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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY COMMENTS OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

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 North America Freight Car Association ("NAFCA") hereby submits these reply comments that address several points raised by the Association of American Railroads ("AAR") and echoed by its Class I railroad members in their individual comments on the *Policy Statement* and the various proposals contained therein.

The AAR comments take issue with the STB's salutary proposed general guideline that:

where demurrage charges are imposed for circumstances beyond the shipper's or receiver's reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency – the stated rationale for and objective of the rail carriers' demurrage rules and charges – and the purpose of demurrage is not fulfilled. Charges assessed for circumstances beyond the shipper's or receiver's reasonable control would, as a general matter, not fulfill the purpose of demurrage.

Policy Statement at 7. In response to this logical and fundamentally fair policy, the AAR submitted a legal brief that discusses AAR's view of the law governing the historical "compensation" and "penalty" components of demurrage in order to advance a position that the *Policy Statement* must be revised to state "[t]he law is well settled that assessment of demurrage charges in no way

depends on a finding of shipper or consignee fault,” meaning that demurrage charges may still be assessed if neither the shipper nor the railroad is at fault for the delay giving rise to the charge. Comments at 6, citing *Foreston Coal Int’l, Inc. v. Baltimore & Ohio R.R. Co.*, 349 I.C.C. 495, 500 (1975). As an initial observation, the AAR’s extensive discussion of the historical “compensation” and “penalty” components of demurrage and their apparent current relevance in this proceeding is inconsistent with the Comments previously filed by the AAR in EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*. There, the AAR concluded it was “no longer necessary or appropriate” after the Staggers Rail Act of 1980 for demurrage charges to be broken down into their compensatory and penalty elements. AAR Comments in EP 754, filed June 6, 2019 at 8 (AAR EP 754 Comments).¹ Be that as it may, the AAR’s view of the applicable law is not correct. In the first place, the AAR’s heavy reliance on *dicta* contained in the 44-year old *Foreston* decision for its recommended correction to the *Policy Statement* is clearly misplaced and is directly contravened by numerous other Interstate Commerce Commission (“ICC”) and STB decisions. Specifically, and significantly, in *Foreston* the demurrage charges at issue were not even established by a railroad in its tariffs in the normal course, but were instead formally imposed by the ICC via an emergency Car Service Order for the purpose of alleviating “the acute shortages of open-top hopper cars throughout the country.” 349 I.C.C. at 496. The acute shortage in part was “the holding of cars by shippers for loading, unloading, or instructions for movement, in excess of the free time periods established by the applicable demurrage and detention tariffs.” *Id.* To address the emergency, ICC Emergency Service Order No. 5 suspended all other applicable railroad tariffs, and rules and regulations. The emergency order was applicable regardless of any lack of fault on

¹ The AAR’s Comments in EP 754 were submitted after the public hearing where AAR produced no witness to give testimony or, more significantly, take questions from the Board members on its positions.

the shipper's part. In the appellate court decision upholding the *Foreston* decision – which AAR conspicuously omits from its Comments - the shippers' attack on the charges established by the ICC was deemed to be an improper challenge to “the fundamental power of the Commission to issue the order,” and their request for a refund of charges was “collateral to the attack upon the order itself.” *Island Creek Coal Sales Co. v. ICC*, 561 F.2d 1219 (6th Cir. 1977). Consequently, the underlying facts and *dicta* in *Foreston* have no application to the issues being addressed in this docket and provide no support for AAR's assertion that its legal position is “well settled.”

A review of other cases cited by the AAR reveals they, too do not support its position that in all cases a shipper is required to pay demurrage charges “unless the railroad is at fault for causing the delay or detention, even if the shipper is not at fault.” Comments at 2. For example, *Drummond & S.W. Ry. V. Chi. St. P. M & O Ry. Co.*, 21 I.C.C. 567 (1911) did not even involve a situation where a shipper was assessed demurrage, as AAR represents. *Id.* Rather, it involved the assessment of demurrage from *one railroad to another*, apparently because the tracks of the carrier receiving the invoice were rendered unsafe by heavy rains. Similarly, in *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009), the railroad assessed demurrage on a third party listed as a consignee on the bills of lading but not a party to the shipping contract. Similarly, *CSX Transp., Inc. v. Meserole St. Recycling*, 618 F. Supp.2d 753 (W.D. Mich. 2009) also involved the assessment of demurrage on a third party not a party to the shipping contract. The AAR merely recites *dicta* in those cases that it believes supports its position.

