



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

247884

STB Docket EP 754

**OVERSIGHT HEARING ON RAILROAD DEMURRAGE
AND ACCESSORIAL PRACTICES**

ENTERED
Office of Proceedings
June 6, 2019
Part of
Public Record

**SUPPLEMENTAL COMMENTS
OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Notice served in this docket on May 24, 2019, the National Grain and Feed Association (“NGFA”) hereby files these supplemental comments in this oversight hearing proceeding.

At the outset, NGFA commends the Board for the excellent public hearing it conducted on May 22-23, 2019. It provided a much-needed opportunity for a diverse array of rail customers and associations like ours that represent them to express concerns about current railroad practices related to demurrage and accessorial charges that are neither commercially fair, commercially achievable nor practicable (without incurring charges), nor reciprocal. There is no question that the Board’s attention has brought increased transparency to these practices and triggered what has been a pent-up groundswell of concern among rail customers, as evidenced by the heavy participation in the hearing. NGFA greatly appreciates the way the public hearing was structured, the probing, perceptive and insightful questions posed by each of the Board members that shed additional significant light on this major issue, and the

opportunity provided for the Class I railroads to respond to concerns expressed by their customers and the Board. The advance preparation and diligence of the Board members and your respective staffs were very obvious, and resulted in a very informative, interactive and useful hearing.

NGFA believes that the information and revelations emanating from the public hearing only strengthens and reinforces the need for the Board to follow up by taking further action to facilitate the adoption of commercially fair and practicable, as well as reciprocal, demurrage and accessorial charges and policies by the Class I railroads.

In these supplemental comments, NGFA wishes to: (1) reiterate its overarching and penultimate recommendation that the Board proceed to develop policies and guidelines regarding Class I railroads' demurrage and accessorial practices and direct the railroads to revise their tariffs accordingly; (2) suggest several foundational commercial fairness and commercial practicability principles that we believe should be included in such policies and guidelines, as borne out in the preponderance of oral and written comments submitted to date in this proceeding; (3) encourage the Board to develop a standardized format that carriers should be required to use to report demurrage and accessorial tariffs; (4) amplify on the reasons Board-established policies and guidelines are necessary to facilitate alternative-dispute resolution processes, such as those available through NGFA's Rail Arbitration and Mediation System; (5) reiterate the inadequacy of the current 20-day statutory notice requirement for tariff changes, particularly for facilities that have invested millions of dollars – usually at the encouragement/demand of the serving railroad – to make facility, sidetrack and other improvements, as well as urge the Board to prohibit tariffs issued by railroads that violate even this minimum notice requirement; and (6)) encourage the Board to renew its rail rate reform initiative and monitor year-over-

year freight rate increases in part to analyze whether carriers react to restrictions placed on current demurrage and accessorial charges by trying to capture those revenues in their line-haul freight rates.

A. The Board Should Issue Policies and Guidelines Governing Demurrage and Accessorial Charges, and Direct Class I Railroads to Modify their Tariffs Accordingly

NGFA renews its call for the Board now to proceed to develop policies and guidelines on railroads' demurrage and accessorial practices so that: (1) they are commercially fair and are structured in a manner that truly meets the statutory purposes of demurrage for both railroad-owned and privately owned and leased railcars and equipment; (2) demurrage practices are commercially practicable and achievable so that a railroad shipper or receiver can meet the requirements utilizing best practices appropriate for their respective industry sector(s) without incurring charges; and (3) they are truly reciprocal, imposing similar incentives and penalties on both railroads and their customers for performance failures that undermine the efficient use of their respective assets.

