

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

CSX TRANSPORTATION, INC. SUPPLEMENTAL COMMENTS

EXECUTIVE SUMMARY

CSX Transportation, Inc. ("CSXT") submits these comments to supplement the record. The Board's hearing notice: (1) expressed an interest in learning more about recent experience with demurrage and accessorial tariffs, the impacts of changes to some carriers' tariffs, and whether demurrage tariffs were balanced and appropriate; and (2) requested the attendance of persons knowledgeable about demurrage practices. CSXT's witnesses appeared to testify about these issues, to answer the Board's questions about these topics, and to listen to our customers' concerns.

We conveyed the importance of our demurrage program to improving network fluidity and our service product. We serve over 5,500 customers every day. The vast majority of those customers manage their product pipeline to avoid congesting yards, sidings, and main line track with railcars they lack the capacity to unload. A minority do not. The impact of this minority's behavior is avoidable congestion that impairs other CSXT customers by slowing and degrading the overall service product.

A great amount of attention was spent on the complaints of a subset of shippers, while very little was given to the benefits of our program and its positive impact on CSXT's record-setting service results appreciated by our overall customer base. Some customers raised reasonable concerns and highlighted ways that carriers could improve their demurrage programs. Other comments and questions made unsupported claims or sought to revive antiquated legal concepts from the pre-Staggers era, with little acknowledgment of recent case law. These efforts failed to recognize the extensive discretion that Congress has given railroads to find the right measures to improve network fluidity for the benefit of all customers.

We look forward to continuing our dialogue with the Board to ensure appropriate review and evaluation of all relevant business facts and legal precedent. We trust the Board will move past the generalized characterizations and embellishment at the hearing and will consider the evidence based on the facts and an accurate understanding of current law. CSXT's demurrage program is balanced and reasonable. Our program is clear, transparent and understood by our customers. We offer customers 24 hours of free time. Our private car storage program does not result in customers paying more than they would for system car demurrage. We offer credits for railroad-caused delay. We have no rigid timetable for customer complaints. We work with our

customers to manage their pipelines, reduce their private car fleets, and resolve the vast majority of disputes. We provide our customers real-time visibility into shipments for pipeline management through ShipCSX.

Moreover, as the Board knows, CSXT's operating metrics have now positioned CSXT as an industry leader—to the benefit of all customers and other stakeholders, including Amtrak and commuter carriers on our network. The demurrage program is an integral part of that success story. In the first quarter of 2019, we achieved an all-time record in velocity, which rose to 20.4 mph, up from 17.5 mph in the first quarter of 2018. Similarly, our terminal dwell hit an all-time record, dropping to 8.9 hours in the first quarter of 2019, down from 10.4 hours in the first quarter of 2018. With our improved service product CSXT has been able grow its merchandise traffic for three consecutive quarters. Our railroad is now beginning to win traffic that has long been committed to truck and previously thought to be beyond our reach. We hope the Board will recognize what the vast majority of CSXT's customers see—that the transition-related service problems we experienced are behind us, and our service is the best it has ever been.

The focus on demurrage has revealed several best practices and shed light on some areas where CSXT can enhance its demurrage program. In light of the feedback we heard at the hearing from our customers and the Board members, CSXT intends to undertake the following voluntary responsive measures:

- i. Dispute Resolution: CSXT will participate in arbitration proceedings through the Board's approved program for certain demurrage related disputes.
- ii. Notice: CSXT will provide customers 60 days' notice of material changes to its demurrage program.
- iii. Communications: CSXT will further its communications with customers who may have unique circumstances associated with a demurrage policy change.
- iv. Credits: CSXT already provides at least 24 hours of "free time," but will provide an additional credit for demurrage on specified holidays where customers may have reduced personnel.
- v. Clarity: CSXT will update and enhance publication of its customer demurrage guide, which will provide greater insights into CSXT's demurrage fees and their actual application in practice.
- vi. Technology: CSXT will explore new technology enhancements to improve visibility and pre-screening of invoices.

At several points during the hearing, the Board indicated that it wanted to take some action to respond to the concerns raised at the hearing. CSXT respectfully submits that the Board has already taken action—it has focused the attention of the rail industry and its stakeholders on concerns about demurrage, and it has encouraged railroads to take voluntary action to amend their programs to respond to those concerns. This step is well in keeping with the Board's recognition that Congress envisioned a minimal role for the agency in regulating demurrage.

“[A]s Congress recognized in passing [ICCTA] the Board’s current level of involvement in demurrage matters is minimal, and *the private sector appears to be working these matters out adequately.*” *Exemption of Demurrage from Regulation*, STB Ex Parte No. 462, at 3 (STB served Mar. 29, 1996) (emphasis added). It is also in keeping with the Board’s statutory mandate to act as a forum to adjudicate complaints, not as a top-down regulator that attempts to promulgate government-designed demurrage policies. This accords with the fact that the Board already has a well-developed set of legal precedent that prevents demurrage from being charged if a railroad is at fault or has failed to give appropriate notice—thus striking an appropriate balance between an efficient network serving the overall customer base and fairness to individual shippers.

