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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 754

**OVERSIGHT HEARING ON
DEMURRAGE AND ACCESSORIAL CHARGES**

**COMMENTS OF
BARILLA AMERICA, INC.**

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May 8, 2019

1.0 INTRODUCTION

Barilla America, Inc. (Barilla) respectfully submits these comments regarding the Board's review of Demurrage and Accessorial Charges. My name is Sandra Dearden; I am President and Executive Consultant at Highroad Consulting, Ltd. (Highroad), headquartered in Highland, IN, which is part of the Chicago metropolitan area. I have been retained by Barilla to present testimony in this proceeding.

We commend the Board for opening this proceeding. Demurrage and Accessorial charges are a significant source of revenue for the railroads. Industry wide (excluding the Canadian railroads), US Class I railroads assessed demurrage and accessorial charges in 2018 close to \$1.3 billion.¹ Without a doubt, that number will increase in 2019, as a result of the changes that became effective January 1, 2019.

The first Barilla shop opened in Parma, Italy in 1877 when Pietro Barilla Senior opened a small shop with an adjoining bakery inside the house of a local baker. Today, Barilla has 28 production sites, 14 abroad; Barilla exports to 100 countries.

Barilla America, Inc. was founded in 1996 and is headquartered in Northbrook, Illinois. Barilla America, Inc. operates as a subsidiary of Barilla G&R Fratelli SpA. Barilla produces and distributes pasta and sauces, and it offers filled and whole grain pastas. Barilla America, Inc. has a production plant and durum wheat mill served by the Union Pacific Railroad (UP) in Ames, Iowa and a production plant served by the Livonia, Avon & Lakeville Railroad (LAL) in Avon, NY. The LAL connects with three Class I railroads, Norfolk Southern Railroad (NS), CSX Transportation (CSX), and Canadian Pacific Railway (CP) via operating rights over NS.

The Ames plant has a durum wheat mill; the plant in Avon, NY does not. Therefore, the Ames mill produces semolina for its own production, and Ames also produces semolina which is shipped by rail to co-packers and to the Avon plant.

The Ames mill sources its wheat from two primary regions: (1) US origins (Arizona, California, North Dakota, and Montana) and, (2) Canadian Northern Plains

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

(Alberta and Saskatchewan). Approximately 80% of the wheat originates in the Northern Plains. Barilla receives approximately 2,420 wheat cars and ships approximately 210 co-product cars annually.

Starting with the 2014 – 2015 crop year, railroads serving the Northern Plains initiated a new dedicated train program. The railroads committed 75% - 80% of their covered hopper fleets to dedicated trains of 100 – 110 cars, changing the way they manage their grain covered hopper cars. Shippers, in this case the grain companies, determine the origin and destination for all dedicated trains. Destinations can include mills or export terminals. Only 20% of the covered hopper fleets were made available by the Northern Plains railroads for the small train open distribution program, which includes 25-car orders. Barilla America was one of the few customers that fell under this small train program.

In 2014, the Ames mill ran out of wheat due to extreme winter operating conditions which impacted on the cycle times and availability of cars for loading. As a result, the wheat suppliers in the Northern Plains region were requesting cars for 100-car trains to cope with the shortage of covered hoppers and to maximize the efficiency of loading at the grain elevators.

Union Pacific Railroad (UP) encouraged Barilla to expand the track capacity at the Ames plant to accommodate 110-car trains, Barilla agreed to do the expansion, and UP signed off on the design. Barilla made this decision to expand its track and storage capacity based on benefits proposed by UP, including:

- The flexibility to purchase wheat from any origin/vendor, and buy wheat that meets Barilla's quality requirements, at the most competitive price.
- Reduced per car freight costs, 100 – 110 car trains versus 25-car units.
- Shorter lead times from origin to destination.
- Positioning Barilla to be market competitive.
- Mitigation of the risk of running out of wheat and shutting down production.
- Reduced CO2 emissions by 158 tons/year due to the number of deliveries.