In this regard, NGFA does not believe the Board should utilize the investigative authority provided under Section 12 of the STB Reauthorization Act of 2015 (49 U.S.C. §11701) to address the issues raised in this proceeding. The harm caused by current demurrage and accessorial charge practices is immediate and readily apparent. That harm only would be exacerbated by a lengthy investigatory period. The public hearing itself, coupled with examples of egregious railroad demurrage and accessorial charges and practices provided within the written submissions and oral statements of NGFA and other parties, as well as the reporting of demurrage and accessorial revenues collected by the Class I carriers (which exceeded \$1.43 billion in 2018 alone), already has served as a *de facto* investigation. This process to date has provided the Board with ample and overwhelming foundational evidence upon which to take action, or, if it deems necessary, to seek additional input from stakeholders on specific

policy directions the Board is inclined to pursue. NGFA believes that utilizing the investigative authority in this proceeding would waste the Board's scarce resources, restrict future dialogue between the Board, rail customers and railroads for the duration of such an investigation, and, importantly, would further delay remedial action, which is not in the public interest.

Thus, NGFA reiterates the position advocated in its written statement (starting at page 29) that the Board has ample statutory authority, and the support of ICC and STB precedent, to take corrective action as a result of this proceeding. Further, as discussed in NGFA's written submission (pages 34-35), the process the Board followed in EP 661 *Rail Fuel Surcharges* has direct relevance to the circumstances and issues involved in this proceeding. In EP 661, there was no complaint or declaratory order. Nonetheless, the Board proceeded under its authority under §10702 "to adopt rules of general applicability for future conduct to address an unreasonable practice." The Board also conducted a public hearing, as it has done in EP 754, and then within a few months issued a decision with proposed guiding principles to govern rail fuel surcharge practices. After taking public comments on its proposals, the Board rightfully proceeded to issue final guidelines, and directed freight railroads to conform their fuel surcharge practices accordingly within a specified time period.

Further, during the question-and-answer period of the panel in which NGFA participated, there was a discussion about whether the Board should – as part of a determination of reasonableness – conduct an analysis of the claimed benefits to railroads of demurrage and accessorial charges against the costs (including business costs and lost investment) of rail shippers and receivers. It was suggested that such an analysis might be conducted on a systemwide basis (i.e., trying to determine the systemwide benefits of a particular charge) or through a "bite-sized" approach that examined the benefits on a more localized basis. Respectfully, NGFA strongly disagrees with the notion of applying complex cost-

benefit and rail system-wide analyses to determine the commercial fairness of railroad demurrage practices and charges. Not only is such an approach unnecessary, it also would be exceedingly difficult, complicated and, therefore – as Vice Chairman Fuchs posited – too costly a standard to litigate.

NGFA believes a more appropriate approach to determining reasonableness would be to examine the railroad's stated purpose for the charge – which typically is to incentivize some sort of behavior – and whether the terms and conditions of the charge, including the level of the charge, reasonably accomplish the desired result. Therefore, the proper analysis should be (1) whether the charge accomplishes a reasonable business purpose; and (2) whether the charge being assessed is set at the level – no more or no less – than is justifiable to meet the stated purpose and applicable statutory authority. Simply put, is the specific charge necessary and set at the least punitive level possible to still incentivize the efficient utilization of rail assets (both railroad and private)? Or, conversely, is it unnecessarily punitive and designed for other purposes (such as revenue-generation)? In addition, requiring that the charges are reciprocal if the railroad fails to perform in accordance with its service plan should help moderate railroad behavior when determining whether, and at what level, to establish demurrage charges.

Such a standard would be consistent with past Board decisions. For example, in Docket FD 35305, the Board expressed its preference for limiting cost-benefit analyses of challenges to railroad practices, stating “[c]ertainly, any tariff provision must be reasonably commensurate economically with the problem it addresses, but requiring a formal cost-benefit analysis whenever a shipper challenges a new practice would unnecessarily limit the Board's discretion. There may be instances where a full, quantified cost-benefit analysis is warranted, but this [a challenge to a coal dust emission standard] is

not that instance.”¹ A few years later, in Docket No. NOR 42119 – a case involving a challenge to a new accessorial charge implemented by the Union Pacific Railway – the Board stated “we find that a tariff penalizing shippers that do not implement measures to remove lading residue that occurs when the car is in the control of the shipper, and to secure cars before tendering them for movement, is not unreasonable. Nor does the level of the penalty in the tariff – which is not intended to be precisely cost-based – seem excessive given the potential disruptions that unclean cars can produce.”² NGFA believes the Board instead should determine reasonableness based upon the purpose of the charge and whether the level of the charge is sufficient to accomplish the desired change in behavior – and no more.

