

BEFORE THE
SURFACE TRANSPORTATION BOARD

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OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

**SUPPLEMENTAL SUBMISSION OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League (“NITL” or “League”) submits this filing to supplement its testimony provided to the Surface Transportation Board (the “Board”) in writing on May 8, 2019 and orally at the hearing on May 22, 2019. NITL greatly appreciates the Board’s efforts in holding a robust oversight hearing and for its serious attention to the significant concerns expressed by the League and many other rail customers regarding railroad demurrage-related practices and accessorial charges.

The testimony at the hearing reaffirmed many of the concerns expressed by NITL in its written submission regarding major challenges rail customers have faced with reduced free time, rail car bunching, inconsistent service, railroad invoicing and dispute resolution practices, as well as certain accessorial charges, such as the NS congestion charge and the UP “not available for service” charge. As widely reported in the testimony, demurrage and accessorial charges have skyrocketed resulting in millions of dollars in additional revenue to the railroads, but the efficiency gains are far from clear. Moreover, the costs to rail customers appear out of proportion to both the efficiencies that should benefit all stakeholders that use rail services and the revenue stream generated for the railroad.

In light of the in-depth discussions during the oversight hearing and written testimonies of various rail customer stakeholders, NITL strongly believes that the Board should find that certain demurrage-related rules and practices are not reasonable to the extent that they fail to serve the underlying purposes of demurrage and are unduly penal to rail customers. The League further believes that there is an urgent need for the Board to clarify and provide guidance to the industry as to the standards that will guide reasonableness determinations under 49 U.S.C. § 10702. In this respect, NITL urges the Board to issue a policy statement that sets forth the standards for reasonableness of demurrage and accessorial practices, taking into account reciprocity and commercial fairness, and to initiate a rulemaking as requested in its May 8 submission. The railroads should be required to modify their tariffs and practices to comply with the Board's rules and standards.

NITL believes that the policy standards and rules for reasonable demurrage-related practices should address at least the following:

- A demurrage-related tariff should be deemed unreasonable and unduly punitive if it fails to incentivize the efficiency of the rail network.
- Demurrage or storage charges that are imposed on customers who cannot avoid the charges are not reasonable. Railroads must account for physical limitations due to a lack of available track capacity or storage at the rail customer's facility or nearby locations.
- Free time for storage charges imposed on private cars should be at least 48 hours. The current zero-day free time regime for private cars is *prima facie* unreasonable since it fails to account for inefficient and widely variable railroad service, and requires rail customers to operate 24/7 to avoid the charges which is not practical.
- The efficiency benefits gained from demurrage and storage rules and charges should outweigh the costs imposed on rail customers to comply with the rules.
- Railroads should not assess demurrage or storage charges on customers if the charges are incurred due to events that are not within the control of the shipper. These events should also include acts of God, especially extreme weather events that disrupt rail or customer operations (e.g., missed switches and bunching by the delivering carrier as well as upstream carriers).
 - Railroad credit rules must be clear and reasonable. Credits for railroad caused detention should apply to both loaded and empty cars, they should not expire

before the customer has a reasonable opportunity to benefit from the credit, and they should be granted automatically by the railroad rather than requiring rail customers to follow cumbersome processes simply to obtain a credit.

- It is not reasonable to subject private cars to more stringent rules than railroad-owned cars.¹
- Railroads should be required to compensate shippers when railroads detain private cars beyond a reasonable amount of time since such detention also undermines efficiencies of both the rail network and the rail customer's operations.
- Railroads should provide sufficient notice for major changes to demurrage tariffs. The 60-days' notice provided to many customers with respect to the recent changes was clearly not sufficient for rail customers to plan and adjust to avoid or mitigate the charges.
- Railroads must establish fair and reasonable invoicing and dispute resolution processes.
 - Railroads must issue accurate invoices that take account of any applicable credits. It is not reasonable to require customers to audit each rail demurrage and storage invoice to determine its accuracy and to file disputes in order to obtain credits or refunds, especially when the railroads often maintain the data needed to validate the invoice, credits, or outcome of a dispute.
 - Railroads must (i) eliminate disincentives for rail customers to challenge demurrage and storage fees (*e.g.*, \$500 handling charge - See NS-6004 Item 950), (ii) ensure that the rail customers have the data they need to dispute a charge, (iii) establish clear and fair timelines for submitting and deciding a claim, and (iv) identify and make available knowledgeable personnel who can help address demurrage-related disputes.

Although rail customer operations vary widely and the best means to address this variation would be through commercial negotiation, railroads generally refuse to deviate from their demurrage-related rules and accessorial charges in contracts. This lack of commercial flexibility is evident of railroad market power and that railroads are profiting from demurrage even where they may not achieve efficiency gains. NITL believes that requiring the establishment of more reasonable and uniform demurrage-related tariff rules and practices that incorporate the standards detailed above would help to alleviate rail customer concerns.

Providing for more uniform and reasonable tariff rules would make it easier for the railroads and

¹ Railroads assess higher charges for storage than demurrage in some cases and provide two days of free time for loading and unloading system cars, but only zero days for private cars. See *e.g.*, NS-6004 Items 600 and 650.

their customers to administer and comply with such rules. Indeed, during the hearing, at least one class-I railroad (i.e., BNSF) appeared to support the adoption of more uniform rules of applicability.

Respectfully submitted,

/s/Bruce Ridley
National Industrial Transportation League

Dated: June 6, 2019