ludlum Steel Corp.*, 92 S. Ct. 1941 (1972).²⁶ Notwithstanding the legislative purpose of 1(14) to increase the number of railroad-owned cars, the statute was interpreted to encompass the railroads' use of private railcars in interstate operations and that, therefore, the ICC had jurisdiction over the efficient use of private cars as well as carrier-owned cars. See, *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, 556 (June 13, 1923)(“The use of private cars by railroad has been recognized by Congress, which has provided for the control of the use of such equipment by us, under the provisions of the Interstate Commerce Act, by means of a mandate addressed to the carriers subject to our jurisdiction.”); *In re Private Cars*, 50 I.C.C. 652 (July 31, 1918)(“The Congress has thus recognized 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.”).

Consistent with the foregoing, §11122(a) provides the Board with discretionary authority to adopt policies and standards that (1) “shall encourage the purchase, acquisition, and efficient use of freight cars,” including but not limited to standards governing “the arrangement for the use

²⁶ Historically, railroads supplied most of the cars in rail service, and therefore the establishment of rules regarding car supply, demurrage and car usage have proceeded from a policy that protects the railroads' investment in railcars and help them achieve revenue adequacy. See *Allied Corp. v Union Pacific Railroad Co.*, Docket No. 38921, 1 I.C.C.2d 480 (1985)(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.)

by a rail carrier of a . . . freight car . . . not owned by the rail carrier using the . . . freight car . . . whether or not owned by another carrier, shipper, or third person,” and (2) establish “sanctions for nonobservance” of such rules. In addition, rules governing compensation to third parties who supply private cars to railroads (mileage allowances and mileage equalization, respectively) are the result of an industrywide agreement that was approved by the ICC as being compliant with §11122. See Ex Parte No. 328, *Investigation of Tank Car Allowance System*, slip op. (ICC served June 15, 1979), and most recently modified in 3 I.C.C. 2d 196 (1986).

In summary, there is ample statutory authority for the Board to formulate standards governing reciprocity and commercial fairness in railroad tariffs addressing demurrage, car storage, and accessorial service and charges.²⁷

**B. The Board Should Use its Authority and the Broad Discretion
to Direct the Railroads to Modify Their Tariffs to Be More
Reciprocal and Commercially Fair**

The NGFA has recounted above how the demurrage and accessorial charges and practices of the Class I railroads have become extremely unfair and unreasonable and has supported this overall assertion with specific examples of current tariff provisions demonstrating this. The NGFA strongly believes that the next steps in this proceeding are for the Board to (1) review the written submissions and testimony it has received, (2) request and analyze any follow up information on the topics set out in the Notice, and then (3) the Board should adopt general rules and policies concerning reciprocity and commercial fairness for demurrage and accessorial charges and practices, and direct the Class I railroads to modify their tariffs in accordance therewith. By

²⁷ In addition, the Board has authority to promulgate regulations governing the issues raised in this Petition and the relief sought. 49 U.S.C. § 1321(a)(Board may “prescribe regulations in carrying out . . . subtitle IV.”). See, e.g, EP 707, *Demurrage Liability* (served April 14, 2014)(where Board proposed regulations governing certain aspects of demurrage liability which were eventually codified at 49 C.F.R. Part 1333).

the same token, the NGFA believes this proceeding should **not** conclude with the Board making no such findings and not directing the railroads to modify their tariffs, and instead leaving any and all questions of whether a particular tariff provision is unreasonably one-sided and/or commercially unfair to be resolved through individual formal complaint proceedings.