NGFA also reiterates its position that the Board should retain oversight to monitor changes to railroads’ tariffs, rather than require compliance questions to be pursued in subsequent formal complaint proceedings. Shippers then could submit “show-cause” filings if they believed a particular railroad had not complied with the Board’s directives. Another alternative could be a process where rail customers file petitions for declaratory order requesting that the Board declare whether the charges being imposed by railroads are consistent with the Board’s policy directives and guidance. While not a substitute for the Board’s complaint process, this would augment it and make the overall situation more balanced, fair and efficient.

Finally, NGFA recognizes that some Class I railroads have responded to the Board’s commencement of this oversight hearing proceeding by addressing a few particularly egregious demurrage and accessorial charges and practices cited by NGFA and rail customers prior to their

¹ Docket FD 35305, *Arkansas Electric Cooperative Ass’n. – Petition for Declaratory Order* (served March 3, 2011) at 6.

² Docket No. NOR 42119, *North America Freight Car Ass’n. v. Union Pacific Railroad Company* (served March 12, 2015)(“NAFCA”) at 6

appearances before the Board on May 22-23, as well as subsequently. While substantive positive changes of course are welcome, NGFA respectfully submits they have been made primarily because of the spotlight shone by the Board on these practices during this proceeding. The railroads' actions certainly do not obviate the need for the Board to take prompt and effective additional action to adopt policies and guidelines for all Class I railroads to follow to be in compliance with the law. In too many instances, current demurrage and accessorial charges and practices are yet merely another manifestation of the overwhelming market power of today's Class I railroads, which they exploit by imposing unilateral, one-sided service and other terms and conditions on their customers.³ NGFA believes railroads should be required to review their "boilerplate" tariff language (including conditions of carriage) to ensure "lack of mutuality" and "contract of adhesion" terms are not embedded.

Tariff "concessions" made today by railroads while in the public glare can – and we submit likely will – vanish over time unless the Board proceeds to establish policy ground rules to govern future railroad practices in this area. Further, for railroads that do respond to customer concerns in a positive

³ During the hearing, the question was posed by Commissioner Oberman of whether in today's railroad industry, their tariffs are essentially "contracts of adhesion," which generally are defined as contracts where one party has sufficient bargaining power over the other that the terms are presented on a "take-it-or-leave-it" basis, with no negotiation. This is indeed the essence of many railroad tariffs governing the rail transportation of agricultural products. The terms, rates and charges are established by the railroad for all shippers of the covered commodities, and they typically are not negotiable except for the few agricultural shippers that enter into transportation contracts specific to their movements. What's more, in a more typical free market, a consumer presented with a contract of adhesion may choose to "leave it" and seek a different supplier or forego the subject of the contract altogether. In today's railroad industry, agricultural shippers with physical access to only one Class I railroad do not have the ability to "leave it" absent (1) shipping using another transportation mode, which usually is less efficient and much costlier; or (2) curtailing production or foregoing business opportunities. Contracts of adhesion usually are enforceable according to their terms unless (1) the contract or a provision does not fall within the reasonable expectations of the weaker or "adhering" party; or (2) the contract or provision is unduly oppressive or "unconscionable." In the case of rail tariffs, the analogous rule is that railroads have the right to establish tariff provisions in the first instance, subject to a determination of reasonableness by this Board.

manner during the intervening period, there is no reason to object to reasonable Board-set policies and guidance on commercially fair, commercially practicable and reciprocal demurrage and accessorial practices. In fact, doing so potentially will level the playing field and prevent rewarding railroads that do not take necessary corrective actions.

B. Foundational Elements for Commercial Fairness and Practicability

NGFA believes that the Board's policies and guidance applicable to tariffs governing demurrage and accessorial charges and practices should provide appropriate incentives to the rail customer and the railroad to efficiently utilize rail cars and other rail assets so as to maximize efficient rail operations systemwide. The Board should include considerations as to whether a rail customer operating efficiently and utilizing best practices appropriate for the respective industry can reasonably comply without incurring such charges. If not, then such practices are not providing the appropriate incentives and are unreasonable. Further, railroad tariffs should contain specific provisions that penalize the railroad for inefficiently using private railcars and other assets, as well as when the railroad is at fault for the demurrage or accessorial charge being triggered.

