

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

TESTIMONY OF BARBARA HAGLER

My name is Barbara Hagler. I am the Logistics Manager for Auriga Polymers, Inc., a wholly owned subsidiary of Indorama, NA, with rail logistics responsibility across North America for Indorama affiliated companies. Joining me today is John Fields, Manager of Logistics for StarPet Inc, another wholly owned subsidiary of Indorama, NA.

The purpose of this Testimony is to draw attention to the unreasonable revisions in Norfolk Southern (NS) rail tariffs and to request Surface Transportation Board (STB) assistance in seeking immediate resolution to stop the sustained damage being caused by NS to Indorama-affiliated companies in general, but in particular, resulting in additional demurrage charges to Starpet, Inc., Asheboro, NC, who is captive to NS.

Indorama currently has the following eight (8) manufacturing plants throughout North America:

- Auriga Polymers Inc. based in Charlotte, NC and Forster, SC.
- Indorama Ventures EO & Glycols, Inc. based in Bayport, TX,
- StarPet, Inc. based in Asheboro, NC,
- AlphaPet, Inc. based in Decatur, AL,
- Entreprise Indorama PTA Montreal, CA.
- Indorama Ventures Xylenes & PTA, Decatur, AL.
- Indorama Ventures, Mexico.
- Indorama Ventures Olefins, LLC, West Lake, LA.

With the exception of Mexico and West Lake, LA, all Indorama facilities have been negatively affected by NS-service failures and changes to NS operations due to their effort to initiate Precision Scheduled Railroading. Three Indorama businesses are rail captive to NS; StarPet in Asheboro, NC, AlphaPet and Indorama Ventures Xylenes & PTA in Decatur, AL.

On October 1, 2018, NS issued Freight Tariff NS 6004-D (Tariff), which relates to demurrage and storage rules and charges. The Tariff cancelled the previous Freight Tariff NS 6004-C, which was effective October 1, 2017. The Tariff made various changes to this existing tariff, including to private cars, which are the matters at issue here.

The first revision at issue by NS is to Item 600 - Rules Governing Cars Held for Loading, which reduces the number of credit days from two to zero credit days that will be earned for each empty private car under Constructive Placement (CP).

The second pertinent change NS made to the Tariff is in Item 1010, which reduces all Private Car Storage from two loading and unloading credits to zero loading and unloading credits. This item provides a table with these reductions in credits for private cars all to zero. As a result, railroad-controlled cars are given one credit day for loading and unloading while private cars are given zero credit days for loading and unloading. Item 1010.

These changes have resulted in storage charges being assessed upon shippers across the NS network regardless of whether the shipper is diligent in its loading and unloading operations. Under this new plan, the storage charge for a private car begins to accrue at the first 12:01 a.m. after constructive placement of the car – that is, after NS notifies the shipper the empty or loaded car is ready to deliver to the shipper – and continues until the shipper directs NS to deliver the car to the facility and it is placed. NS's storage charge for private cars is an average assessment: upon constructive placement, each empty car will receive zero credits and for each day thereafter

that the car remains on the track, one car day is assessed until the shipper orders the car delivered and it is placed. Total credit days for private cars are subtracted from total car days for the month. Here, there can be no credit days because of the zero credit days in the Tariff. If a private car is constructively placed, that means a demurrage charge will likely be applied. For example, if a car is brought to the shipper at 11:59 pm that means it would have one minute to accept the car and have it placed, which gives it no time to remedy a situation. In other words, this change to private cars could result in situations where a customer could not possibly avoid storage charges being assessed no matter how efficient it is.

Specifically, with respect to Starpet/Indorama in Asheboro, North Carolina, these NS tariff changes have in fact created immediate demurrage penalties. Starpet/Indorama has advised NS on numerous occasions that its practices, including these tariff changes and changes to the points/yards where constructive placement occurs are unreasonable and unfair. The facts in support of Indorama/Starpet's objection to its recent demurrage charges are as follows:

- In 2017, as a part of their Precision Scheduled Railroading initiative, NS reduced train starts between Linwood, NC and Highpoint, NC from 2 a day to 1. Additionally, NS changed the way StarPet was able to order in cars. Historically, since the plant opened, StarPet would order seven (7) empty cars, seven (7) PTA cars and three (3) Glycol cars. Now, they must order by quantity, not car number, and NS brings the cars easiest for them to deliver. StarPet then does not receive the correct mix of car types which has created service issues that have caused plant production slow-downs until the correct cars are delivered. In addition to the failures at Asheboro, NC, over the past 2 years, StarPet has had more than 30 NS service failures at customer sites including Dalton, GA, High Point, NC and Bellevue, OH yards which have required altering production plans and forced multiple bulk truck deliveries. These service failures have substantially increased production costs and costs to serve our customers. NS frequently embargoed StarPet and other local customers due to reported congestion. One StarPet customer is less than 2 miles of empty track away from StarPet in Asheboro NC. Due to NS service failures to this customer, StarPet lost a million pounds per month in sales until the customer was able to convert to accepting trucks.
- NS gave notice of demurrage Tariff changes in October of 2018, becoming effective on January 1, 2019, which did not give Indorama/Starpet time to change its operations to accommodate the newly implemented Tariff before NS began imposing these new

demurrage penalties. NS rail service problems, that started in 2017 and caused multiple partial site shutdowns, reduced site production and nearly resulted in complete shutdowns and continue to be an issue. Indorama/Starpet is not guaranteed any cars by NS, even when specific cars are ordered. Updated tariffs also were published in January and March, implementing additional changes again without time to adjust operations to accommodate. Starpet/Indorama feels overburdened and unable to get ahead of the rapid-fire changes to the tariffs.

- Moreover, NS simultaneously began to change its constructive placement (CP) locations for the Asheboro, NC site, which has triggered more demurrage penalties. As part of NS's Precision Scheduled Railroading initiative, constructive placement locations have moved from High Point, NC to Linwood, NC then to Spencer, NC without any notice to Starpet/Indorama. And then NS would move the cars to Lexington,,NC and Greensboro, NC while keeping them in constructive placement. This practice was lifted briefly in the fall of 2018 after the threat of an embargo was lifted but became effective again on January 1. **Some of these locations take two days for these constructively placed cars to be delivered to Indorama/StarPet, so demurrage charges cannot be avoided at these CP spots.** When Indorama/Starpet personnel asked how to avoid demurrage at these locations, NS committed to coming to the site to walk through changes and make sure everyone was on the same page. This did not happen. Prior to this change, when CP was only from one yard, StarPet was able to manage ordering cars with very little demurrage. **Over the 20 months from January 2017 to August 2018, StarPet had a total of \$540 in demurrage. Once the CP placement was changed to multiple yards, StarPet is now being charged over \$20,000 per month. This happened with NO deviation in StarPet operations other than trying to accommodate NS's tariff changes.**
- While Indorama/Starpet cannot order in cars directly from Linwood, NS is placing cars in constructive placement in Linwood and High Point and charging demurrage from both locations. Demurrage continues to accrue in Linwood when no cars are available to order in High Point. Indorama/Starpet has no control over the location of cars in the area; cars are placed in several locations other than the High Point serving yard. As stated, this builds automatic demurrage charges into the operation, is unreasonable and needs to be corrected immediately. Additionally, supplemental demurrage charges are assessed as car quantities in CP status reach double average daily receipts.
- Despite being shipped according to a ratable schedule, raw material cars continue to bunch and arrive at the same time, making it impossible for Indorama/StarPet to bring all cars in at once. High Point yard can and does fluctuate daily from empty to overflowing. Indorama/Starpet receives multiple days of cars plus its regular quantities when deliveries are missed by no fault of Indorama/StarPet. In addition to the bunching, transit times have been inconsistent and unreliable. Over 200 railcars at a cost of over \$100,000 per month were required to be added to Indorama's PET railcar fleet to compensate for NS service failures and protect market share. Failures throughout the rail network always result in penalties for StarPet with no responsibility taken by the railroad.

Indorama/StarPet has not changed its manufacturing process and continues to make every effort to maximize production. It is constantly forced to react to changes by Norfolk Southern to its rail service and demurrage tariffs as relates to the Asheboro site over the past 24 months, including many occasions of lowering production and near miss shutdowns. In spite of these continuing unacceptable, egregious service events, Indorama/StarPet remains committed to a partnership with Norfolk Southern. While at the National Freight Transportation Association (NFTA) annual meeting on March 29, 2019, we had a quick meeting with NS upper management and requested a sit down in Charlotte to go over all of the issues we are having. We offered April 15th to meet but were advised the soonest available time was May 24th – a full month and a half after our requested date. This speaks to NS's lack of urgency to help right the issues these changes and service failures have caused. We informed NS that we were aware of the scheduled hearing today and planned to participate. We then received an invitation to come to Atlanta on May 16th for a meeting or maybe the 15th if they could rearrange schedules, if not the 24th date in Charlotte would stand. Neither dates would work for our schedules.