Requests at the hearing that the Board enact sweeping new rules for demurrage policies would be a sharp break from Congress’s intent, from sound economic and public policy, and from the Board’s own stated commitment to improving rail service and protecting the fluidity of the network. Instead, the Board should continue to encourage private sector solutions, while making clear it is available to adjudicate complaints where necessary. The responsive measures CSXT is taking due to the feedback it has received from customers and the Board are exactly the type of private sector solution Congress instructed the Board to pursue.

CSXT will begin in **Section I** by describing the settled legal framework that governs demurrage and detail how that legal framework finds support in sound economic principles. In **Section II**, we respond to some specific customer comments about CSXT over the two-day hearing and in written comments. We conclude in **Section III** by describing the changes CSXT plans to make to its program in light of lessons learned at the hearing.

I. THE PROPER LEGAL FRAMEWORK IS CLEAR AND ESTABLISHED.

1. Demurrage - basic principles and framework.

Demurrage has been a bedrock feature of the railroad industry for over 100 years. It serves two purposes. Demurrage compensates the railroad for the use of its railcars and property, and creates incentive for customers to load and unload quickly and improve network fluidity. *See, e.g., Chrysler Corp. v. New York Central R.R. Co.*, 234 I.C.C. 755, 759 (1939); *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 145 n.1 (1923); 49 C.F.R. § 1333.1 (“Demurrage is 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.”).

The law has evolved over the last century, but two concepts are constant. First, railroads are directed by Congress to create demurrage programs to encourage better utilization of their assets—both rail equipment and network capacity. This fundamental transportation policy promotes the public interest by creating proper incentives for individual customers to curtail the harm to the railroad and other customers if they fill yards, sidings, and mainline track with railcars because they lack the capacity to store and unload at their facilities.

Second, railroads cannot collect demurrage when the railroad caused the delay. This is entirely logical. If a carrier causes the delay (such as by failing to switch railcars into a customer

facility on an agreed upon day of service despite the customer being ready and able to receive them), the national policy prevents a carrier from demanding demurrage payment. That feature creates the reciprocal incentives for railroads to provide good service and for customers to load and unload railcars efficiently.

There was extensive questioning of each railroad witness about certain legal principles that once applied to demurrage in the pre-Staggers era. We therefore offer a brief summary of how the agency abandoned complicated rules in favor of a fair and clear set of legal principles.

2. Agency law on demurrage has evolved since the Staggers Act into a set of clear and straightforward principles.

i. The ICC's early demurrage rules were heavy-handed and complicated.

The Interstate Commerce Commission “had continuously been active in this area [of demurrage].” *Investigation of Railroad Freight Service*, 345 I.C.C. 1223, 1283 (1976). For example, the ICC issued rules of national applicability regarding demurrage and approved demurrage rate agreements with antitrust immunity. The ICC’s rules determined the liability of carriers and customers for the detention of cars beyond the applicable free time.

The ICC also established the basic principle that if the railroad was at fault, it could not collect demurrage charges *unless* the customer failed to engage in “due diligence.” *See, e.g., Ormet Corp. v. Illinois Cent. R.R. Co.*, 341 I.C.C. 647, 651 (1972) (“where the customer exercised due diligence and the cause of the detention was attributable solely to the carrier, the measure of damages has been that the demurrage charges should be remitted in their entirety”). To satisfy the obligation of “due diligence,” the ICC held that “some evidence that complainant [the customer] made special efforts to avoid or abate the accrual of demurrage is required.” *See Prince Mfg. Co. v. Norfolk & W. Ry. Co.*, 356 I.C.C. 702, 707 (1978).¹

Penalty charges were found unreasonable and remitted to the customer where the customer established: (1) that it was not the proximate cause of the detention and (2) that it exercised due diligence in releasing or attempting to release the railroad equipment. *See Prince*, 356 I.C.C. at 705-706. In such circumstances, the carrier would be ordered to remit back to the customer any charge in excess of the “compensatory” component, which was an ICC-prescribed per diem charge plus 20% for incidental costs. *Prince*, 356 I.C.C. at 708; *Ormet*, 341 I.C.C. at 651. The compensatory component was calculated with no allowance for free time, and included weekends and holidays. And notably, where a customer did *not* engage in due diligence, it was liable for the full demurrage charge, *even where the railroad was the proximate cause of the delay*. *See Ormet*, 341 I.C.C. at 651-652.

