



November 6, 2019

Surface Transportation Board
Attn: Docket No.757
395 E Street SW
Washington, DC 20423-0001

Re: Policy Statement on Demurrage and Accessorial Rules and Charges

The National Mining Association (NMA) submits the following comments in response to the Surface Transportation Board's (STB) proposed policy statement providing principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. NMA is the national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members rely on rail transportation to ship coal and minerals throughout the nation, and benefit from shipping rates that are fair and predictable. NMA members are directly impacted when the demurrage and accessorial charges that are levied do not reflect the cause of those delays, or cannot be predicted in advance or understood when a shipper receives a bill.

NMA appreciates that the Board's attention and response to the testimony and submissions received from over 90 interested parties subsequent to the Oversight Hearing in May 2019. NMA is encouraged by the Board's demurrage policy guidance and call for good faith negotiation and problem solving between shippers and railroads on demurrage practices and charges. In the proposed policy statement, the Board has accurately recognized the need for fair and balanced policies on the various problems raised by shippers regarding free time, bunching, over lapping charges, credits, notice of tariff changes and issuing demurrage invoices directly to shippers instead of warehouse operators. Acknowledging the ongoing failures of current demurrage policy is an important step towards a more fair and efficient framework. However, the Board's proposed policy statement fails to mandate any significant policy changes to improve the reliability, predictability, or consistency of rail car deliveries (service) for shippers. The policy statement also does not make any determination regarding the reasonableness or lawfulness of demurrage rules and charges.

NMA strongly agrees with the Board's statement that "[c]harges assessed for circumstances beyond the shipper's or receiver's reasonable control would, as a general matter, not fulfill the purpose of demurrage." EP 757 Policy Statement at 7. The Board's proposed policy also refers to the need for transparency and mutual accountability between shippers and railroads. However, the Board does not propose to make any binding determinations that would require rail carriers to adhere to demurrage and accessorial policies that would keep these charges within the bounds of their intended scope. Greater specificity and established standards for demurrage charges would avoid requiring rail customers to bring cases regarding egregious demurrage and accessorial charges to the STB.

The resolution of demurrage issues through piecemeal appeal to the STB adds cost and delay to an already time consuming and burdensome process of disputing demurrage charges. NMA members and a host of allied shipping interests participated in the public hearing in May and urged the STB to use its existing authority to adopt specific rules governing demurrage and accessorial practices, and to require rail carriers to modify their tariffs accordingly. Shippers also urged the Board to conduct follow-up monitoring of rail carrier demurrage charges, rather than require shippers to pursue relief through filings or petitions seeking relief.

In addition, a wide range of shippers stressed the need for improved reciprocity between carriers and rail customers at the two-day Oversight Hearing. While the proposed policy statement does state implicitly on page 7 that "it is unreasonable to charge demurrage for delays attributable to the rail carrier", the Board's proposed policy statement does not include any enforcement mechanism or affirmative accountability for railroads. There is no requirement that the railroads to pay for any delays they have caused or prohibition on collecting demurrage from shippers if the railroads caused their own delay. Instead, the burden is on the shipper to contest shipper delays that are caused by carrier actions, such as bunching or missed switching.

NMA believes that railroad tariffs should contain specific language that sets forth, to the maximum extent possible, when a rail shipper is excused from paying accessorial or demurrage charges because it is either not the cause of the action triggering the charge or the railroad is at fault. The Board should also consider requiring in tariff rule language a similar approach that the Federal Energy Regulatory Commission uses when penalties are imposed to enforce rule compliance for transmission providers and pipelines. The carriers collect proceeds (or demurrage) from customers when appropriate, but do not retain those proceeds. Instead, the carriers are required to issue credits and/or distribute the proceeds to those customers that followed the rules. The charges do not function as a profit center.

The proposed policy statement acknowledges that demurrage serves a valuable purpose to encourage efficient use of rail assets by holding shippers accountable for their actions or operations that delay or cause inefficiencies. However, as mining shippers have

noted, demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers. Charges should not be assessed in circumstances beyond the shipper's or a receiver's reasonable control. Charges should also not be assessed at unreasonably high levels as to become punitive.

The Board also disregards shippers' concern that implementation of Precision Scheduled Railroad (PSR) has disrupted and undermined service for shippers. PSR, with very limited exception, has provided benefits and efficiencies for the carrier exclusively, often to the detriment of the utility and producer community, by making less capacity and services available with greater restrictions, for the primary purpose of increasing rail carrier efficiency and productivity and lowering the operating ratio. PSR is the primary cause for the increase in demurrage and accessorial fees that railroads are assessing due to circumstances beyond the shipper's control and at higher cost levels than can be considered reasonable. Furthermore, even after a customer pays these charges, there is no certainty that the locomotive power will be returned on the date requested. NMA members report a numerous instances in which a train was not returned to service until several days or weeks after an advance notice request for return to service.

PSR seeks to lower the carrier's operating ratio by, among other things, minimizing capital assets, reducing converting switch rail operations to batch processing, adopting lean manufacturing principles, simplifying work tasks, and eliminating low return functions through cutting back of services. However, the benefits of to the rail freight customer appear nonexistent. NMA members have experienced bunched railcars, insufficient locomotives availability, inadequate staffing levels, and deficient customer service compared to previous levels. PSR creates service issues and delays beyond the shipper's control, yet the railroads are now imposing higher rates and penalty charges under the demurrage and accessorial rules. These increased charges do not incentivize shipper behavior to improve efficiency, but instead force shippers to receive an inferior and inadequate level of service.

The STB has jurisdiction over railroad rate and service issues such as those created by PSR, and those rates for captive shippers as well as other charges should be reasonable. The Board should use its existing authority to address the usefulness and fairness of such practices as PSR.

Coal shippers and receivers have invested billions of dollars of capital to improve the operational and financial efficiency of the rail carriers with no guarantee of a return on their investment. This massive contribution to rail carrier efficiency includes: purchasing, leasing and maintaining a private fleet of rail cars; accommodating increased train lengths by installing rapid loading and unloading systems at origin and destination; installing multiple loop tracks; being able to load and unload, including providing locomotive crews and even third-party locomotive switching on a 24/7 basis to accommodate railroad schedules; and lastly, maintaining large coal stockpiles at both

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origin and destination to compensate for “surge or smoothing” capacity in the rail system, all at no cost to the rail carrier.

The coal customer’s financial investment has enabled the railroads to reduce their rolling stock, locomotive power, crews and surge capacity. However, in return for this massive investment, the railroads impose demurrage charges for any train delays beyond times set by the railroad for loading and unloading and reduce the availability of locomotives and crews to the point of unpredictability in service for trains at origin and destination. The final policy statement adopted by the Board should acknowledge and seek to resolve the lack of fairness, reciprocity, and reasonable protection for the shipper’s significant capital investment.

NMA appreciates the Board’s attention to this critical issue and for the opportunity to submit comments in response to the proposed policy statement on demurrage and accessorial charges. The proposed policy statement is a positive first step towards more efficient and equitable demurrage policy. The STB must ensure that there is fairness and reciprocity of risk and rewards between carriers and shippers. NMA welcomes the opportunity to continue working with the STB to improve rail system efficiency and implement a framework that reduces the costs borne by shippers for rail delays.

Thank you for your consideration of these comments.

Sincerely,



Adam Eckman
Associate General Counsel