In this regard, NGFA believes the Board's principles/guidance should include, but not be limited to, the following:

- Provide a minimum of 24 hours free time to load or unload trains once the cars are actually placed (actual placement) at a given facility during its normal operating business hours (unless otherwise mutually agreed), *provided* the rail customer has not requested that the cars be held by the railroad in constructive placement at a rail serving yard. A different time period of not less than 48 hours for processed commodities could be considered for

shipments involving manifest traffic. Tariffs that impose zero free time for loading/unloading either privately owned or leased or railroad-owned cars should be prohibited. In addition, reciprocity should be provided if carriers fail to actually place railcars at a facility in accordance with the train's trip plan within in a similar time span as the railroad's demurrage policy.

- Require more commercially fair and standardized practices related to railroad debit-and-credit policies that truly absolve the shipper from paying charges when the railroad's actions are the reason the charges are incurred. In particular, offsetting credits provided by rail carriers should not be restricted to specific commodities or types of shipments and should be eligible to be applied to other railroad charges incurred by customers, including freight charges, other accessorial charges, etc., or rebated in the form of a monetary payment from the railroad to its customer (just as the customer is required to do when paying demurrage and accessorial invoices). Nor should they be allowed to expire; indeed, reciprocity should prevail here, too, in that railroad-imposed demurrage and accessorial charges do not "expire" until paid. Moreover, the number of credits should be expanded to reflect that they only partially compensate the rail shipper for the harm caused by the railroad's inefficient service and/or use of private railcars.
- Prohibit demurrage and accessorial charges – and require offsetting credits or other compensation be provided to rail customers – in instances where the shipper's inability to load or unload cars within timeframes set by the railroad is attributable to "bunching."⁴ As noted in NGFA's written statement, this is the practice of delivering batches of cars to a rail

⁴ Euphemistically called "train building" during the public hearing.

customer's facility or rail siding for loading or unloading despite the fact that the customer ordered the cars on a more regular schedule to accommodate its facility operations and the railroad's anticipated service schedule. Because bunching typically occurs solely as a result of the railroad's operating decision(s), and such actions undermine the customer's efforts to efficiently conduct its business and facility operations while accommodating the railroad's anticipated service schedule, there is no factual or policy basis for holding a rail customer responsible for demurrage and/or accessorial charges when the railroad bunches deliveries of railcars.

- Railroads should be prohibited from imposing so-called "congestion charges." Demurrage, private car storage charges and embargoes already are imposed by rail carriers to address congestion at railroad-owned property. Indeed, NGFA's statement cited the "double-dipping" practiced by Norfolk Southern Railway (NS) on cars already in their yard while at the same time imposing storage charges when notification is provided to the shipper that the yard is "congested." [NS Tariff 8002-A, Item 6265]. Further, NS reserves for itself the sole discretion to determine when an "excessive quantity of cars for a consignee...causes material operations problems" that trigger a congestion charge. Congestion charges also can be compounded through no fault of the rail customer if a shortline carrier is involved.
- Demurrage rules should be modified to reflect the dramatic changes in ownership of railcars, in which more than 80 percent of grain hopper cars and 100 percent of tank cars now are owned or leased by rail customers, not the carriers. This could be accomplished by applying private car storage charges reciprocally – charging the same railroad fees to the carriers when railroads cause private cars to dwell excessively while in railroad custody between empty release and loaded billing and constructive/actual placement at destination. This would

mirror the original intent of demurrage to protect the efficient utilization of assets/investment that the car owner (at that time, the railroads) made in rolling stock.