There is ample authority for the Board to make findings and policies concerning demurrage and accessorial charges and to direct the railroads to modify their demurrage and accessorial charge tariffs. To be sure, the Board had broad discretion to review railroad carrier practices for compliance with §10702 based on the facts and circumstances of particular cases presented to it in formal proceedings. However, the Board also has broad discretion under §10702 to “adopt rules of general applicability for future conduct to address an unreasonable practice,” even in the absence of a formal complaint or petition for declaratory order. *Railroad Fuel Surcharges, supra*, 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). In *Railroad Fuel Surcharges* – as in the case here of its own concerns and the complaints of many rail industry stakeholders over railroad demurrage and accessorial charges – the Board instituted a proceeding to review the reasonableness of Class I railroad fuel surcharge tariff provisions. No formal complaints or petitions for declaratory order were filed by any aggrieved party or railroad. After convening an initial public hearing, the Board proposed and sought further public comment on several policy directives regarding fuel surcharges that would apply to all such provisions. At the conclusion of that process, the Board adopted several general rules to apply to tariff terms instituting fuel surcharges that were necessary to make them comport with §10702 and ordered that “Railroads are directed to conform their practices to the findings contained in this decision.” *Railroad Fuel Surcharges* (decision served Jan. 27, 2007) at 14. In doing so, the Board

rejected arguments by railroad parties that it could only declare an action an unreasonable practice if it was acting on a specific complaint, since it was not addressing any individual railroad's fuel surcharge program or awarding any damages. *Id.* at 7. In this proceeding, NGFA and other parties have provided examples of individual Class I railroad tariffs and practices to better inform the Board of the scope of the current problem. However, these examples also should provide ample evidence for general findings regarding reciprocity and commercial fairness that all Class I railroad tariffs should be directed to contain if they are to comply with §10702 and other statutes.²⁸

Such a process would follow Board precedent that establishes specific tariff language is preferred over vague representations by the railroad about the purported meaning of its tariff terms and how they would be implemented. For example, the Board has held that a railroad tariff provision broadly imposing a charge against rail customers for contaminated railcars without limitation violated §10702 because it contained no language stating how the railroad would apply the tariff if the shipper was not responsible for the contamination. Docket NOR 42119, *North America Freight Car Association v. Union Pacific Railroad Co.* (served March 12, 2015) at 8-9. In that case the Board rejected the railroad's representations to it that despite the broad wording of its tariff it would not apply the tariff "unfairly." In doing so, the Board held "UP's assurances alone about how it would apply the tariff, however, do not provide a shipper sufficient information. *Such assurances are not included in the tariff* and the Board has found overbroad and ambiguous language in tariff provisions to be unreasonable." *Id.* at 9 (emphasis added), *citing* FD No. 35557, *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions* (served Dec. 17, 2013) at 30.

²⁸ See also, *Ormet, supra*, (where the Interstate Commerce Commission ("ICC") denied the request of railroad defendant to withdraw a petition to reopen a decision on the reasonableness of demurrage charges and issue a decision on general rules governing demurrage because "the issues, involving as they do matters of considerable importance to car service, transcend the immediate interests of the parties," and " . . . we are under an obligation to ensure that the dictates of the law are properly discharged." *Id.* at 647.

In FD No 35557, the Board applied a similar analysis to representations by BNSF about how it would apply its tariff language, stating, “BNSF has failed to explain how the language of the tariff can be reconciled with its stated intent that the liability provision would only hold shippers liable for negligent or improper use of toppers. Accordingly, *we find this specific language*—which is separable from the remainder of the tariff—to be unreasonable.” *Id.* (emphasis added). The Board previously had rejected another attempt by UP to “clarify its tariff” in pleadings before the agency, holding that “*the tariff does not contain such ‘but for’ language or otherwise limit itself to the situations that UP describes in its pleadings.*” Docket FD 35504, *Union Pacific Railroad Co. – Petition for Declaratory Order*, (served April 30, 2013)(emphasis added). The applicable tariff term was found to be unreasonable and contrary to §10702 because of the ambiguity created by the terms of the tariff despite UP’s proffered “clarification.”

The Board similarly should reject the recent attempts by the Class I railroads to proffer similar “clarifications” or explanations of how they would apply their demurrage, storage and accessorial charge tariff terms where the railroad was at fault in the absence of actual tariff language supporting such statements. These include the aforementioned vague and inaccurate responses Chairmen Begeman received from UP and NS in November 2018.