Likewise, even in this era of extensive federal oversight, customers were responsible for “ordinary economic vagaries and risks of doing business.” *Intercontinental Mfg. Co. – Pet. for Declaratory Order – Demurrage Charges on Bomb Casings*, 357 I.C.C. 300, 303 (1978). And customers were “at fault” where the congestion was caused by third-parties forwarding

¹ These rules applied somewhat differently to “straight” demurrage plans and “average” demurrage plans, both of which were highly regulated by the ICC.

shipments in larger volume than could be unloaded by the customer. *Apex Tire & Rubber Co. v. New York, New Haven & Hartford R.R. Co.*, 277 I.C.C. 1, 3 (1950).

ii. The Staggers Act transformed the regulatory landscape.

Although the Staggers Rail Act of 1980 made dramatic changes in the ICC's regulatory jurisdiction, the dual purposes of demurrage remain the same: to compensate and create incentives to return equipment into use quickly and improve network fluidity. See *Utah Cent. Ry. Co. – Petition for Declaratory Order –Kenco Logistic Services, LLC, Kenco Group, and Specialized Rail Service, Inc.*, STB Finance Docket No. 36131, at 7-8 (STB served March 20, 2019); see also *Demurrage Liability*, Ex Parte No. 707, at 2 (STB served April 11, 2014) (“[D]emurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system.”)

The Staggers Act's most significant change was to remove the agency's jurisdiction over demurrage disputes governed by rail transportation contracts. See *H.B. Fuller Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 550 (1997). Where the transportation is performed under contract, even where the contract simply refers to a railroad's demurrage public tariff, “the Board would not have jurisdiction over services provided under contracts incorporating those tariffs.” *Id.* at 553. As the Board explained, “[t]he fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under the contract.” *Id.*

Following the Staggers Act, the ICC aggressively pared back its demurrage policies.

- It stopped issuing rules of national application. See *Railroads Per Diem, Mileage, Demurrage, and Storage Agreement*, 1 I.C.C.2d 924, 934 (1985) ([T]he primary purpose of demurrage ... charges is ... to enhance efficient car use by ensuring the prompt turnaround of equipment. . . . Since their impact is localized, the need for nationwide uniformity is by no means apparent.”). Instead, the ICC allowed demurrage rates to be determined by market forces. *Id.* (concluding “that the need for uniform demurrage and storage charges has been overstated, that such charges clearly can be established on a unilateral basis, as a free market approach to such charges will more effectively foster the goals of the national rail transportation Policy”).
- It removed approval of industry-wide rates, concluding that it was best to let competition drive individualized demurrage practices, subject to case-by-case adjudication of reasonableness. See *Exemption of Demurrage from Regulation*, STB Ex Parte No. 462.
- It removed burdensome paperwork requirements regarding demurrage and detention. See *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail, Carriers of Property*, Ex Parte No. 285, 47 Fed. Reg. 58273 (1982). The ICC stated that, contrary to the Staggers Act's policy that unnecessary federal regulation be eliminated, these rules

“generate needless paperwork and negate the efficiencies provided by the use of computers. The kind of recordkeeping required by these rules is clearly expensive, cumbersome, and unnecessary, and no longer serves to protect the public interest.” *Id.*; see also *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices*, 1 I.C.C.2d 700, 701 (1985).

- It abandoned the concept of fixed, uniform, and national “per diem” charges in a variety of contexts. See *Railroads Per Diem, Mileage, Demurrage*, 1 I.C.C.2d at 926-927 (discussing changed philosophy following Staggers regarding per diem charges); *Joint Petition for Rulemaking on Railroad Car Hire Compensation – Rulemaking*, 9 I.C.C.2d 80 (1992) (“deprescribing” per diem rates for railroad-owned cars), *aff’d sub nom. Southern Pac. Transportation Co. v. ICC*, 69 F.3d 583 (D.C. Cir. 1995).²

By the time of the passage of ICCTA, the newly created STB’s role in regulating demurrage was minimal, demonstrating that market forces were working matters out adequately. See *Demurrage Liability*, STB Ex Parte 707, at 7 (acknowledging that under 49 U.S.C. § 10746, which was carried forward as part of ICCTA, the railroads are tasked in the first instance with the role of establishing terms related to demurrage). The transformation from heavy-handed regulations to market-oriented solutions was captured by the STB immediately after the passage of ICCTA:

Indeed, **as Congress recognized** in passing the Act (see H. Conf. Rep. No. 422, 104th Cong., 1st Sess. 178 (1995)), the Board’s current level of involvement in demurrage matters **is minimal**, and **the private sector appears to be working these matters out adequately**.