- Require tariffs to contain clearly stated and monetarily comparable penalties that will apply to the railroad if it is at fault or the rail customer is not responsible for delays, such as occurrences involving spot-and-pull delays when the railroad fails to deliver cars ordered-in by the customer. NGFA again cites UP's so-called "not prepared for service" tariff (Tariff 6004, Item 9055). Even after being amended on May 8, 2019 to modify the charge from "per-car" to "per-occurrence" and providing a minimum threshold of three occurrences per month before such charges are imposed, UP's tariff still does not contain reciprocal or comparable language addressing occurrences when it is the reason the customer is not "prepared for service" (e.g., because of a failure to arrive on schedule and failure to notify the rail customer in sufficient time prior to arrival). Another UP example of non-reciprocity involves its unit train forecasting tariff, which, even after being amended on May 31, 2019 to reduce the charge from \$10,000 to \$2,500 per occurrence still does not contain an equivalent penalty against UP if its crews and locomotives do not arrive within 48 hours to pick up a loaded train that has been billed and released by the rail customer.
- Require rail carriers, *prior to issuing invoices* for demurrage and accessorial charges, to (1) confirm that the charges are being assessed properly in accordance with the lawful tariff terms and the general rule that such charges are improper if they are the result of carrier fault; or constitute a tariff term or charge that does not comply with the Board's policy principles and guidance; and (2) notify and consult with the affected rail customer to validate the accuracy and legitimacy of the charge, with human intervention at the appropriate decision-making level provided by the carrier. As demonstrated repeatedly in evidence submitted in

this proceeding, the accounting and collection departments of Class I rail carriers overwhelmingly issue invoices automatically based solely on train movement data without sufficient internal review or documentation for accuracy, thereby placing on their customers the entire burden of checking accuracy and applicability. As the Board heard from many rail customers, this burden is substantial. The railroads then control the process for determining whether such invoices are valid – from reporting of performance by their crews (a potentially inherent conflict-of-interest) to overreliance on railroad computer systems to determine when charges should apply, with minimal human oversight or intervention provided. The Board should consider adopting guidance that requires railroads to submit justification and substantiation (e.g., data and evidence) with the invoice sent to customers to facilitate this process.

The Board's rules also should require that rail customers be given a reasonable period of time, for instance, 30 days, to challenge an invoice they believe is incorrect. Further, the Board should require reciprocity if a shipper successfully challenges a demurrage or accessorial charge invoice. For instance, NS currently imposes a \$500 charge on customers unsuccessfully challenging such charges, but incurs no reciprocal penalty if the customer prevails.

C. Require Standardized Reporting by Carriers of Demurrage, Accessorial Charges

Next, NGFA believes that the public hearing demonstrated the complexity of tariff charges and changes pertaining to demurrage and accessorial practices, which also was reflected in several statements made by Board members themselves.

NGFA again commends the Board for requiring quarterly reporting of data related to demurrage and accessorial charges by the Class I carriers, and urges that it be continued in 2020 and beyond. But we believe more should be done. Specifically, we encourage the Board to develop a standardized spreadsheet format that carriers should be required to use to report demurrage and accessorial tariffs, itemized by the type, category and amount of each charge, as well as the amount collected by type and category of charge (*e.g.*, “*free time for loading/unloading,*” “*car storage,*” *etc.*). NGFA’s written statement at pages 24 and 28 contains an admittedly less-than-comprehensive example of such categories for demurrage charges. Further, we believe such data should include a breakdown on how much of each of the charges is designed to encourage rail customers to utilize rail assets efficiently versus the amount intended to compensate the carrier for costs allegedly incurred because of purported adverse impacts on network fluidity.⁵ This enhanced reporting would provide much-needed uniformity and transparency, and enable the Board, rail customers and other interested parties to better compare and contrast the fees being assessed by carriers, as well as to monitor trends.

D. Facilitating Dispute-Resolution Processes

NGFA also wishes to reiterate its oral public hearing testimony that the dispute-resolution procedures applicable to demurrage and accessorial charges deployed by most Class I carriers are commercially unfair precisely because railroads largely have eliminated prior language that specified when such charges would be waived, credits issued, or absence of customer fault recognized. By so doing, the carriers now reserve to themselves the sole discretion to make such determinations if a dispute occurs.

⁵ On this point, NGFA believes it is necessary for the Board to clarify for stakeholders what the costs incurred by the railroad are.

