

Before the Surface Transportation Board

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**STB Docket No. EP 754
Oversight Hearing on Demurrage and Accessorial Charges**

Written Testimony of Dow, Inc.

Dow, Inc., hereby submits written testimony in conjunction with the Surface Transportation Board's May 22, 2019, hearing on demurrage, storage,¹ and accessorial charges under docket EP 754. Dow commends the Board for holding a hearing to review these charges. Many recent changes railroads have made to their storage and accessorial rules and practices concern Dow. Part II of this testimony specifically identifies Dow's concerns with specific recent changes to storage and accessorial rules and practices. Part III identifies Dow's concern with the absence of reciprocal obligations from railroads to account for their service failures. Part IV identifies actions the Board should consider after the hearing.

I. Identity and Interest of Dow

Dow is a leading multi-national manufacturer of chemical products that operates 113 manufacturing sites in 31 countries and employs approximately 37,000 people. It has a portfolio of performance materials, industrial intermediates, and plastics businesses that delivers a broad range of differentiated science-based products and solutions for our customers in high-growth segments, such as packaging, infrastructure, and consumer care.

¹ Throughout this testimony, storage refers to charges assessed on private cars held on a carrier's track beyond a specified period for loading or unloading. These charges are akin to demurrage charges on railroad-provided cars and often are referred to as demurrage.

Dow makes significant use of rail transportation. Its major manufacturing sites in the United States are located in Texas and Louisiana. These sites, and others around the country, depend upon railroads to provide safe, secure, reliable, and economic transportation of raw materials and products.

II. Dow's recent experience with storage and accessorial practices raises multiple concerns.

Dow is alarmed by its recent experience with storage and accessorial practices, especially those of Norfolk Southern (NS) and Union Pacific (UP). Railroads have made significant changes to their storage and accessorial rules under the guise of promoting efficiency. But the railroads made many of these changes faster than Dow could make the operating adjustments the railroads desire. Also, these changes have resulted in charges that were arbitrary, arose from the railroads' own service failures, or otherwise failed to provide an efficiency incentive.

A. NS congestion charge

Dow has multiple concerns related to NS's congestion charge, especially in relation to how NS has applied the charge regarding Dow's Kankakee, Illinois facility, which is captive to NS. The charge applies when, "in the sole judgment of Norfolk Southern," an excessive quantity of cars destined for a consignee location (the "Congested Location") congests NS's facilities, causing material operating problems. NS Tariff 8002-A, Item 6265 (eff. Apr. 1, 2019). The charge is \$100 per each of the "consignee's cars destined for the Congestion Location that exceeds two (2) times the average number of cars that the consignee received at the Congested Location for each day within the previous two weeks, which two weeks will be measured from the date [NS notified the consignee that it may begin to hold excess cars moving to the Congested Location]." *Id.* NS recently reduced the number of exempt cars by one-third, from three times the average number of cars received at the Congested Location to two times, which

had the effect of expanding the applicability of the charge. Letter from Pricing Services, NS to NS Customers (Oct. 1, 2018), <https://tinyurl.com/y4qy4j2p> (noting the change would become effective January 1, 2019). Dow estimates that, for 2019, it will incur \$600,000 in congestion charges for Kankakee, on top of storage charges, which totaled \$194,000 in 2018.

NS applies the congestion charge arbitrarily. Although NS describes the charge as applying when an excessive number of cars congests its facilities causing material operating problems, NS reserves the right to determine when this occurs in its “sole” judgment. Moreover, NS appears to be applying the charge in a discretionary fashion. Since 2018, the number of cars held in NS yards for delivery to Kankakee has not materially changed. Yet, shortly after NS reduced the number of cars exempt from the charge by one third, it began classifying Kankakee as a Congested Location.