Exemption of Demurrage from Regulation, STB Ex Parte No. 462 at 3 (emphasis added). Specifically, the Conference Report on ICCTA stated that the demurrage provisions of the statute were not changed because “[t]he ICC’s existing rules on this subject and on car supply generally represent *a limited and negotiation-based regulatory framework* for assuring timely and efficient use of the railcar fleet. This section makes no changes that would disturb that framework.” H. Conf. Rep. No. 104-422, 104th Cong., 1st Sess. 178 (1995) (emphasis added).

² See also, e.g., *TTX Co. – Application For Approval of Pooling Of Car Service With Respect To Flatcars*, STB Finance Docket No. 27590 (Sub-No. 3) at 6, n.11 (STB served Aug. 31, 2004) (“Railroad-owned equipment car hire charges were at one time set by an ICC-prescribed formula. However, such cars are now ‘deprescribed,’ and car hire charges are determined entirely by market forces”).

iii. Modern demurrage law is now straightforward, clear and well settled.

Modern STB demurrage cases have distilled the precedent following the Staggers Act into three straightforward principles.

The first principle explains the reason for demurrage. “The principle underlying demurrage is simple. When a customer or receiver uses a railroad-owned rail car, it is depriving the railroad of an asset—the use of that car. A railroad has a right to set a reasonable time—free time—for a shipper/receiver to finish using a car and return it to the railroad. If a shipper/receiver keeps a rail car for too long (beyond the allocated free time), it compensates the railroad in the form of demurrage payments for the extended use of the car.” *Portland & Western R.R., Inc. – Petition For Declaratory Order – RK Storage & Warehousing, Inc.*, STB Finance Docket No. 35406, at 4 (STB served July 26, 2011); *R.R. Salvage & Restoration, Inc. – Pet. For Declaratory Order – Reasonableness of Demurrage Charges*, Docket Nos. 42102 and 42103, at 4 (STB served July 19, 2010); *Capitol Materials Inc. – Pet. for Declaratory Order – Certain Rates & Practices of Norfolk S. Ry.*, 7 S.T.B. 576, 577 (2004). This principle applies to private car storage just as it does to system cars. See *N. Am. Freight Car Ass’n v. BNSF Ry. Co.*, STB Docket No. 42060 (Sub-No. 1), at 6 (STB served Jan. 26, 2007) (“Storing empty private cars imposes costs on the railroad, including the loss of system fluidity and the opportunity cost associated with using track for long-term car storage that instead could be used to facilitate the efficient movement of freight.”).

The second principle explains who must pay demurrage. Any person receiving railcars from a rail carrier for loading or unloading who detains the cars beyond the specified period of time may be held liable for demurrage if that person has actual notice of the terms of the demurrage tariff providing for such liability prior to the carrier’s placement of the railcars. See *Demurrage Liability*, STB Ex Parte No. 707, at 6-9 & App. A; 49 C.F.R. §§ 1333.1 - 1333.3. These rules apply not only to customers, but also to third parties who receive railcars for loading or unloading. *Id.*

The third principle protects customers from *railroad*-caused delay. “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 reason for the delay is not the shipper’s, but the railroad’s fault.” *Capitol Materials*, 7 S.T.B. at 577; see, e.g., *Portland & Western R.R.*, STB Finance Docket No. 35406, at 6 (denying demurrage caused by missed switches without any inquiry into customer due diligence). However, the failure to meet a proposed delivery schedule is no reason to deny demurrage. “In light of the complexity and variety of many private 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.” *N. Am. Freight Car Ass’n v. BNSF*, STB

Docket No. 42060 at 12.³ Rather, the law “make[s] manifest that the question of fault is fact-specific.” *N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166, 1173 (D.C. Cir. 2008).

A number of STB demurrage cases over the past twenty years have applied these clear principles on a fact-specific basis. Sometimes the STB has responded to court referrals, providing important guidance both for individual cases and for industry stakeholders as a whole.⁴ In other cases the STB is asked to adjudicate demurrage disputes. Where a shipper is able to document instances of railroad fault, the Board has disallowed charges. For example, in *Portland & Western Railroad, Inc.*, at 5-6, STB Finance Docket No. 35406, the Board found that a substantial proportion of the demurrage charges being sought were attributable to missed railroad switches, and therefore that those charges were improper.