NGFA believes this shortcoming, too, could be addressed by the Board establishing policy principles and guidance. For instance, we urge the Board to hold that any language such as that contained in NS's Conditions of Carriage (#1E, Rule 300) asserting its right to recover "all reasonable costs of collection (including, but not limited to reasonable attorneys' fees, investigation costs, expert fees and litigation costs)," as well as finance charges against any unpaid demurrage and storage charges, accessorial charges and other types of charges is unreasonable *per se*, as well as patently commercially unfair.⁶ In the first place, provisions by which the railroad unilaterally gives itself the right in its tariffs to collect attorneys' fees, expert fees, and other litigation costs are directly contrary to the long-established policy of the STB to refuse to award attorneys' fees and other costs to parties in disputes other than when there is a failure to respond to discovery.⁷ Indeed, the Board and the ICC before it long have questioned whether there is even any statutory authority for the agencies to award attorneys' fees and other costs to parties appearing before them.⁸ As such, permitting railroads to implement such provisions while their customers have no reciprocal rights before the Board or other forums is patently

⁶ NGFA's written statement (page 27) cites a similar UP tariff (UP Tariff 1000 at 2) that holds rail customers responsible for interest charges, UP's court costs and UP's reasonable attorney's fees if UP files suit to collect any amounts owed by the customer. There is no reciprocity nor waiver of such charges even if UP subsequently loses the case.

⁷ See 49 C.F.R. §1114.31(b).

⁸ STB Docket No. 42085, *Climate Master Inc. and International Environmental, Inc. – Petition for Declaratory Order - Certain Rates and Practices of Trans Tech Solutions, Inc., F&M Bank, and Midland Trans. Co.*, (served September 28, 2004) at 1, citing *General Mills, Inc.–Petition for Declaratory Order*, 8 I.C.C.2d 313, 325 (1992), *aff'd sub nom. Bankruptcy Estate of United Shipping Co. v. General Mills, Inc.*, 34 F.3d 1383 (8th Cir. 1994); STB Docket No. 42094 (Sub-No. 1); *PCI Trans., Inc. v. Fort Worth & Western RR Co.* (served April 24, 2008); *Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation*, STB Docket No. 42087, slip op. at 18 (STB served July 27, 2005) (explaining that there is no statutory authority for the Board to award legal fees).

unreasonable. Consequently, there is a strong argument to be made that such provisions are unlawful *per se* and, therefore, void if a railroad ever attempts to enforce them. However, NGFA believes that a statement from the Board confirming that such provisions are void and unenforceable is appropriate and necessary to provide clarity to stakeholders, and also to the federal courts, since railroads must seek collection of unpaid demurrage and accessorial charges amounts in federal court pursuant to 49 U.S.C. §11705.

Moreover, in NGFA's view, such provisions clearly are intended to have a chilling effect to discourage rail customers from challenging any of the railroad's charges or practices, regardless of how legitimate such a challenge may be. This is yet another huge obstacle erected in front of railroad customers trying to defend themselves against demurrage and accessorial charges that are wrongly assessed on grounds that the railroad was the cause of the tariff terms being triggered, or the shipper otherwise was not at fault.

Finally, NGFA wishes to reiterate the point made in its oral testimony that the development of Board-established policy principles and guidance in this area is important to the efficient functioning of private sector alternative-dispute resolution processes, such as NGFA's Rail Arbitration and Mediation System. NGFA's Rail Arbitration Rules, established in 1998, require NGFA rail carrier and rail customer member companies to arbitrate "disputes involving the *application of* a railroad's demurrage rule(s) or term(s)." (emphasis added.) Thus, the railroad tariff's commercial fairness, practicability or reciprocity is **not** subject to compulsory arbitration under NGFA's system – only how those tariffs are "applied" – even if the application of those terms is commercially unfair, unachievable in practice and non-reciprocal. In fact, NGFA railroad member companies consistently have resisted determining the commercial fairness of their demurrage and accessorial charges through NGFA rail arbitration.