Nor does AAR's reliance upon *Chrysler Corp. v. N.Y. Cent. R.R. Co.*, 234 I.C.C. 755 (1939) support its view of the law, and in fact the decision actually refutes it, because in that case the ICC (1) specifically acknowledged there were exceptions to the hard and fast rule the AAR advances (*id.* at 758), and (2) further noted the doctrine of “*vis major*” (*i.e.* force majeure):

has been applied to excuse the nonperformance of duties which were prevented by natural forces wholly beyond the control of human agencies. *Under this doctrine it has been held that a shipper was not liable for demurrage on cars*, the release of which was prevented by an unprecedented storm causing a washout on the shipper's logging road. *Southern Ry. Co. v. White*, 284 Fed. 560.

Id. at 759 (emphasis supplied). Rather than supporting the AAR's position, this decision supports the Board's policy guideline that shippers and receivers should not be held responsible for any demurrage charges when charges are assessed for circumstances beyond the shippers' reasonable control. As yet another example of how AAR's claimed statement of the law is not supported by the precedent it cites, *N. Am. Freight Car Ass'n v. STB*, 529 F.2d 1166 (D.C. Cir. 2008) dealt in pertinent part only with the question of the extent to which a shipper must present evidence that demurrage charges are caused by variations in service that are the fault of the railroad, leading to the charges being excused. *Id.* at 1173. Nowhere in that opinion did the court state, let alone hold as AAR represents, that a shipper must always pay demurrage "even if the shipper was not at fault" if the railroad is not at fault. AAR Comments at 3.²

In contrast to the cases cobbled together by AAR to try and support its erroneous view of the law, there are numerous agency decisions and court opinions that clearly establish that in cases where the shipper is not at fault and the railroad is also not at fault, the railroad may not collect 100% of its demurrage charge, and the agency has the discretionary authority to excuse payment of charge in its entirety. These cases provide ample support for the *Policy Statement*. Such cases

² Other examples include *Am. Smelting & Refining Co. v. Director Gen., As Agent, Baltimore & Ohio R.R. Co.*, 69 I.C.C. 229 (1922)(which involved a unique "substitution arrangement" where the shippers agreed to be charged demurrage in exchange for the railroad unloading coal cars of multiple shippers into vessels based on arrival time in order to maximize loadings). The more recent cases cited, such as *Portland & Western R.R. Inc- Petition for Declaratory Order – RK Storage & Warehousing, Inc.*, STB FD No. 35406 (Served July 26, 2011), make no mention of the rule AAR espouses.

include *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647 (1972), where the ICC summarized the applicable rule to be:

Where the consignee exercised due diligence and the proximate cause of the detention was attributable to neither the shipper nor the carrier, the penalty portion of the charge has been remitted because it was futile as a deterrent against excessive demurrage. Obviously, railroads should not be permitted to make sizable profits of a shipper who is powerless to act.

Id. at 651(citations omitted). In *Monongahela Power Co. v. I.C.C.*, 640 F.2d 504 (4th Cir. 1981), the court upheld the ICC’s application of this rule, noting that where there is “a straight demurrage situation the ICC has, *with consistency*, ordered reparation of the ‘penalty’ portion of demurrage charges on proof that the shipper was not the proximate cause and acted with due diligence.” *Id.* at 506 (emphasis supplied). The court strongly indicated further that the ICC had the discretion under its governing statute to excuse the *entire* charge, stating that “[t]he question is simply whether the charge, clearly applicable, shall nevertheless under *the ICC’s discretionary power to abate applicable tariffs and other charges*, be forgiven to the extent the penalty portion of the demurrage of the grounds that, under the circumstances, it is unreasonable.” *Id.* at 507 (emphasis supplied), *citing Prince Mfg. Co. v. Norfolk & Western Ry*, 356 I.C.C. 702 (1978), where the ICC stated (emphasis supplied):

where demurrage charges penalize a shipper who is powerless to avoid or abate the detention of cars because of circumstances beyond its control, they do not accomplish their purpose. Therefore, penalty charges have been found unreasonable and remitted upon a showing by the shipper (or consignee) that it was not the proximate cause of the detention and that it exercised due diligence in releasing or attempting to release the railroad equipment.