StarPet personnel have been in constant communication with the NS and have repeatedly requested assistance. On November 1, 2018, John Fields Manager in Logistics at StarPet advised NS via email of the following:

"We are disputing the entire demurrage bill, as NS unilaterally imposed this new quantity ordering system on our facility, started CP status from three different locations, and also allowed cars to sit longer than 5 days for their convenience. The maximum credit that we were allowed is 5 days of cars. There are cars that sat on CP status for more than 15 days due to NS's failure to pull them into our facility because they were not convenient for NS.

This process was not fully explained in detail by the sales/marketing team and OSS. They never advised that we could still order cars in on the quantity ordering system that had been in CP status. The lack of communication alone from the NS team should allow relief from the demurrage bills.

NS service issues also caused many of these issues with their inconsistent service in spotting/pulling cars from the facility, inconsistent transit times, and overall congestion on the railroad. NS has acknowledged that they have had service issues over the past year and again are in a process of revamping their operations to ensure faster service. All of this has been at the cost of the shipper/customer. In the past, we have had no demurrage bills due to how we ran our operations at StarPet. We find it totally unacceptable that we would have in excess of \$50,000 in demurrage over two months when our past record would indicate this has never been an issue.”

The NS response was “...charges were determined to be correct as billed...”. Despite continued attempts by Indorama to resolve this conflict, NS ultimately returns with the same response. All cars, despite current location and NS ability to deliver, and our lack of opportunity to order, are on demurrage after the first day that NS receives them into Linwood. Online quantity orders, despite OSS notification from StarPet of lack of supply in High Point, continue to have spotty delivery results. Quantities in High Point fluctuate from next to nothing to complaints of overfilling this yard (done by NS operations, not our request). Demurrage charges for the StarPet site now total over \$150,000 as of May 8, 2019. Although we do not believe any of the demurrage penalty charges are valid, in view of the unreasonable and unfair NS initiatives, we offered to put some amount in escrow as a good faith measure until this matter is resolved. However, NS rejected our offer.

NS did offer to send in a Third Party to StarPet’s site to evaluate our operations with a view toward pushing more railcars onto our property and reducing the dynamic track space used by StarPet to do switching and organize outbound loads and empties. We refused such direct calls to StarPet site by the Third Party. NS then offered an in-house entity to evaluate StarPet site which was also rejected because the NS service problems have never been within StarPet’s property, and we felt that NS does not possess the expertise nor have StarPet’s best interest at heart. NS is only looking for ways to use the customer property to subsidize their service failures.

We have no leverage to cause NS to correct its unreasonable tariff changes and CP practices before costing StarPet thousands of dollars. With no way to recover these losses except to use the only possible avenue available to shippers, appearing before the Surface Transportation Board, we do not take this lightly. We have been patient.

We see potential violations of two ICCTA provisions that may be considered here: 49 U.S.C. § 10702(2), which requires that a railroad “establish reasonable...practices” related to transportation and service; and (2) 49 U.S.C. § 10746, which requires that demurrage charges fulfill two enumerated “national needs” objectives. While there has not been a case that deals with a situation where a railroad applies zero credit days for storage purposes, the case law requires some credit days or time for a shipper to reasonably deal with the cars it receives from a railroad.

The reasonableness standard applies to demurrage. “The principle underlying demurrage is straightforward: when a shipper holds a rail car beyond a **reasonable time**, it is taking up a railroad asset for which the railroad should be compensated. Demurrage charges therefore serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient.” *North America Freight Car Ass’n , et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) slip op. at 8 (STB served January 26, 2007) (emphasis added). With respect to the Tariff changes by NS at issue, “when a shipper’s privately owned rail cars are idled on the railroad’s tracks, it is depriving the railroad of the use of that track.” *R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges*, STB Docket No., 42102, slip op. at 4 (STB served July 20, 2010);

The STB has issued regulations regarding demurrage that address the matter of time for a customer to handle a car. The STB defines demurrage as “a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a **specified period of time (i.e., free time)** for loading or unloading, and serves as a penalty for **undue** car detention to encourage the efficient use of rail cars in the rail network.” 49 C.F.R. § 1331.1 (emphasis added). It also defined who is subject to demurrage: “Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond **the period of free time** set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. The notice required by this section shall be in written or electronic form.” 49 C.F.R. § 1331.3 (emphasis added). Notably, both definitions acknowledge “a specified period of time” for a shipper to use railroad track.