E. Notice of Tariff Changes

NGFA recognizes that the current requirement that carriers provide at least 20 days' notice of tariff changes is a statutory provision contained in 49 U.S.C. §11101, and thus the Board's ability to lengthen that time period is constrained. However, NGFA serves notice that it believes this standard is woefully outdated and inadequate given the implementation of the so-called "precision scheduled railroad" operating model by most Class I railroads. It also is outdated because the overwhelming majority of railcars now are owned or leased by non-railroads, and rail customers have invested billions of dollars more in facilities, operations and personnel to accommodate railroads' operating plan demands and to enable shippers and receivers to remain competitive in the markets they serve. Therefore, rail customers need longer lead times to try to minimize the adverse effects on their investments from substantive operational changes made by the railroads to which they tender traffic. Finally, as the Board heard throughout the hearing, the scope, number and impact of many of the tariff items being changed (e.g., infrastructure, service days, etc.) warrant a much longer notification period.

NGFA suggests one means to enforce reasonable notification requirements for operational changes that will substantially and adversely affect the investments and operations of rail shippers is to more liberally apply the Board's authority to enjoin the implementation of a railroad practice pursuant to 49 U.S.C. §1321(b)(4). The Board recently utilized this authority to enjoin the imposition of an accessorial charge by a shortline railroad (involving a \$50,000 prepayment charge as a condition to receive unit train service) because the charge would have placed an undue financial burden on the shipper.⁹ The undue financial burden was that the shipper had made considerable investments in

⁹ *Central Valley Ag Grinding, Inc., and Central Valley Ag Transport, Inc. v. Modesto and Empire Traction Co.*, STB Docket No. NOR 42159 (served June 12, 2018).

shipping via 90- to 110-car unit trains, and that suddenly switching to shorter trains as desired by the shortline “would impose substantially higher costs that would render service uneconomical.”¹⁰ In the era of PSR, where the Class I railroads are making wholesale changes to their operating plans to reverse decades of established practices, such as grain unit train service, more liberal use of the STB’s injunctive authority could mitigate the harm of railroad proposals to make such changes on very short notice.

But one thing the Board should address in this proceeding are situations in which a carrier implements tariff changes without the 20 days’ required notice. NGFA was apprised by one of its member companies during the public hearing that the NS did just that earlier this year when it transmitted ***an email*** announcing it was imposing, *effective immediately*, a new locomotive-detention charge of \$800-per-train-per-hour for any railroad system cars on grain merchandise unit trains not emptied, released and available after the 24-hour free-loading period. Tariffs implemented without the required 20 days’ notice should be ruled null-and-void by the Board upon notification by rail customers.

F. Monitoring Freight Rates and Rail Rate Reform

NGFA also requests that the Board monitor year-over-year increases in freight rail rates based upon a concern that carriers will attempt to recoup revenues previously generated by commercially unfair and non-reciprocal demurrage and accessorial charges through increased line-haul rates.

In addition, NGFA fully supports the Board proceeding expeditiously to solicit public comment on the findings and recommendations of its Rail Rate Reform Task Force, and begin the process of modernizing, streamlining and reducing the complexity and costs associated with its current unworkable

¹⁰ *Id.* at 5.

rate-challenge methodologies. Such reform is desperately needed to provide some reasonable recourse for rail shippers to challenge unreasonable rail rates at the Board, as well as to prod railroads to participate in alternative-dispute resolution forums like NGFA's Rail Arbitration and Mediation System to equitably resolve rate-related disputes with their customers.

Conclusion

NGFA appreciates the Board's multiple actions to date regarding this important issue, and its consideration of our recommendations. NGFA believes it is very clear that the Board needs to step in and take action to (1) develop policy principles, provide guidance and restore some balance; and (2) direct the railroads to revise their tariffs accordingly. Further, we believe the Board has the authority to do so as part of this proceeding. NGFA appreciates the Board's consideration of its views and recommendations in this proceeding, and would be pleased to provide the Board with any additional information it believes is necessary to develop and implement specific policy direction and guidance regarding rail demurrage and accessorial charges and practices.

Respectfully submitted,



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June 6, 2019