In contrast, the Board has found that demurrage charges are reasonable where they were not attributable to railroad fault. For example, in *Savannah Port Terminal*, the Board found that it was reasonable and appropriate to require the customer (Capital) to pay the demurrage charges because “the obvious source of Capital’s problem was not inadequate service by the railroad, but rather the inadequacy of Capital’s track to meet the volumes that Capital’s business generated, a problem that Capital was aware of from the start.”⁵ *Id.* at 9. Similarly, in the recent *Utah Central* decision, the Board found that demurrage charges were appropriate despite the receiver’s allegations that other railroads had caused bunching, where the shipper had produced no evidence that the railroad that assessed the demurrage charges was at fault for the alleged bunching.⁶

In sum, the Board has stated that “the law is well settled” (*Capitol Materials*, 7 S.T.B. at 578) and that “demurrage charges are properly assessed even if the cause for the delay is beyond the [shipper’s] control, unless the carrier itself is responsible for the delay.” *Norfolk Southern Ry. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009). There is no longer any inquiry in customer fault or due diligence. *CSX Transp., Inc. v. Meserole St. Recycling*, 618 F. Supp.2d 753, 771

³ See also *Capitol Materials*, 7 S.T.B. at 582 (“[G]iven the many variables outside a railroad’s control that may affect delivery . . . a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.”).

⁴ *R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges*, Docket Nos. 42102 and 42103, at 5-8 (responding to court-referred issues on notice, proof of placement, cars held on private track, cars held for the convenience of the railroad, cars containing railroad-owned freight, wrongful constructive placement, placement on third-party track, and interest due on late payments).

⁵ *Savannah Port Terminal R.R. – Pet. for Decl. Order – Certain Rates and Practices Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920, at 9 (STB served May 30, 2008).

⁶ See *Utah Cent. Ry. Co., LLC – Pet. for Decl. Order – Kenco Logistic Services, LLC, Kenco Group, and Specialized Rail Service, Inc.*, STB Finance Docket No. 36131, at 12 (STB served March 20, 2019); see also *id.* at 8 (shipper required to pay demurrage because “on this record, it appears that cars remained in constructive placement and accrued demurrage because [the shippers]’s (i) did not use ShipperConnect (or other authorized method) to request placements and (ii) did not timely place orders to guarantee same-day switching service”).

(W.D. Mich. 2009) (“A rail carrier’s ability to collect demurrage from a shipper does not depend on a finding that the shipper was at fault”). And the pre-Staggers concept of customer fault/due diligence—either as a shield from the penalty component or as a sword that forced full payment even if the railroad caused the delay—has disappeared from the Board’s demurrage precedent. It has been mentioned in only one ICC or STB decision in the past thirty-eight years. *See R. Franklin Unger – Pet. for Decl. Order – Assessment and Collection of Demurrage and Switching Charges*, STB Docket No. 42030 (STB served June 14, 2000).

There is thus no requirement for a carrier to disassemble its charge into a compensatory and penalty component, nor for the customer to show due diligence. A customer is not excused from a demurrage charge when a railroad does not meet an ideal delivery schedule. Nor is a customer excused when it does not have sufficient capacity at its facility to meet its demand. Absent carrier fault, and with adequate notice, the customer must pay demurrage to promote the smooth functioning of the rail system.

3. The current framework finds support in sound economic principles on the treatment of externalities.

In economic terminology, demurrage rules address a significant “externality” in the railroad industry. When customers clog railroad yards, sidings, and mainline with private cars, they create a clear cost on the railroads and the entire network (including other customers). This cost is an “externality.”⁷ This externality has two components: the costs to the railroads, both direct cost and indirect costs from a deterioration in network fluidity and the overall service product; and the cost borne by other customers, who suffer as a result of the degradation to network fluidity and resiliency. If not “internalized” (*i.e.*, borne by the customer responsible for these costs), the customer will lack the proper economic incentive to adjust its behavior efficiently.⁸

The current law properly lets a railroad collect the full demurrage charge, so long as it did not cause the delay. This creates important incentives for a customer to take a variety of actions to minimize the harm to the railroads, its network, and other customers. There is a range of behavior a customer could take. It could take steps to reduce its transportation service requests to match its physical capacity. It could pass the demurrage costs to its own customers to incentivize them to reduce demand. It could monitor and control the pipeline of product inbound to its facilities, or ship fewer railcars outbound. It could reduce the size of its private equipment fleet. It could hire weekend crews or make investments to turn equipment faster. It could make capital improvements to its facility to expand loading and unloading capacity. Options abound.

⁷ Paul Krugman & Robin Wells, *ECONOMICS* 2nd Ed. (2009), at 433 (“When individuals impose costs on or provide benefits for others, but don’t have an economic incentive to take those costs or benefits into account, economists say that *externalities* are generated.”) (emphasis in original).

⁸ *Id.* at 439 (“When individuals *do* take externalities into account when making decisions, economists say that they *internalize the externality*. If externalities are full internalized, the outcome is efficient even without government intervention.”) (emphasis in original).