NS does not waive the charge if bunching causes the congestion. NS’s congestion charge tariff does not include any exclusion for congestion caused by bunching or reasons beyond the consignor’s or consignee’s control. This is a significant concern for Dow, because bunching is a key driver of the congestion charges Dow incurs at Kankakee. NS has delivered shipments to Kankakee in bunched fashion despite Dow staggering outbound raw material shipments at their origin to match Kankakee’s raw material consumption. Recent examples of this include:

- At the beginning of January, Dow shipped 16 railcars in 4 shipments of 2-6 cars over the span of 6 consecutive days from Texas City to Kankakee, and NS delivered 14 of these cars on a single day.

- Also in January, Dow shipped 9 railcars in 4 shipments of 1-4 cars over the span of 6 consecutive days from Deer Park to Kankakee, and NS constructively placed all 9 of these cars on a single day.
- In February, Dow shipped 10 cars from Texas City to Kankakee over the span of 8 days and NS constructively placed them in the span of 2 consecutive days.

Each of these bunching events resulted in congestion charges that NS refuses to waive.

NS does not provide sufficient data to enable Dow to validate NS's billing of congestion charges. It simply provides the number of cars in its system destined to the Congested Location, the average number of cars it has actually placed at the Congested Location in the past rolling 14 days, and the maximum number of cars permitted before the congestion charge is applied. Nowhere does NS identify the specific cars it used to derive these figures. Further, when Dow requests this information, it takes months for NS to provide it. This prevents Dow from being able to timely audit and dispute NS's congestion charges, where appropriate.

The NS congestion charge amounts to a double penalty. NS applies its congestion charge on top of storage charges that it assesses on a car. This is unnecessary because storage, alone, provides a sufficient penalty to incentivize rail customers to avoid congesting rail facilities with cars awaiting delivery. In fact, NS does not assess a penal charge in addition to its storage charge in any other circumstance.

NS does not report this charge to the Board. In response to the Board's recent requests that railroads report demurrage, storage, and accessorial charges, NS does not appear to be reporting the congestion charges it assesses. See Letter from Jason A. Zampi, VP & Controller, NS, to Surface Transportation Board 2 (Apr. 30, 2019), <https://tinyurl.com/y6hhabwk> (omitting

Tariff 8002-A, Item 6265 from the list of reported accessorial revenue). This deprives the Board of a full picture of the charges NS is assessing to penalize shippers for rail network congestion.

B. NS free time reductions for private cars subject to storage

NS's changes to its free time rules have resulted in a substantial reduction in free days and an increase in costs for Dow. NS historically provided free time by starting the accrual of storage charges at midnight following constructive placement and issuing "Credit Days," which are a one-day credits that offset one day of storage charges. NS Tariff 6004-D, Items 200, 600 (eff. Oct. 1, 2017). Effective January 1, 2019, NS reduced the number of Credit Days for private cars from two to zero. NS Tariff 6004-D, Item 600 (eff. Jan. 1, 2019).

NS provides inadequate free time to address rail service shortcomings. Free time is necessary to account for rail service issues that frequently arise and strain Dow's ability to accept cars. Dow's facilities served by NS have limited capacity to store excess cars. For example, the Kankakee facility only has storage for 10-12 railcars, which must accommodate loaded raw material cars for unloading, empty raw material cars for return, empty finished product cars for loading, and loaded finished product cars for shipment. As explained in Section II.A, Dow carefully staggers shipments of inbound raw materials to Kankakee to match the facility's rail car storage capacity and consumption rate. Yet, NS often delivers these cars bunched, sometimes in groups exceeding nine cars in two days, which far exceeds Kankakee's capacity to receive shipments.² Moreover, NS returns empty private cars to Kankakee for loading at its convenience, without providing Dow with any schedule of returns. This makes controlling the flow of inbound cars impossible. Accordingly, NS's elimination of Credit Days for loading and unloading private cars is penalizing Dow for railroad service issues that are beyond Dow's control.

² See Kankakee discussion in Section II.A.

NS's credit system for service shortcomings does not offset the elimination of free time for private cars subject to storage. NS's credit program, which awards credits to offset storage charges arising in certain situations, is insufficient for addressing the lack of free time. For example, it does not apply to empty cars whatsoever. Also, although the program awards credits for each day that a loaded car arrives early or late, this is based on NS's original estimated time of arrival for the car, which NS generates upon receipt of the car and does not account for anything that occurred before such receipt. *See* NS Tariff 6004-D, Item 950 (eff. Apr. 1, 2019). This is especially problematic for inbound Kankakee shipments, because Kankakee early or late arrivals often arise from bunching or service issues on the railroads that interchanged the cars to NS.