The project required purchase of additional land (\$210,000), plus a capex of \$9.3 million for modifications to the rail yard, electrical wiring for bin loading equipment and for devices located on top of silos, and construction of silos to increase storage capacity from 20,000 to 30,000 metric tons. There were some additional

incidental costs that were outside the above the discussed cost of the project. For example, Barilla had to purchase software to establish interface with the new continuous motion scale (\$13,000). The project was recently completed in November 2018.

In the former configuration of the mill's unloading set up, Barilla would not have been able to turn around a 110-car train in the 48-hour window to comply with UP's scheduled switches on Monday, Wednesday, Friday. However, with the track expansion and continuous motion scale they were confident they could turn a train in 48 hours. Therefore, Barilla made a decision not to spend an additional \$1.2 million to expand the capacity of the unloading pits.

On September 17, 2018, UP announced its Unified Plan 2020 (scheduled railroading). Subsequently, a UP representative told Barilla that the new precision railroading is being implemented and may bring change in the future, changes that may include moving away from unit trains. In November 2018, UP announced changes to its Demurrage and Accessorial rules and charges tariff, UP-6004 to become effective January 1, 2019, which included reduction of the demurrage credits from two days to one day for unloading.

UP's consideration of trending away from unscheduled unit trains will not correspond to policies of the carriers that originate trains in the Northern Plains. Therefore, unless UP convinces its connecting carriers not to ship unit trains to Ames and other destinations on UP, which we believe to be unlikely, UP will have to accept the trains at interchange.

Currently, 90% of Barilla's inbound shipments of wheat originate off line, and the domestic shipments originate at stations on UP in Arizona, California and Idaho. Shipments from those origins comprise a minor portion of our inbound durum, and already move in manifest train service.

However, UP advise that they may trend away from unscheduled trains, after encouraging Barilla to initiate a \$9.3 million capex project, is only one example of unreasonable decisions and actions initiated by UP. In this statement, I will address only three primary topics:

1. Demurrage Rules and Charges.
2. Prepared for Service Charge (PFS).
3. UP Operations and Customer Service.

2.0 "A RAILROAD'S PRACTICES AND RULES MUST BE REASONABLE".

The primary claim under the Interstate Commerce Commission Termination Act (ICCTA) of 1995 that is at issue here is pursuant to 49 U.S.C. §10702(2), which requires the railroad to "establish reasonable...practices" related to "transportation and service". [I]n Section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable. Instead, it gave the Board "broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered". *North American Freight Car Ass'n (NAFCA), et. al. v. BNSF Railway Co.* STB Docket No. 42060 (Sub-No. 1) slip op, at 8 (STB served January 26, 2007). Quoting *Granite State Concrete Co. v. STB* 417 F. 3d 85, 92 (1st Cir. 2005, "This broad discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts." *Id.* Moreover, the Board "may adopt rules of general applicability for future conduct to address an unreasonable practice, even though [the Board's] authority to award shipper-specific remedies is limited to a formal complaint proceeding" where the specific facts are examined. *Rail Fuel Surcharges*, STB Docket No. EP 661, slip op. at 8, (STB served January 26, 2007. Applying that broad discretion and ability to adopt rules of general applicability to the facts at hand, the Board should find the UP's Demurrage and Accessorial charges addressed herein to be *per se* unreasonable practices and adopt corresponding rules.

3.0 DEMURRAGE RULES AND CHARGES

On November 5, 2018, UP sent an email regarding changes to accessorial charges published in Tariff UP 6004, to become effective January 1, 2019. One of the changes provides:

Demurrage Chargeable Events

To encourage the efficient use and release of rail cars promptly for use by all customers, we will be making the changes below to our Chargeable Events tariff item:

One "arrival credit" will be issued for each loaded rail car arriving in the serving area within the past 24 hours.

This change reduces the arrival credit from two days to one day. Therefore, the shipper² has only one day to unload a car at its facility as opposed to two, which has been the industry standard for decades. In fact, the STB has stated that, “[p]roviding 48 hours free time for unloading is standard practice in the railroad industry.” *Portland & Western R.R., Inc. – Petition for Decl. Order – Reasonableness of Demurrage Charges*, STB Docket No. 42102, slip op. at 3 (STB served July 20, 2010); *Capital Materials, Inc. – Pet. for Decl. Order – Certain Rates and Practices of Norfolk So. Ry. Co.*, STB Docket No. 42068, slip op. at 3 (STB served April 12, 2004); *Unger, Trustee of Ind. Hi-Rail Corp., Debtor – Pet. for Decl. Order – Assessment & Collection of Demurrage and Switching Charges*, STB Docket No. 42030, slip op. at 7 n. 15 (STB served June 14, 2000).