Moreover, as CSXT's Vice President of Sales and Customer Engagement Arthur Adams testified at the hearing, CSXT actively engages with its customers to help them take advantage of their options to increase efficiency and reduce or eliminate demurrage charges. CSXT takes great pride in working alongside our customers to actively manage their pipeline. Mr. Adams talked about the ways that CSXT has worked to respond to our customers' desire for better supply chain visibility, better tools for pipeline management and reduction of demurrage charges.⁹

Under CSXT's demurrage policy and processes, therefore, no customer is "powerless" to avoid a demurrage bill. Options to reduce or eliminate charges are always available. It is true that some customers may choose to incur some demurrage charges rather than making investments or operational changes to avoid such charges. Customers have the power to make the economic choices that make sense for their businesses. And railroads have the statutory power to use demurrage as it was intended: to incentivize customers to make the choices that are in the best interest of the overall rail network.

As useful as cost-benefit analysis is in the rulemaking context, any attempt to apply it to individual demurrage disputes would make such disputes impossible to adjudicate. It would require a substantial amount of data and would inject tremendous uncertainty that would increase disputes and litigation. A proper cost-benefit analysis cannot be limited to the individual customer complaining about demurrage charges and the railroad—it must account for all the efficiency and fluidity benefits that demurrage incentives deliver for other customers. It would also inject undesired complexity. Fact-specific inquiries into railroad fault already are complex; introducing individualized cost-benefit analysis would overwhelm the process.

II. RESPONSE TO CUSTOMER-SPECIFIC ISSUES.

Several incomplete or incorrect statements were made at the hearing. To avoid the danger of the Board taking any action premised on incorrect information, CSXT will respond to those statements here for the benefit of the Board. CSXT has committed and will remain committed to direct engagement with its customers on these issues and any others that may arise going forward. Candidly, CSXT believes its service and customer interactions have been misunderstood or misinterpreted, and it hopes to set the record straight here.

It was alleged that railroads retaliate against customers. CSXT does not tolerate any form of customer retaliation. CSXT was disturbed to hear a suggestion that CSXT's dialogues with parties who indicated that they wished to testify at the most recent Listening Session were actually attempts to prevent those customers from testifying. CSXT will never and has never pressured customers to not testify before the STB. On the contrary, during CSXT's service transition in 2017, Sales & Marketing personnel were actively reaching out to many customers to help resolve their problems with CSXT's service. This is exactly the kind of proactive engagement that the Board has encouraged, and it is disappointing that some parties apparently have suggested that CSXT acted with questionable intent. Engaging with customers to help solve their problems is not retaliation by any definition.

⁹ Oversight Hearing on Demurrage and Accessorial Charges, Docket No. EP 754, Day 1 Transcript at 116-21 (May 23, 2019) ("Day 1 Transcript").

The one other allegation of CSXT retaliation at the hearing is demonstrably false. According to one of our smaller shippers, after a witness testified at the 2017 Listening Session related to CSXT service, CSXT retaliated by eliminating car placement refunds, purposefully causing service disruptions, and reducing demurrage credits from three days to one for the shipper and its related businesses.

This allegation is not true. First, car placement refunds were not eliminated. Second, the service disruptions the customer allegedly experienced—while regrettable—were part of the same service issues resulting from the initial implementation of PSR that prompted the Listening Session in the first place, and they have long since been corrected.

Third, the customer's testimony regarding the reduction in credit days was not accurate. Due to unique circumstances, CSXT had previously made an exception for one of the customer's facilities via a contract that permitted three credit days instead of two. On January 1, 2018, CSXT instituted a tariff change that reduced credit days from two to one, and the customer's contract was due to expire in April 2018. Rather than allowing the contract to expire and force a reduction of that facility from three credit days to one, CSXT renewed the special contract effective May 1, 2018 with a modification that reduced credit days from three to two, a change that was in line with the tariff reduction and still provided the customer an extra credit day. Providing preferential treatment is not evidence of retaliation. On the contrary, this is an example of CSXT's willingness to work with its customers who have unique circumstances requiring more free time beyond CSXT's now-standard 24 hours. As described below, CSXT will also be making changes to its credit policy that will provide all customers additional relief.

Other customers raised issues that are not as inflammatory as claims of retaliation, but which also merit a short correction, clarification, or response.

One of the terminal operators CSXT serves asserted that CSXT unilaterally created "carrier controlled permit systems" and embargoed traffic to its terminals. While CSXT did embargo that customer's traffic, it did so out of necessity. For nearly ten weeks, the customer had 12-20 days' worth of product sitting in a CSXT yard unable to enter certain of its terminals because the terminals were over capacity. Rather than allowing continued shipments, which would have exacerbated congestion issues, a temporary embargo was enacted from November 27, 2018 to January 29, 2019 to resolve the problem in the short term.

CSXT did not unilaterally act without consulting this terminal operator. CSXT serves the terminal operator at multiple locations across the CSXT network. We are in close, continuous dialogue with them daily at both the Sales & Marketing and local operations levels due to their importance to CSXT's overall network. Given the amount of activity and the terminal operator's many locations, we maintain this level of communication to ensure a fluid supply chain. As a result, CSXT stayed in close contact with this terminal operator both before and throughout the embargo to ensure it never ran out of products, which as far as CSXT knows did not happen.