C. NS switch charge increase

NS's increase to its intra-terminal and inter-terminal switching fee for private rail cars concerns Dow. This year, NS increased these fees from \$500 to \$750 per private car. NS Tariff 8001-A, Item 7000 (eff. Feb. 15, 2019). This increase does not appear to correspond with an increase in NS's costs. Moreover, it seems focused on generating additional revenue from railcars that shippers move off NS's yards in response to NS's storage and congestion charge practices. As explained in Parts II.A and B, NS has reduced free time for private cars and revised its congestion charge rule to increase its ability to charge for private cars held in its yards. NS also has told Dow that it ultimately wants no more than one day of customer inventory in its yards. If NS's congestion and storage practices achieve NS's goal of reducing the cars in its yards, NS will have fewer opportunities to generate revenue from storage and congestion charges, but its customers will need switches. By increasing its switch charges by an amount equivalent to over four days of storage charges for non-hazmat cars, NS will be able to offset some of this lost revenue.

D. UP's Not Prepared for Service charge

UP has begun assessing a “Not Prepared for Service” charge regardless of whether Dow’s readiness for service has an adverse impact on UP’s operations. Effective January 1, 2019, UP started the roll out of its Not Prepared for Service rule, under which it would assess a \$400 charge for each released railcar that UP is unable to pull or spot due to customer actions. UP Tariff 6004-C, Item 9055-D (current version at Item 9055-E). UP recently modified the rule on May 8, 2019, to make the charge applicable on an occurrence basis, rather than per railcar, and to allow three non-chargeable occurrences per month. UP Tariff 6005-C, Item 9055-E (eff. May 8, 2019). Examples of when this charge may apply include when a car is not placed at the agreed upon location for pickup, when a car is not ready to be pulled, or when a customer refuses delivery of a car. *See id.*

Although the purpose of this charge is to “improve cycle times and provide more reliable train service,” UP applies the charge in situations that do not affect its service or reduce the service burden on UP. *See* Announcement CN2019-6 from Kenny Rocker, Executive Vice President, Union Pacific to Customers (Mar. 1, 2019), <https://tinyurl.com/yy5yh9x>. An example of this is when UP drops off and picks up cars on the same trip, which is typical in Dow’s experience, especially at larger facilities. In this scenario, where UP is already making a trip to the facility, UP does not incur an additional operational burden if it cannot pick up some of the cars that were released, but otherwise still drops off or picks up other cars. UP might even incur less operational burden if it has to drop off cars and the cars it needs to pick up are not available. Nevertheless, UP may count this scenario as an occurrence under its Not Prepared for Service rule.

E. UP Despacho Previo charge

Dow predicts that recent changes to UP's Despacho Previo program will result in an estimated \$1.3 million cost increase to Dow. Despacho Previo is a program under which UP moves Mexico-bound railcars to interior U.S. yards, where it builds run-through cross-border trains with cars that have received clearance from Mexican customs. UP, Despacho Previo, <https://www.up.com/customers/mexico/despacho/index.htm> (last visited May 5, 2019). UP assesses a "Document Delay" charge on all Mexico-bound railcars that have not cleared Mexican customs within a certain processing time starting the first 12:01am after the shipper provides shipment instructions to UP. UP Tariff 6004-C, Item 8530-Q (eff. Apr. 1, 2019). As of April 1, 2019, UP reduced the customs clearance deadline for shipments originating in Arkansas, Louisiana, and Texas from 48 hours to 24 hours, including Sundays and UP holidays, which UP previously excluded. *See id.* In addition, UP raised the Document Delay charge to \$300 per car per day from \$75 per car per day for the first three days. *See id.* UP's policy concerning cars that have not cleared customs at an origin facility is to either: switch out the car, if UP has time, and assess a \$180 intra-plant switch per car or block of cars; or pull only the cars up to the uncleared car and assess its \$400 Not Prepared for Service charge for the uncleared car and the block of cars behind it. Dow has multiple concerns with these changes.