Consistent with established Board precedent, the Board should reject similar vague and self-serving explanations it receives from the Class I railroads in this oversight hearing and require railroad tariffs to contain appropriately reciprocal provisions that explicitly and fairly allocate fault between railroads and their customers, and, as such, truly encourage *both rail customers and rail carriers* to maximize the efficient utilization of railroad cars and other railroad assets that comprise the nation’s rail system.

**C. Shippers Should Not be Required to Resort to Formal Litigation to
Resolve All Questions of Sufficient Reciprocity and Commercial
Fairness**

As stated previously, the NGFA submits that the outcome of this proceeding should not be that the Board takes no action to require the Class I railroads to modify their demurrage and accessorial practices and charges, and conclude that any changes only may be pursued in subsequently filed formal complaint or declaratory order proceedings.²⁹ The NGFA recognizes that this has been the general default position of the Board in demurrage disputes and other unreasonable practice cases. *NAFCA, supra* at 13, note 47, 529 F.3d at 1174. *See also*, EP 707, *Demurrage Liability*, (served April 12, 2014) at 23-24, where the Board declined to consider adding language regarding carrier fault in the contexts of constructive placement and bunching to proposed 49 C.F.R. §1333.3. The Board concluded accounting for carrier fault was outside the scope of that proceeding, and that constructive placement and bunching issues “are best addressed in the context of individual disputes. If a receiver believes that it has been unfairly charged demurrage because of a rail carrier’s conduct, and it is unable to resolve the dispute informally

²⁹ The Board has entertained petitions for declaratory orders in numerous cases involving questions over the reasonableness of railroad tariff terms, including terms governing demurrage and accessorial charges. *See* FD 35504, *Union Pacific Railroad Co. – Petition for Declaratory Order* (Served April 30, 2013)(Petition seeking ruling on the reasonableness of indemnification terms in a tariff governing the transportation of Toxic Inhalation Hazardous (TIH) commodities.); STB Finance Docket No. 35305, *Arkansas Electric Cooperative Corp. – Petition for Declaratory Order* (served Dec. 1, 2009)(Petition asking the Board to declare that tariff provisions issued by BNSF Railway Company commanding control of coal dust emissions from rail cars constituted an unreasonable rule or practice and that any refusal to provide service for non-compliance with the Tariff provisions is a violation of BNSF’s common carrier obligation). STB Docket No. FD 35387, *Ag Processing Inc. a Cooperative – Petition for Declaratory Order* (Served May 9, 2012)(Begeman dissenting)(Petition seeking declaration that a tariff provision of Norfolk Southern Railway was unlawful was denied, but only because majority concluded that “there is no present likelihood that Petitioners will be impacted negatively by the tariff.”). The Board also has instituted numerous declaratory order proceedings to examine the reasonableness of railroad practices and tariff terms governing demurrage and storage charges. In most, but not all, cases, such proceedings are in response to a referral of issues by a state or federal district court.

with the carrier, it is free to avail itself of the Board's alternative dispute resolution options or to pursue a complaint with the Board." *Id*, citing, *Capitol Materials Inc.*, *supra*.

However, there are several factors that weigh against such a position in the context of this proceeding. First, the written submissions and testimony in response to the Notice have confirmed to the Board the sheer volume of questionable demurrage and accessorial charges and practices currently being deployed by the Class I railroads, and the frequency and rapidity with which new and modified charges are being imposed on rail customers. The most egregious aspects of such tariffs (e.g., lack of sufficient reciprocity or accounting for railroad fault; deficient credit and debit systems; unfair and one-sided dispute-resolution processes, no accounting for railroad "bunching" its deliveries of railcars, etc.) can be addressed through the Board's issuance of general findings of what is acceptable under applicable law, which the Board then can direct the Class I railroads to incorporate into their tariffs. This is far more efficient than requiring shippers and other affected parties to try to establish such general principles on a case-by-case, railroad-by-railroad basis.