The question then becomes what is a “reasonable period.” Undoubtedly, it is more than zero. Zero is not a period of time. This zero credit days by NS is unreasonable on its face considering the nature of the rail industry, which has “many variables outside a railroad’s control that may affect delivery.” *Capitol Materials, Inc. – Pet. for Dec. Order – Certain Rates and Practices of Norfolk So. Ry Co.*, STB Docket No. 42068, slip op. at 7 (STB served Apr. 12, 2004). Moreover, the case law consistently notes that “free time” is a specific period, which implies that there must be some time in order to satisfy the reasonableness test. *See Illinois Cent. 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.’”).

Based on the STB's repeated references to a reasonable time period for acceptance of a car for loading and unloading, without charge, it is hard to fathom how a zero time period fits within this definition. It certainly cannot encourage a shipper to be more efficient because the period of time for storage here could begin in minutes. Moreover, the use of zero credit days appears to be more of a revenue producer for the NS than a deterrent for the use of its tracks by private cars. See *Iversen v. U.S.*, 63 F.Supp. 1001 (D.D.C. 1946), *aff'd* 327 U.S. 767 (where demurrage charge that required unloading during certain Christmas holidays which would have been impossible due to the labor situation so it could not accomplish objective of unloading cars and only result was to cause payments to railroads by shippers, rule was found to be arbitrary). Consequently, zero credit days for private cars cannot be a reasonable time because it is not even a time.

This situation with zero credit days is even more unreasonable because NS has moved its constructive placement locations for the Indorama/Starpet facility to areas that require two days for delivery. Therefore, every car constructively placed in these locations is going to be assessed at least two days of demurrage no matter what it does. This result is the very definition of unreasonable. NS has placed Indorama/Starpet into a situation which has no solution, but just a penalty.

The second claim would be a violation of 49 U.S.C. § 10746, which provides:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to –

- (1) Freight car use and distribution; and

- (2) Maintenance of an adequate supply of freight cars to be available for transportation of property.

The zero-credit day rule for private cars fails to fulfill either of these national needs. The concept of private cars is important because it allows service when there are periods of greater need during peak season. This new NS policy will deter private car owners from using these cars because demurrage costs will skyrocket where a shipper has limited control over these charges because there is no room for any error or congestion at a shipper facility. Without a reasonable period to accept the cars when delivered, the ability to avert storage fees is lost. As these fees rise, shippers will begin to abandon the concept of private cars in favor of railroad-controlled cars where at least some free time is given. Moreover, as noted, this new policy only appears to be a revenue maker for railroads and not a way to satisfy these two national needs for freight cars.

NS claimed in its December 4, 2018 letter to the STB that it is only “making these changes to properly align stakeholder incentives with improving our asset utilization, because using assets more efficiently will lead to network fluidity and better service.” However, these demurrage/storage changes have not had that type of impact. The only impact has been a substantial increase in its revenues for demurrage/storage charges. For example, NS also increased a one-day demurrage charge by 50% from \$100 to \$150 in the Tariff without any basis.

Based on the reports NS has submitted to the Board this year, NS’s quarterly revenue for demurrage has skyrocketed from approximately \$55,000,000 in the first quarter of 2018 to \$79,000,000 in the first quarter of 2019. In other words, in one year, the amount of revenue

earned per quarter from demurrage has increased by nearly 44%. This increase has not gone unnoticed by its shareholders.

In an April 24, 2019 stock note regarding NS issued by Wolfe Research, the analyst noted that NS yields were higher than expected for the first quarter of 2019. "Higher accessorial charges boosted yields by 90bp, and we expect this tailwind to accelerate in 2Q as NSC benefits from a full quarter of charges." While NS says one thing to its regulator, it says another thing to its shareholders. The numbers do not lie. NS is only making these changes to increase its revenue at the expense of its customers like Indorama. Alan Shaw, NS Executive Vice President and Chief Marketing Officer acknowledged during the 2018 Rail Trends conference, "the railroad's strategic plan was delivering, financially – but not on service reliability and consistency."

To be clear, Indorama/Starpet's position on these tariff and service changes has not changed: They are unreasonable and unfair, and we believe they should be rolled back to mirror the 2017 tariffs.

Respectfully submitted



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