Apart from the decisions it erroneously relies upon, the AAR cites to no statutory authority that supports its argument that the *Policy Statement* is not supported by law and must be revised as AAR suggests. This is because 49 U.S.C. §10746 gives the STB broad discretionary authority

regarding demurrage practices and therefore provides ample authority for the *Policy Statement's* guidelines that would excuse the entire demurrage charge in the event the shipper is unable to comply with the railroad's demurrage policies due to circumstances beyond its control that it cannot avoid through due diligence. Excusing the entire charge rather than just the "penalty" portion is further supported by the AAR's admission in its filings, as well as the testimony of railroad witnesses during the hearing held in EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*, that despite their reliance upon the demarcation of "compensation" and "penalty" portions of demurrage, *none of the Class I railroads establish their demurrage charges in a way that defines what portion is "compensation" and what portion is "penalty."* AAR EP 754 Comments at 8-9.³

Undeterred by the fact that its Class I railroad members' demurrage charges no longer have distinguishable penalty and compensation components due solely to their choice, and indeed apparently *because* of this choice, the AAR now advances the convenient position that unless it can clearly be demonstrated that the railroad is at fault for the delay giving rise to the charge, it

³ At the EP 754 hearing Board Member Oberman persistently questioned Class I railroad witnesses on the extent to which their charges were comprised of compensation and penalty components. To the extent they did not avoid answering the questions altogether, the Class I railroad witnesses confirmed that their demurrage charges do not separate out the penalty and compensation portions. See, Transcript of May 22, 2019 at 138-139 (CSX Transportation ("CSXT") witnesses saying they'd "have to get back to you" on the breakdown of CSXT's charges and vaguely referencing "commercial sensitivity" issues); 144 (CSXT witness eventually admitting CSXT can't tell how much of their charges are compensation and penalty); 166-167 (UP witnesses avoiding the question with a vague reference to sensitivities regarding "calibrat[ing] rates"); Transcript of May 23, 2019 at 859 (BNSF admitting its charges do not have compensation and penalty components); 863 (Canadian Pacific ("CP") witness also admitting there is no breakdown but conveniently asserting its demurrage charges were 100% compensation, which under AAR's view of the law would mean that CP should always receive 100% of their demurrage charges unless it could be proved that the railroad was at fault for the circumstances giving rise to the charge); and 891 (Canadian National ("CN") witness asserting that CN had done "an analysis" of the question and promising to "respond to this question after and under seal," which did not occur to NAFCA's knowledge).

must be permitted to invoice the shipper for the *entire* demurrage charge, subject to apparently a formal complaint proceeding challenging the reasonableness of the entire charge without even taking into consideration the “compensation” and “penalty” components the AAR extensively discusses and relies upon in its Comments to support its view of the law. *See Id.* at 9.

The fact of the matter is that the Board’s policy guideline that rail shippers should not be responsible for payment of any demurrage charges when they are imposed for “circumstances beyond the shipper’s or receiver’s reasonable control” because “they do not accomplish their purpose to incentivize behavior to encourage efficiency,” is amply supported by the Board’s statutory authority and applicable agency and court precedent. It is also supported by general considerations of fairness and reciprocity. However, to the extent a policy that would excuse shippers from paying the entire demurrage charge in the event the charge is assessed for circumstances beyond the shipper’s control is considered a departure from prior precedent, the STB is always free to take such action if it is rationally explained. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (stating a policy change must only meet three requirements: the new policy must be permissible under the statute; there must be good reasons for it; and the agency must believe that the new policy is better); *Handley v. Chapman*, 587 F.3d 275 (5th Cir. 2009); *Ca. State Grange v. Nat’l Marine Fisheries Serv.*, 620 F.Supp.2d 1111 (E.D.Ca. 2008).