Barilla will need to make significant changes to turn a train in 24 hours, including expansion of the unloading pits and upgrade of wheat elevators and conveyors (\$1.2 million), and renegotiation of the contract with the third party that unloads the trains. Changes to the agreement would include the size of the crews and increased fees to be paid to the third party.

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.³

A free day may include a certain day of the week or holiday when demurrage is not charged. Prior to January 1, 2019, shippers were allowed two free days to unload and release a railroad-owned car after it had been constructively placed. If, for example, a car is released after just one day, the railroad does not assess a demurrage charge. Credit days work differently. Using the same example, a shipper gets one-day credit to apply to other demurrage charges. At the end of the month, a shipper subtracts the number of credits from the debits. If there are two more debits than credits, the shipper is charged for two days’ demurrage. The same demurrage rules apply to a single car and to multiple car units or unit trains, overlooking the additional time required to load or unload the larger units.

² In this presentation, references to shippers or customers include consignors or consignees.

³ 49 CFR § 1333.1 - Demurrage defined.

The UP tariff also includes a provision that if UP does not pick up or deliver a car due to UP's actions, an accessorial charge will not be assessed. Instead, under UP's standard demurrage program, UP would give the customer two offsetting credits for its operational failures "*in order to maintain a fair and balanced approach.*"

UP also adopted a *You Are Next* policy so customers are notified to prepare for loading or unloading a train. We do not know what You Are Next actually means as UP's service is not reliable and we are not talking about missing by a few hours, trains have actually arrived 24 – 28 hours late. During that time, Barilla and the third party incur labor costs for employees called in to service the train. There have been a number of operational failures, yet Barilla has never seen credits when UP fails to deliver cars as promised and planned.

There are a number of problems with the demurrage rules and, as a result, Barilla is faced with hidden costs that were not included in the cost benefit analysis to justify expansion of the track and storage infrastructure.

For example, when UP delivers trains to Barilla's plant, they do not leave the locomotives with the train. Instead, the locomotives are returned to UP service, and a *deadhead* charge of \$3,200 is assessed. Subsequently, when a locomotive returns to pick up the empties, a second deadhead charge of \$3,200 is assessed (\$6,400 per train). Removing the three locomotives was at Barilla's request due to an asset utilization charge of \$200 per hour per engine after free time (one day). Barilla concluded that the deadhead charges are cheaper than paying the hourly rate for three engines.

The deadhead charges are unreasonable because the shipper is financially forced to agree with UP's decision not to leave the locomotives with the train. We can only assume that the railroad's decision to return the locomotives to service is based on the railroad's operational needs, and there is a cost benefit to the railroad to have access to the locomotives for other trains that move while Barilla unloads its trains. The costs and potential cost benefit incurred by the railroad when deadheading are not transparent, so we do not know what is behind the \$6,400 charge per train. However, because the shipper is financially forced to concede, and deadheading is beneficial to the railroad, we submit this charge is unreasonable.

Another cost incurred is based on when the car or train is delivered. Most Class I railroads start the demurrage clock at 12:01 a.m. of the day following placement (unit trains use a car placement time agreed to by UP and the customer. Customers can go into the unit train interface in the UP website and adjust the actual placement by three hours). The charge is not prorated, and a shipper incurs one day of demurrage even if the car is released at 12:02 a.m. This appears to be the way UP calculates demurrage. This seems to be unreasonable even for a single car, but certainly for unit trains that require additional time for loading or unloading. Barilla experienced this in February and March, 2019; currently, there is an open dispute with UP for Barilla to recover \$22,100 for lost credits. Also, for unit train shippers the process to file disputes is cumbersome since because disputes are car specific.