Another customer asserted that CSXT railcar bunching was the cause of its demurrage charges. As CSXT has explained, the ShipCSX tool allows demurrage charges to be disputed and prompts the customer to enter a reason for the dispute. To CSXT's knowledge, the customer who testified about bunching has not submitted a dispute to CSXT on the basis of bunching. If that

customer's demurrage was caused by CSXT bunching traffic, CSXT will provide credits for those days of demurrage—as it has for many other customers. CSXT has reached out to the customer about its bunching concerns with the goal of finding a meaningful resolution to that issue. In addition, as described below, CSXT is working on technology solutions to streamline the process for resolving bunching disputes.

In the same vein, another customer complained that it received a demurrage bill even though CSXT was the real cause of the delays. Issues like this are precisely why CSXT has a dispute resolution process. That process worked in this instance. As the customer testified, after engaging in the dispute process, CSXT canceled the demurrage invoice. We believe this example is evidence that CSXT's processes are working the way they should. Further, CSXT is exploring new technology improvements to improve visibility and pre-screening of demurrage invoices, which will further enhance these processes.

Another customer made the unsupported claim that changes in CSXT service have “often led to last mile service issues.” CSXT has and will continue to devote significant internal resources to help this customer with customer service and pipeline management. A member of CSXT's car management team is essentially dedicated to this customer, and CSXT coordinates with the customer by phone almost daily to talk through orders and idle cars. This intense engagement is working, as this customer has ordered less cars this year – as a direct result of their car ordering being better aligned with actual demand – while enjoying an order fill rate that is consistent with or higher than 2018. And as described below, CSXT will soon be deploying a technology solution that will provide relief to customers for early and late arrivals of system cars.

A chemicals customer made unsupported claims about CSXT's service by suggesting that CSXT's service was just now returning to levels seen before implementation, but was “no better.” While we continuously strive to improve service, our review of the data indicated the customer benefited from meaningfully improved transit times. In 2016—prior to PSR's implementation on the CSXT network—the customer's transit times were an average of 5.5 days. Transit times for the customer did go up in 2017, at the peak of the service challenges, with a 10% increase to 6.1 days. But transit times in 2018 were *down* to an average of 5.2 days. And in the first quarter of 2019, transit times are *30% faster* than transit times in 2016, down to 3.8 days on average. By any measure, that is a remarkable improvement from pre-PSR operations. And those improvements have a real benefit to customers, who have greater reliability, less inventory carrying costs for products in transit, and potentially the ability to reduce their own railcar fleets.

Finally, a CSXT customer complained that CSXT's demurrage invoices did not include both the date and the time of constructive placement, and that the lack of this information makes it harder for customers to dispute invoices. CSXT does not have the current technology in place to include that information on individual invoices, but it does make this information available to customers within ShipCSX. That said, CSXT recognizes the value of providing this information on invoices and the potential beneficial effect on dispute resolution. As discussed below, CSXT

is now actively exploring the feasibility of adding placement times to invoices to address the customer's concern.

In conclusion, CSXT notes that the majority of comments directed at CSXT did not stem from any recent tariff revision or policy change that shippers believed was unreasonable. Instead, comments seemed focused on individualized service or billing issues. While CSXT believes that the above responses are important to correct the record, CSXT emphasizes that it understands and hears the concerns that have been voiced by the Board and by its customers. The Section below outlines some policy and technology changes that CSXT believes will address many of the concerns that have been expressed.

III. STEPS TO FURTHER IMPROVE CSXT'S DEMURRAGE PROGRAM.

Chairman Begeman requested that the railroads listen to the testimony, read the submissions, and consider what changes could be appropriate to make in its demurrage practices.¹⁰ Several best practices were revealed through the Board's proceedings, either by other carriers, customers, or from Board member questions and comments. In the interests of transparency, better service, and to comport with the spirit of the request from Chairman Begeman, CSXT plans to take several steps to improve its demurrage program. These are voluntary steps CSXT is taking regardless of any jurisdictional or legal issues in order to work collaboratively with its customers and other stakeholders.¹¹ These changes generally fall into two categories: policy changes and technology changes, with some necessary overlap.

1. Policy Changes

Alternative Dispute Resolution: CSXT will participate in arbitration proceedings through the Board for demurrage related disputes within the Board's jurisdiction, except where disputes are already subject to potential NGFA arbitration. CSXT's participation will be more fully explained in a separate filing in the Ex Parte 699 Docket to be filed this month.