If UP assesses a Not Prepared for Service charge, because of an uncleared car, it will unfairly punish Dow and recover more than its cost to accept the uncleared car. If UP were to accept the uncleared car, it would still earn a \$300 per day fee from Dow for the uncleared car, which compensates UP for having to hold the car pending clearance. But if UP were to reject the car and assess a \$400 Not Prepared for Service charge, it would recover more than its cost of accepting the uncleared car. There is no reason why UP should recover a higher fee when it

rejects a car, and such practice would unfairly punish Dow solely because UP decided to reject an uncleared car.

UP may assess the Document Delay charge on uncleared Dow cars while they are in UP-operated storage yards that Dow pays for. Dow has multiple storage yards for which UP controls the switching and release of cars per an agreement between Dow and UP. If Dow orders UP to send one of these cars to Mexico and does not provide UP with customs clearance within 24 hours of providing disposition instructions, UP could treat the car as being on its system and assess a Document Delay charge on it. This practice is inconsistent with UP's stated purpose of Despacho Previo, which is to reduce congestion, because it results in a charge on cars that are sitting in Dow-acquired storage where they do not congest UP's system. Moreover, it amounts to a double-charge to Dow, because Dow must pay the Document Delay charge, which appears to cover storage of uncleared cars on UP's system, on top of the storage charges it already pays to UP for use of the storage yards.

UP did not provide sufficient notice of the changes to the processing time and Document Delay fee. Specifically, UP notified Dow of the changes to the processing time and Document Delay fee approximately one month before they became effective. Not until the effective date of the changes did UP provide sufficient clarification about how it would assess the Document Delay fee. This did not provide Dow enough time to adjust its customs clearance process to meet the reduced processing time and avoid the Document Delay fee. Historically, Dow's processes for obtaining customs clearance started with providing shipment instructions to UP. This triggered car weighing and other events necessary to obtain customs clearance, which Dow normally obtained approximately 24-48 hours after providing shipping instructions. Given the complexity of the entire work process for Mexico customs clearance, a month's notice is

insufficient to enable Dow to develop alternative work processes that would complete as many pre-clearance events as possible before sending shipping instructions to UP, which triggers the processing-time clock.

F. Administration of private car storage and accessorial rules

1. Railroads provided insufficient notice of the changes to their private car storage and accessorial practices.

Railroads have implemented many recent changes to their storage and accessorial rules on 45 or fewer days' notice, which is faster than Dow could make corresponding adjustments to its operations. As a result, Dow has incurred increased storage and accessorial charges that possibly could have been avoided if it had been given reasonable notice. This is wholly inconsistent with the railroads' purported purpose for these changes, which was to provide an incentive for rail customers to make operational adjustments that reduce rail congestion and increase rail network efficiency. As a result, railroads have been able to generate revenue from rail customers who are open to making the operational adjustments the railroads desire.

Indeed, many of the adjustments that Dow must make to avoid charges under the changed storage and accessorial rules require substantial time to implement. For example, free time reductions and congestion charges require Dow to obtain additional storage, either by acquiring nearby storage track or constructing additional storage track, or to upgrade its loading and unloading capabilities. These adjustments take much longer than 45 days to implement, especially given that they require extensive coordination and planning and many railroads have recently begun to refuse to enter storage track agreements.

Also, Dow must make many adjustments to account for changes to longstanding storage and accessorial practices around which Dow designed its rail facilities and operations. In some cases, these changes affect facilities and rail operations that Dow and the rail carrier had jointly

optimized. Making infrastructure and operational adjustments at these facilities to accommodate changed storage and accessorial practices requires careful planning to minimize disruption to the facility, which could easily spill over to the serving railroad's operations.

