

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. EP 757  
Policy Statement on Demurrage and Accessorial Rules and Charges**

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**OPENING COMMENTS OF  
THE OMAHA PUBLIC POWER DISTRICT**

Pursuant to the Notice of Proposed Statement of Board Policy served by the Surface Transportation Board's ("STB" or "Board") in this docket on October 7, 2019 ("*Policy Statement*"), the Omaha Public Power District ("OPPD") hereby submits its opening comments on the *Policy Statement* and the various proposed guidelines and principles contained therein.

**I. Identity and Interest of OPPD**

OPPD is a publicly owned electric utility headquartered in Omaha, Nebraska that provides electricity and other services to 846,000 people located in service territory encompassing 13 counties and 5,000 square miles in central Nebraska. In addition to participating in the Southwest Power Pool to market electricity, OPPD generates approximately 12,000 gigawatt hours of power annually via several modes, which include its North Omaha Power Station ("NOPS") and Nebraska City Power Station ("NCPS"). NOPS and NCPS are in part fueled by several million tons of coal OPPD purchases from mines in the Powder River Basin in Wyoming ("PRB"). The coal is currently transported to NOPS and NCPS by the Union Pacific Railroad Company ("UP") from the PRB pursuant to a contract OPPD and UP entered into in 2013. In late 2018 UP materially amended the common carrier terms and conditions (referred to as "tariffs" for convenience) it has put in place to govern the transportation of PRB coal, some of which are incorporated by reference into OPPD's contract. These amendments have substantially modified the prior relationships

between UP and its coal customers by (1) eliminating certain provisions that established when the customers were not responsible for certain accessorial charges; (2) placing all authority for determining when a customer is not liable for a charge because it is not at fault in the sole discretion of UP; (3) substantially placing the burden and responsibility for tariff-related issue notification, tracking, researching, and disputes on the customer; and (4) omitting any means for the customer to have a reciprocal ability to incentivize the railroad to efficiently utilize the railcars the customer supplies to the railroad in order to receive coal transportation.

## **II. Comments of OPPD on *Policy Statement***

### **A. The Board Should Clarify that the *Policy Statement* Applies to Accessorial Charge and Practices**

As a shipper who transports coal in unit trains of railcars that it provides to the Class I railroads for this service – at present UP – OPPD is increasingly subjected to the imposition of accessorial charges and related practices. *See, e.g.*, Written Submission of the National Coal Transportation Association (“NCTA”) in Docket EP 754, *Oversight Hearing on Demurrage and Accessorial Charges* (“*Oversight Hearing Proceeding*”), for examples of accessorial charges that are now assessed unit train coal shippers by UP.<sup>1</sup> As the Board heard from NCTA and other stakeholders in that proceeding, the assessment of accessorial charges by the Class I railroads entails many of the same unreasonable practices as their demurrage charges. These unreasonable practices include customers being assessed charges despite the carrier being at fault or when the circumstances are beyond the shipper’s reasonable control to prevent, insufficient free time to load or unload a unit train, carrier-caused bunching of unit trains, erratic rail service, inaccurate and unwarranted invoicing, and unreasonable and onerous dispute resolution practices.

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<sup>1</sup> *See also*, Statement of Betty Whalen, President, Western Coal Traffic League, (“WCTL”) submitted in EP 754 on May 8, 2019.