Second, to the extent the Board has relied in the past on tariff language and carrier-imposed dispute-resolution processes to commercially resolve demurrage and accessorial charge disputes, this proceeding should demonstrate to the Board that this is no longer the case. As discussed above, rail tariffs largely have eliminated provisions that address railroad fault (or other instances where the shipper is not at fault). Rail shippers and the Board are left only with at most vague statements that the railroad will issue "credits" in instances where the railroad determines itself to be at fault or will otherwise accommodate their customers, with no accompanying language. Moreover, in today's industry the Class I railroads in general err on the side of applying their demurrage and accessorial tariffs literally and assess all charges allowed by their terms, and then

place all of the burden on the shipper to expend the time and resources to assemble and document all facts that would support a dispute, many which are simply denied.

Third, many rail shippers are extremely reluctant to pursue any formal litigation before a court or the Board because of its cost and complexity, the time it takes to receive a decision, and the very real fear of retaliation and retribution by the defendant rail carrier. This complexity and cost of bringing a case particularly is true for smaller shippers whose income proportionately can be affected as much or more significantly by railroad charges than larger companies.

Accordingly, the NGFA encourages the Board to be proactive in this proceeding by directing the Class I railroads to amend their tariffs to more clearly spell out rail users' and railroads' respective rights and responsibilities concerning railcar and asset usage, including defining and addressing when either is at fault for delays or other inefficient use of such assets. This will enable rail shippers and receivers, particularly smaller companies, to better address disputes with the Class I railroads with which they deal.³⁰

³⁰ The action requested by NGFA is distinguishable from the relief sought by the complainant in *NAFCA v. BNSF Railway Co.*, Docket NOR 42060 (Sub No. 1)(served January 26, 2007)(“*NAFCA*”) *aff'd* *NAFCA v. STB*, 529 F.3d 1166 (2008)(“*NAFCA Appeal*”). In that case, NAFCA asked the Board to void entirely new storage and demurrage charges adopted by BNSF and directed to private railcars placed on BNSF's tracks. *NAFCA* at 9. One of the numerous arguments raised by the complainant was that the new charges were unlawful and void because the tariff provisions did not make adequate provisions for “service variability” by BNSF. *id.* at 12. The Board ultimately disagreed stating “[i]n 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*.” *Id.* (emphasis added), *citing Capitol Materials*. Requiring railroads to amend their tariffs to be more reciprocal and commercially fair would not eliminate any existing Class I railroad demurrage or accessorial program. Nor would it require railroads to eliminate all service variability. Rather, it would more appropriately identify and account for instances where the shipper should not be charged because of delays caused by the railroad, and it would place proper incentives on the Class I railroads to utilize private railcars in their possession, and related rail assets constructed and operated by their customers efficiently.

Finally, proactive Board action on current Class I railroad demurrage and accessorial practices and charges, rather than requiring all questions of reasonableness to be decided in individual formal cases, is preferred because of the fact that to the extent such cases are filed, most are settled confidentially prior to a final decision. This results in the individual complainant(s) receiving accommodation, but no precedent or policy upon which others can rely. Any other party aggrieved by the railroad's actions must start anew with its own complaint.

The outcome of the Board proactively directing the Class I railroads to amend their tariffs to address the deficiencies identified in this hearing process would be fully supported by law and precedent. Further, even if such an approach would be considered a departure from the Board's previous policies of resolving such issues via individual formal proceedings, such an outcome would be completely justified. "Regulatory agencies do not establish rules of conduct to last forever," *American Trucking Assns., Inc. v. Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967), and an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968). The Board need only provide a "reasoned analysis" for the change. *Motor Vehicle Mfrs. Ass'n. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 48 (1983). See also *Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (1983) at 129:

Where the [Interstate Commerce] Commission departs from its own settled precedent, as here, it must present a "reasoned analysis" that justifies its change of interpretation so as to permit judicial review of its new policies. See *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 1769, 114 L.Ed. 2d 233 (1991). The reviewing court must be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate. See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 93 S. Ct. 2367, 2375, 37 L.Ed. 350 (1973). That new interpretation – once explained with reasoned analysis – is still entitled to deference under the standard of *Chevron*. See *Rust*, 500 U.S. at ____, 111 S. Ct. at 1769.