Dow's experience at its NS-captive Kankakee facility provides an example of changes to storage and accessorial rules that occurred faster than Dow could make necessary operational adjustments. Before NS eliminated its free time on private cars and revised its congestion-fee rule, Kankakee had sufficient storage to minimize Dow's exposure to storage and congestion charges. After NS's recent changes, however, Dow must build or lease additional storage track to continue minimizing its exposure to storage and congestion charges at Kankakee. Dow could not reasonably make these adjustments within the short notice NS provided for its rule changes. Building track requires a long term initiative, both because of the expense to build the track and the lack of space at the facility. Similarly, Dow has not been able to lease additional nearby storage track.

Dow has experienced a similar issue at its Gulf Coast locations, which include massive installations with multiple chemical plants, tenants, and rail yards. Dow and UP had jointly designed rail operations and facilities to optimize them for these locations. UP's recent changes to its Despacho Previo program will disrupt this optimization by requiring Dow to adjust its processes for releasing outbound cars and hold these cars at plants for a longer time. Because the necessary process adjustments affect various independent processes, including customer billing and customs clearance processes, making the adjustments requires extensive and careful coordination within Dow and externally.

2. Railroads have been reluctant to coordinate with Dow on solutions that reduce congestion, storage, and accessorial charges.

In Dow's recent experience, railroads have been internally focused on transitioning to new service models, without considering the impact of this transition on their customers. For example, NS has voiced little concern about the impact its changes are having on Dow's Kankakee facility and supply chain. In fact, it has indicated that it wants no more than one day of Dow inventory in its yard serving Kankakee, even though NS knows this would be unworkable for Kankakee given current rail service variability. Further, NS has been reluctant to assist Dow with finding additional storage for Kankakee cars.

Railroads also have refused to adopt suggestions that would reduce the congestion they are so desperately trying to eliminate. For example, a Dow-customer location that NS serves also can receive service from CSX Transportation (CSXT). Dow has suggested a reciprocal switch to CSXT near the customer location, since NS has an existing reciprocal switch in place with CSXT for other industry in the same city as the customer's facility. NS will not allow the switch, even though it would eliminate congestion on NS from Dow cars awaiting delivery to the customer. Accordingly, NS, a revenue adequate carrier, appears more concerned about earning revenues on captive traffic than solving its purported congestion issues.

3. The data and processes necessary to dispute private car storage and accessorial charges are inadequate.

Dow has had difficulty validating and disputing charges and credit awards because of inadequate data and dispute resolution processes. Often, Dow relies on railroad data to determine whether storage and accessorial charges are valid or to identify whether railroads have awarded sufficient credits for rail service issues. In many cases, obtaining this data is difficult, because it requires extensive research on the railroads' web sites. For example, bills assessing storage charges often do not include the original estimated time of arrival (ETA) for affected cars, which

is sometimes necessary to determine whether Dow is entitled to offsetting credits. Dow must scour the railroad's website for this ETA data, even though the railroad used the data to generate its bill and could have easily included it in the bill. Also, concerning NS's congestion charges, NS does not identify the cars for which it is assessing the charges, and when Dow requests a list of these cars, NS takes months to provide it. At the very least, railroads should provide easily accessible data to support their charges and enable Dow to determine that it has been awarded sufficient credits for service failures.

Further, Dow has concerns about the short deadlines railroads provide for disputing charges, especially considering the difficulty Dow has had obtaining validating data. NS provides only 30 days to dispute a storage invoice. NS Tariff 6004-D, Item 950 (eff. Apr. 1, 2019). In addition, NS charges a *non-refundable* \$500 handling fee if a dispute is not received by the fifth day of the month after demurrage accrual closes, which essentially discourages disputes that are not raised immediately. *See id.*

4. Dow is not receiving credits for bunching unless it occurs on the delivering carrier's line.

Although railroads have policies under which they provide credits if they deliver bunched cars, these policies have a glaring exception: no credits are awarded for bunching that occurs on an upstream carrier. Moreover, NS does not provide credits to offset its congestion charges arising from bunching, even if NS causes the bunching.