The Board asked if these issues can be addressed in contracts. Initially, when Barilla located the plant at Ames, UP established contract rates but only for the initial contract term of five years or 2,500 wheat cars, whichever occurred earlier. To our knowledge, the railroads in general have decided to only publish grain rates in public tariffs. Therefore, this is not an option.

3.0 PREPARED FOR SERVICE (PFS)

Another addition to the tariff is a \$400 PFS charge when a car cannot be spotted or pulled because of the shipper's actions. This new charge applied by UP sets forth reasons for this penalty per occurrence. This includes but is not limited to:

1. *Cars not completely loaded or unloaded, but released for movement.*
2. *Cars released, but not placed at the agreed upon location for access by Union Pacific.*
3. *Cars released and placed at a location that is inaccessible by Union Pacific.*
4. *Cars unable to be spotted due to track blocked by debris, safety flags, locked gate, or other rail cars to be pulled.*

PFS charges will be assessed regardless of whether the shipper is diligent in its loading and unloading operations. Under this new plan, the PFS charge for a car will accrue immediately upon one of these occurrences by a customer. While neither the Interstate Commerce Commission Termination Act (ICCTA) of 1995 nor case law has directly addressed these issues, applying by analogy case law for demurrage issues indicate that tariffs must allow a "reasonable period" for remedying situations that

result in these types of charges. See e.g. *Illinois Central Gulf R.Co. v. I.C.C.*, 702 F.2d 111, 113 n. 1 (7th Cir, 1983) ("Railroads assess demurrage charges when shippers hold railway cars for loading and unloading longer than a specific period, called 'free-time.'"); *Portland Western R.R.* slip op. at 4 ("A railroad has a right to set a reasonable time – free time – for a shipper/receiver to finish using a car and return it to the railroad.") In fact, as noted earlier, the STB has stated that "[p]roviding 48 hours free time for unloading is standard practice in the railroad industry." *Id.* At 5. However, the PFS charge is immediately imposed, even if the shipper is unaware of the situation blocking service. We could cite a number of potential examples, including a tree falling on the track as the result of a storm. The PFS charge deprives shippers of this reasonable period to remedy the situation and, arguably, is an unreasonable practice.

3.0 UP OPERATIONS AND CUSTOMER SERVICE

In UP's announcement of the changes to their Accessorial Tariff 6004-series, they state:

Our top priority is to provide safe, reliable transportation for our customers. Part of that commitment is to maintain a fluid and adequate supply of rail cars and to ensure that all rail car assets, both railroad and privately owned, are utilized as optimally as possible.

To encourage efficient use of rail cars by all parties, the transportation industry utilizes a demurrage system that charges a fee for the extended use of a freight car. These charges help offset the costs of purchasing and maintaining these assets; they also ensure that equipment utilization is prioritized and encourage equipment users to release rail cars promptly for use by other customers.

This is a noble goal; however, it seems that UP is not participating in their own initiative. UP's service has not improved. In fact UP's service and communications have become so unreliable that Barilla cannot plan for even an approximate arrival time. As a result, Barilla has incurred increased labor costs, scheduling crews to unload trains that arrive 24 – 28 hours late. Also, after Barilla releases the train, the cars have remained in Barilla's yard for up to four days before a UP crew shows up to pull the empty cars, thereby impacting on the railroad's equipment utilization.

UP's Customer Service is hit or miss – there are so many different departments and people don't seemed to be cross trained. Barilla experienced a steep learning

curve that they were required to work through on their own. First a customer must know which department to call, which one to access via the web or which ones can only be reached by telephone. Then a customer is required to wait for a return call if the automated system says there is no one to help you. A prime example is the unit train Grain Desk. The employees of the Grain Desk were very helpful when Barilla first started to receive unit trains (and they are still helpful when they can be reached). However, UP terminated email accessibility for their employees. As a result, it can take hours to get an answer to a simple question.

4.0 SUMMARY

Changes to the rules highlighted herein are not fair nor reasonable. While this testimony focuses on Union Pacific, these issues are not isolated to UP but they represent attitudes and actions that are occurring throughout the rail industry. Union Pacific's UP 2020 plan, and their consideration of potentially discouraging customers from shipping and receiving unit trains, i.e., unscheduled trains, after the Barilla invested significant capital to expand their rail infrastructure and storage to accommodate trains, is not a problem in itself. Instead, it is a symptom of the disregard and disrespect railroads have for their customers. Barilla is a good, consistent customer that is local on UP. Barilla invested more than \$9.3 million for expansion of the rail infrastructure and storage capabilities so they could receive 110-car unit trains as encouraged by UP and supported by better pricing for these longer trains versus 25-car units.