While Docket EP 757 is entitled *Policy Statement on Demurrage and Accessorial Rules and Charges*, the majority of the discussion and proposed policy guidelines address only the demurrage practices of the railroads. For example, the Historical Overview and General Principles section of the *Policy Statement* is almost exclusively a discussion of the history and general rules governing demurrage. Moreover, OPPD notes that the Board has used too narrow a definition of “accessorial charges” for purposes of the *Policy Statement*. As the written submittals by NCTA and WCTL and others in EP 754 summarized, the true breadth and scope of accessorial charges that unit train coal shippers are subjected to in today’s railroad industry go far beyond merely “charges for diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering on railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions.” *Policy Statement* at 2, note 3.<sup>2</sup>

The *Policy Statement* contains no definitive declaration by the Board that the general guidelines or principles the STB proposes would apply to demurrage disputes would also be applied in disputes over accessorial practices and charges. Since these principles should also apply the accessorial charges and practices of the Class I railroads the final *Policy Statement* should include a more robust discussion of how its general principles and guidelines apply to accessorial charges and practices. In EP 754 the Board received a great deal of written and oral testimony describing how Class I railroads are now assessing extremely high accessorial charges related to

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<sup>2</sup> The definition of “accessorial charge” in the *Policy Statement* is narrower than the definition used by the Board when seeking industry stakeholder input in the *Oversight Hearing Proceeding*, where the Board stated in part that “[a]ccessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges.” EP 754, *Notice of Public Hearing* at 1, note 1. OPPD submits the broader definition is correct and should be utilized in the final *Policy Statement*.

unit train and other transportation. Accordingly, OPPD submits the final *Policy Statement* should include a summary of the legal rules that would be applicable in disputes over the level of accessorial charges in addition to standards for assessing the reasonableness of accessorial practices. For example, the Board should elaborate on its general statement that “issues relating to accessorial charges may arise in proceedings before the Board in a variety of contexts”<sup>3</sup> by providing a summary of each of the contexts and the legal rules applicable to challenging the reasonableness of accessorial charges.

To the extent the Board believes different general principles and guidelines should apply to accessorial charges and practices than those the Board intends to apply to demurrage charges and practices, it should clearly identify and explain these differences.

B. The *Policy Statement* Does Not Sufficiently Address the Lack of Reciprocity Between Railroads and Shippers Regarding Car Usage

Much of the written submissions and testimony in the *Oversight Hearing Proceeding* informed the Board about the lack of reciprocity between rail carriers and their shipper customers concerning their respective use of rail cars. Numerous rail shippers provided examples of how railroad demurrage and accessorial charges and practices hold shippers to extremely onerous, and in some cases unachievable standards in the name of railcar and equipment efficiency, but railroads themselves refuse to be held to any standards that would penalize them for their inefficient use of private railcars. Like many shippers of PRB coal OPPD owns and maintains a large fleet of railcars that it supplies to UP in unit trains, all at OPPD’s cost. While UP assesses OPPD accessorial charges if OPPD does not strictly comply with UP’s terms and conditions (and in some cases where OPPD is not at fault for the circumstances giving rise to the charge), UP’s terms and conditions contain virtually no provisions that penalize UP for its service failures or other

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<sup>3</sup> *Policy Statement* at 2, note 2.

inefficient use of OPPD's fleet, let alone fully compensate OPPD for the costs it incurs from UP's inefficiencies. Despite all of the information and examples of the lack of reciprocity in the rail industry today, the Board's *Policy Statement* contains virtually no discussion of this serious problem. OPPD implores the STB to revisit this issue in the final *Policy Statement* and provide guidelines and principles that would aid industry stakeholders in remedying situations where a lack of reciprocity exists.

C. The Policy Guidelines Correctly Recognize the Contribution Inconsistent Railroad Service has to Unfair Demurrage and Accessorial Charges and Practices

Although the *Policy Statement* does not directly address the lack of reciprocity issue, OPPD supports the Board's recognition that general guidelines and policies to govern demurrage and accessorial charges should relieve shippers and receivers of liability when the charges result from inconsistent or variable railroad service. In the area of "carrier-caused circumstances" that might give rise to situations beyond the shipper's reasonable control where demurrage or accessorial charges would not be appropriate, OPPD would add that in the coal unit train area, in addition to carrier-caused bunching, the Board should include: (1) inadequate available railroad crews, (2) inadequate notifications of train arrival, (3) railroad decisions of which unit train to stage for unloading(*i.e.*, if more than one train is at a facility, the railroad may wrongly choose to dump an incoming train and let a train already waiting continue to wait, and (4) railroad equipment problems that slow down the dumping of a unit train.