This practice of withholding credits for bunching is especially troubling because it penalizes Dow for bunching that is beyond Dow's control. Dow simply has no say in whether any railroad bunches Dow's cars while enroute to their destination. Thus, storage and congestion charges do not deter bunching; they merely generate revenue for the railroads.

Indeed, Dow has incurred storage and congestion charges from NS's delivery of bunched shipments to Dow's Kankakee facility. This bunching may occur with the upstream carrier at the East St. Louis gateway, which is before NS receives the shipments and outside of Dow's reasonable control. NS has not provided any credits to offset the storage and congestion charges resulting from the upstream bunching.

III. Railroads should have reciprocal service obligations.

Although recent changes to railroad storage and accessorial rules increase Dow's accountability to the railroads when Dow activities have the potential to disrupt rail operations, railroads have no reciprocal obligation when their service failures disrupt Dow's operations. This practice is commercially unfair and enables the railroads to ignore the significant costs that arise from rail service failures.

Rail service failures have serious consequences for Dow and its customers. The materials that Dow receives and ships by rail are necessary for Dow and its customers to operate. Thus, at the very least, rail service failures require Dow and its customers to maintain excess inventory of rail shipments and the additional railcars and storage needed to support this inventory. Moreover, service failures can and do cause Dow to reduce or suspend operations. These operational slowdowns and shutdowns are costly, because they result in lost business, they end with startup operations that often consume substantial raw materials without producing acceptable finished product, and they do not absolve Dow of its obligations to pay for the staffing, equipment, and facilities involved in the operation.

In fact, there are many common service failures that have significant consequences for rail customers and are analogous to rail customer conduct that results in charges from the railroads, such as:

- Missed, early, or late switches. For example, if UP misses a switch at a Dow facility, Dow may need to make costly operational adjustments to avoid a shutdown, and UP pays nothing. In fact, if UP fails to deliver a car, delivers the wrong car, or places a car at the wrong location, Dow is not entitled to damages. But if Dow fails to place a car on the appropriate track for pickup by UP, UP may assess a \$400 Not Prepared for Service charge.
- Failure to deliver cars when ordered. For example, if NS fails to deliver cars when ordered, Dow may need to slow or shutdown operations. But if Dow does not order in cars by midnight on the day NS constructively places them, Dow incurs storage charges.
- Bunching on a connecting carrier. If Dow congests an NS destination by sending more railcars than it can process, NS will assess storage and congestion charges. But if NS delivers cars bunched by a connecting carrier and Dow is unable to accept them, NS fails to waive any resulting storage or congestion charges.

IV. Dow would like the STB to consider taking certain post-hearing actions.

Dow respectfully requests that the Board take the following actions after its hearing.

First, the Board should investigate whether the railroads are reporting revenue from all demurrage, storage, and accessorial charges in the quarterly reports they submit in response to Chairman Begeman's December 17, 2018, requests. As explained above, Dow understands that NS does not report revenues it receives under its congestion charge rule (NS 8002-A, Item 6265). This charge is essentially an extension of the penal element of NS's demurrage and storage charges. If NS is omitting this charge from its reporting, NS is distorting the true scope of the revenues it receives from demurrage- and accessorial-type charges. Should any railroad's

reporting be incomplete, the Board should require the railroad to update past reports to account for the missing information and to include complete information in future reports.

Second, the Board should initiate a rulemaking proceeding to establish rules for billing and disputing storage and accessorial charges. These rules should require railroads to make the information necessary to audit storage charges, accessorial charges, and credits readily available to their customers. They also should specify the minimum period for filing disputes, establish clear deadlines for railroads to respond to disputes, and prohibit “handling” fees that merely serve to discourage claims.

Third, the Board should establish clear guidance identifying demurrage, storage, and accessorial practices that are unreasonable. This guidance should address the reasonableness of demurrage, storage, and accessorial charges that penalize customers for inefficiency where the railroad has no reciprocal obligations for its service failures. It also should address reasonable notice of changes to demurrage, storage, and accessorial rules. In addition, it should address the reasonableness of charges arising from bunching on an upstream carrier and other circumstances beyond the reasonable control of a rail customer.

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