Barilla is a Responsible Customer for Union Pacific Railroad – Barilla made a decision not to expand the capacity of the unloading pits because Barilla understood from written conversation with the UP representative that Barilla could turn a train in 48 hours. Barilla's \$9.3 million project was completed in November 2018, about the same time UP announced changes to Tariff 6004-Series which included reduction of the allowable credits from two days to one day. Barilla cannot unload a train in 24 hours; as a result, Barilla's demurrage costs will increase unless Barilla spends an additional \$1.2 million to increase the capacity of the unloading pits. The questions are (1) whether or not one day for loading or unloading is reasonable, and (2) if the same standards should apply for loading and unloading unit trains when it takes longer to handle 110 cars versus a single car.

You Are Next Policy and Operational Failures - Also, UP's rules seem to include some empty promises, including offsetting credits for operational failures, and the *You Are Next* policy lacks substance when trains arrive 24 – 28 hours late. Barilla has not received any credits for operational failures, and the *You Are Next* policy is not helpful and can be detrimental. When trains arrive 24 – 28 hours late, a lost labor cost for Barilla.

Deadhead Charges - We submit that *Deadhead Charges* assessed against customers are unreasonable. Barilla is paying Deadhead Charges for all trains received for unloading. Without a more in-depth investigation and analysis, it would seem that the railroad benefits from not leaving the locomotive with the train, and returning the power to service while trains are loaded or unloaded. Furthermore, there is no foundation for Deadhead Charges totaling \$6,400 per train.

Calculation of Demurrage – The current rules need to be reviewed for potential change. Assessing debits for a full day when cars are, for example, released at 12:02 a.m. versus 12:01 a.m. simply does not seem right as it does not seem fair to apply a full day of debits for only one minute, considering clocks of various people involved may not be in sync.

Prepared for Service (PFS) Rule – Case law indicates that tariffs must allow a “reasonable period” for remedying situations that result in charges. The railroad's customers may not be aware of the situation blocking the railroad, and the rule deprives shippers of a reasonable period to remedy any issues. Therefore, we submit that this rule constitutes an unreasonable practice.

UP Operations and Customer Service – UP's service has not improved; trains continue to arrive 24 – 28 hours late. Also, trains that are released empty sit for four days before UP pulls the empty cars, requiring Barilla to provide space to hold the empties, and impacting on the productivity of UP's covered hopper cars.

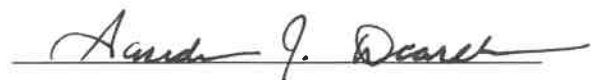
Based on the foregoing, we submit the following suggestions for the Board's consideration:

1. Change one arrival credit back to two arrival credits for unloading in accordance with industry practice.

2. When railroads miss switches and bunching occurs, shippers need relief on all of the cars impacted, including cars being held by the railroad and cars already enroute.
3. Deadhead charges applied on unit trains should be terminated. By returning the locomotives to service, the locomotive units can be used for other trains, thereby improving the productivity of the locomotive fleet. Also, UP's charge of \$6,400 per train is without foundation.
4. Union Pacific's Prepared for Service (PFS) charge of \$400 per car results in double dipping over and above the demurrage charges, so PFS charges should be eliminated.
5. The method for calculating demurrage should be reviewed for potential change so shippers do not incur a full day of debits for extremely brief periods of time.
6. There should be charge(s) that shippers can assess to recover costs that result from railroad operational failures, including plant shutdowns, increased labor costs, lost business, potential diversion charges, car costs for private cars, and use of holding tracks when a railroad fails to pull released cars within the same time allowed for loading or unloading cars and trains (one or two credit days).

Again, we commend the Board for opening this proceeding, and we appreciate the opportunity to present our views.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sandra J. Dearden", written in dark ink.

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