D. The Board Should Retain Jurisdiction and Oversight Over Railroads' Revision of Tariff Terms in Response to this Petition

Finally, the NGFA requests that the Board retain jurisdiction over this matter. It would be significantly more efficient for changes made to railroad tariffs in response to the Board's directives to be monitored in this proceeding than for affected parties to challenge individual tariff provisions through subsequent separate formal complaints. This likely would entail multiple formal proceedings against individual railroads challenging their compliance with the Board's directives, with each case subject to their own procedural schedule requiring evidence and argument (and discovery). Accordingly, the NGFA seeks to avoid the result in Docket FD 35504, *Union Pacific Railroad Co. – Petition for Declaratory Order* (served October 10, 2014) where the Board held that a tariff modification made by UP in response to a Board directive in a decision denying UP's petition had to be reviewed in formal complaint proceedings because the Board did not make an affirmative ruling that UP's tariff provision was reasonable or unreasonable, just that railroad did not carry its burden of proof that its provision was reasonable. As an alternative to retaining jurisdiction to oversee the directed modifications, the Board could permit affected parties that question whether an individual carrier has failed to comply with the Board's directives to seek a ruling on such questions through a petition for declaratory order, generally a more streamlined process than a formal complaint proceeding.

V. Conclusion

The NGFA again commends the Board for conducting this timely oversight hearing. The current demurrage and accessorial charges and practices of the Class I railroads are of great concern to NGFA's member companies, many of which have been significantly and adversely harmed by them.

In this statement, the NGFA has endeavored to provide the Board with detailed examples of its member companies' experiences with demurrage and accessorial charges and practices, and the adverse impacts they have had. The NGFA also has provided its perspectives on how several existing demurrage and accessorial tariffs are neither commercially fair nor reciprocal, and as such are imbalanced and unreasonable, as well as how they potentially could be modified. As stated herein, the NGFA strongly believes this proceeding should result in directives from the Board to the Class I railroads to modify their existing tariffs to incorporate certain concepts of reciprocity and commercial fairness. The NGFA respectfully suggests that such guidance should include the following minimum standards:

- A. Tariff provisions should clearly state objective and reciprocal criteria that apply when the railroad is deemed to be at fault for delay or other action(s) that triggers the assessment of demurrage and accessorial charges (or the customer is otherwise not at fault), as well as the specific penalties or other actions the railroad is required to take to compensate the rail customer or excuse it from liability.
- B. Railroads should be penalized to the same extent as their customers if they cause delays or are responsible for other actions that result in the inefficient use of privately owned railcars and private railcar assets. In this regard, the Board should give strong consideration to requiring incentives that protect the billions of dollars in investment customers of Class I railroads have made in railcars and other assets.
- C. Railroad tariffs should contain commercially fair and reciprocal terms that appropriately relieve the customer from responsibility for instances when a customer is penalized under the tariff when the delay or other action triggering the charge actually is the responsibility of the railroad. For instance, with respect to credit-and-debit systems deployed by railroads, tariff terms must first explain when "debits" are not assessed because the railroad is the cause of the debit being issued, and that credits are issued to provide some relief for the railroad's actions, understanding that railroad "credits" only offset a fraction of the true costs to customers of railroad actions that adversely affect the customer's operations and use of its railcar fleet.
- D. Railroad dispute-resolution programs should be commercially fair, and, among other features, should delete any reference to collecting attorney's fees and other costs of litigation unless these same rights are extended to the shipper should it prevail in its dispute.

Finally, the Board should retain jurisdiction and oversight authority regarding the changes made to railroad tariff provisions as a result of this oversight hearing proceeding.

The NGFA appreciates the Board's consideration of its recommendations, and looks forward to continued interaction on this important matter.

Respectfully submitted,

Handwritten signatures of Randall C. Gordon and Thomas W. Wilcox in blue ink.

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May 8, 2019