OPPD also fully supports the Board's general policy guideline that a shipper is not responsible for demurrage or an accessorial charge if the basis for the charge is beyond the reasonable control of the shipper or receiver, such as unloading disabilities, weather and railroad-caused problems like missed switches, bunching, etc. OPPD suggests that unit train coal shippers would benefit from the Board elaborating on examples of "reasonable rules and practices for

dealing with, among other things, variability in service and carrier-caused bunching . . . and for ensuring that shippers and receivers have a reasonable opportunity to evaluate and order incoming cars before demurrage begins to accrue.”

D. Demurrage and Accessorial Charge Invoicing and Dispute Resolution

The *Policy Statement* recognizes that Class I railroad demurrage and accessorial charge invoicing practices, combined with opaque and unreasonable dispute resolution procedures, have greatly contributed to the high level of frustration among rail shippers and receivers. OPPD has experienced many issues with invoices submitted by UP, with the primary problem in OPPD’s experience being the lack of information substantiating the reason for the charge combined with UP placing 100% of the burden on OPPD to contest the charge. OPPD therefore concurs with the Board’s guidelines that demurrage and accessorial charge invoices should be clear, accurate, and contain sufficient information for the rail user to determine why it is being charged and ensure that the charge has been correctly calculated pursuant to the applicable tariff terms and conditions. The Board is correct that rail carriers should issue a bill for demurrage or for an accessorial charge “only when the charges are accurate and warranted, and consistent with the purpose of such charges.” *Policy Statement* at 16. However, the Board should expand and clarify its expectations on how a railroad would make this determination, and what remedies would be available for the rail shipper or receiver if a railroad violates this requirement.

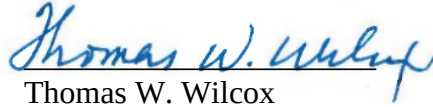
Moreover, OPPD concurs “[r]ail shippers and receivers should be able to review, and necessary, dispute charges without the need to engage in a forensic accountant or expend ‘countless hours and extra overhead’ to research charges and seek to resolve disputes.” *Id.* at 16. Over the past nine months OPPD personnel have spent many man hours analyzing and contesting demurrage and accessorial charges UP has assessed it. The *Policy Statement* contains several very general statements about dispute resolution terms and conditions, such as “rail shippers and

receivers should be given a reasonable time period to request further information and to dispute charges, and the rail carrier likewise should respond within a reasonable time period.” *Id.* at 17. However, the current unfair and one-sided dispute resolution procedures, where 100% of the burden is on the shipper to prove it is not responsible for a particular charge, require the Board to provide additional, detailed guidance on the minimum standards for a reasonable dispute resolution process. The Board could provide specific guidance on timeframes for requesting and receiving information regarding a dispute, and reasonable times for a dispute to be reviewed and resolved.

### **III. Conclusion**

In conclusion, OPPD generally supports the general principles and guidance set forth in the Policy Statement, but there are several areas the Board should address and/or amplify in the final version of the *Policy Statement*. It should clarify that the general principles and guidance apply equally to accessorial charges and provide additional discussion on the general standards and rules that would apply to complaints challenging accessorial charges and practices. The Board should also more fully address the very critical issue of lack of reciprocity between railroads and private car owners and lessees regarding the efficient use of railcars. Finally, the Board should expand its discussion of reasonable invoicing practices and provide more detailed guidance on what it considers reasonable dispute resolution procedures.

Respectfully submitted, .



Thomas W. Wilcox  
GKG Law, P.C  
1055 Thomas Jefferson St, NW  
Suite 500  
Washington, D.C. 20007  
202-342-5248

*Attorney for the Omaha Public Power  
District*

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