Notice: CSXT appreciated that there were questions related to adequate customer notice posed by several Board Members, including Vice Chairman Fuchs in particular.¹² As the Board is aware from CSXT's status report, for the vast majority of tariff changes several months of notice were provided prior to a change taking effect.¹³ CSXT recognizes the importance of

¹⁰ See, e.g., Oversight Hearing on Demurrage and Accessorial Charges, Docket No. EP 754, Day 2 Transcript at 1002-1003 (May 23, 2019) ("Day 2 Transcript") ("I certainly ho[p]e that the railroads will reply to some – with the comments that they've heard today, let the Board know in their reply what actions they might be taking in response.").

¹¹ CSXT cautions that the transportation market is fluid and that these concepts will be reviewed and updated over time.

¹² See, e.g., Day 1 Transcript at 441.

¹³ See, e.g., Data Submission of CSX Transportation, Inc., STB Ex Parte 754, at Appendix A (May 22, 2019).

providing customers with sufficient notice of upcoming changes. Going forward, CSXT will abide by a voluntary notice requirement of 60 days for any demurrage-related tariff changes.

Communications: Moreover, CSXT will strive to communicate in advance with customers who may have unique circumstances or compliance burdens associated with the adoption of a demurrage policy change.

Clarity: CSXT will update and enhance publication of its customer demurrage guide. The guide will provide greater insights into CSXT's demurrage fees and their actual application in practice (including with respect to credits, as discussed below). The guide will be a useful reference for customers to understand when and how fees might apply and how to avoid such fees.

Credits: There was also significant interest regarding commercially fair credits, including concerns about the visibility of credits awarded for railroad fault and about the fairness of offering zero free time raised by Board Member Oberman.¹⁴

Visibility of Credits for CSXT Fault: Within the customer demurrage guide, CSXT will provide explanations and examples of how credits will be provided when a review indicates that the demurrage/storage charge was the result of CSXT fault, including bunching, missed switches, data reporting or technology errors, or a similar cause.

Holiday Credits: CSXT currently provides at least 24 hours of "free time" for its customers before demurrage charges are assessed.¹⁵ In order to further improve flexibility for its customers, CSXT will incorporate the use of holiday credits, which allow an additional credit for demurrage on specified holidays where customers may have reduced personnel. CSXT will include the credit in a forthcoming tariff publication.

Late Placement Credit: Further, in response to customer feedback at the hearing, CSXT is examining the feasibility of extending an additional credit for loaded cars which have been constructively placed after a certain cut-off time, to offset the late placement.

Fee-Shifting Reciprocity: CSXT will ensure that any collection-related attorney-fee-shifting will apply reciprocally to CSXT and to any other party.

2. Technology Changes

Multiple parties raised concerns about the technological tools available to allow customers to track and minimize demurrage charges. The types of issues raised included a lack of visibility into the pipeline; trip plan visibility; inadequate pre-screening of invoices; and failure to include sufficient information on invoices to allow the customer to accurately question the charge or pass the charge on to their own customer where appropriate. Prior to the hearing, CSXT had commissioned several technology upgrades addressing a number of these items.

¹⁴ See, e.g., Day 2 Transcript at 841.

¹⁵ See Data Submission of CSX Transportation, Inc., STB Ex Parte 754, at 8.

CSXT is now internally vetting the feasibility of additional technology upgrades to address specific customer concerns raised at the hearing.

- i. ShipCSX Enhancements: CSXT takes great pride in its ShipCSX tool. As previously announced, CSXT will have upgrades online by the end-of-the year to: allow visibility into CSXT's Trip Plan compliance; provide pipeline capacity alerts to assist customers in improving their own pipeline management; and support remote monitoring on desktop, laptop, or mobile devices. In direct response to customer feedback at the hearing, CSXT is now examining: whether placement times available through the ShipCSX tool can also be included on invoices, to assist customers with assessment of demurrage liability; and whether shipper names can be included on shipper invoices, to assist receivers with addressing demurrage issues with their shippers directly.
- ii. Bunching Visibility: Prior to the hearing, CSXT was working on a technology solution to streamline the process for resolving bunching disputes. In response to the discussion on this topic at the hearing, CSXT is examining whether its technology can be deployed to avoid the need for bunching disputes altogether.
- iii. Empty System Car Logic: This technology solution (again, in process prior to the hearing) will provide relief to customers for early and late arrivals of system cars.

CSXT welcomes continued input from its customers as to what other technological tools and solutions CSXT can provide that would be helpful in managing the rail network and customer needs.

CONCLUSION

CSXT appreciates the Board's interest in finding reasonable solutions to address customer concerns regarding demurrage. CSXT's goal is to be responsive to legitimate issues raised, while defending the important role of demurrage in the overall efficiency of the network and for the broader benefit of all customers.

Respectfully submitted,



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