Excusing the entire charge under such circumstances as opposed to entitling the railroad to the compensation component of the charge is warranted because as stated above, the railroads no longer establish demurrage charges which designate the compensation and penalty portions; but also because there is no established formula or common standards for what the appropriate level of compensation should be. The Class I railroads’ view of an appropriate compensation portion of demurrage appears to be strikingly different than the ICC’s and the Board’s. Contrast:

Railroads Per Diem, Mileage, Demurrage – Agreement, 1 I.C.C. 2d 924, 933 (1985) (demurrage charges “are primarily a penalty to deter undue detention, and to a lesser extent compensation to the railroad for expenses incurred,” and STB Docket No. NOR 42102, *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, (STB served July 20, 2010) at 8 (“ . . . demurrage is intended to compensate railroads for the expenses they incur when rail cars are detained by shippers”) with AAR Comments in EP 754 at 3, where AAR asserted broadly without any discernable support⁴ that the “economic underpinnings of demurrage and storage” established by ICC and STB precedent include “(1) charges directly related to freight car utilization; (2) other direct operating costs related to the demurrage process; (3) capital costs related to the demurrage process; and (4) opportunity costs associated with congestion caused by excessive freight car processing.” Given the lack of clear standards or guidelines on the compensation component of demurrage, and the strong possibility of disagreement among industry stakeholders on what such standards or guidelines should be,⁵ to the extent the Board intends to incorporate the notion of dividing demurrage into compensation and penalty portions into its final *Policy Statement*, it must either (1) take additional public comment on compensation standards to be incorporated into the final policy document, or (2) start a rulemaking proceeding to establish what constitutes appropriate compensation for delayed use of railcars for purposes of demurrage charges.

⁴ The AAR’s assertion was challenged in a letter by the National Grain & Feed Association submitted in EP 754 on June 17, 2019.

⁵ Indeed, as stated previously in footnote 3, CP has taken the position that its demurrage charges are 100% compensatory (and so presumably contain no penalty component), and indeed CP followed up its testimony in EP 754 with a statement in this proceeding that “the demurrage that CP collects does not fully compensate CP for its ownership costs.” However, CP has provided no insight on how CP would define such costs. EP 757 Comments of Canadian Pacific at 16.

Finally, NAFCA reiterates its primary position in this proceeding and in EP 754, which is that the STB's rules and policy guidelines regarding demurrage and accessorial charges must be truly reciprocal, given that approximately 74% of railcars in the Nation's railcar fleet are owned by parties other than railroads who have individually invested millions of dollars and collectively invested billions of dollars in railcars, equipment, and track assets in order to obtain rail service. NAFCA reiterates its support for the STB's proposed policy guideline that where demurrage charges are imposed for circumstances beyond the shipper's or receiver's reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency and the purpose of demurrage is not fulfilled. In such cases, the shipper or receiver should not be liable for *any* charges unless it can be shown that the shipper or receiver did not exercise due diligence to avoid or mitigate the charge. This guideline could also be equally applied to the Class I railroads' use of private cars, meaning that railroads should not be penalized for holding onto private cars too long if the delay is beyond their reasonable control they cannot overcome with due diligence. However, if the Board is considering revising its guidelines to permit railroads to collect some portion of their demurrage charges if neither the shipper nor the railroad are at fault for the delay, then the STB must either further amend its guidelines or commence a rulemaking for the purpose of adopting a reciprocal requirement that shippers, private car owners and lessees are entitled to compensation by the railroads for similar "no-fault" delays associated with their use of private cars. Such reciprocity is mandated by the present makeup of the National car fleet, and it is entirely consistent with the AAR's primary rationale for its position, which is that the party who benefits from the use of a car should bear the risk of the delay in accepting or returning the car if neither the railroad nor the shipper is at fault. Comments at 4. It is beyond dispute that the Class I railroads derive tremendous monetary and operational benefits from their use of private cars to

conduct their business, typically at no cost to them. There is no policy or legal reason why entities who provide private cars to the railroads for their use should not be compensated for that loss of use under a policy or rule that entitles Class I railroads to such compensation in instances where neither the shipper nor the railroad is at fault for the circumstances resulting in the charge. See AAR Comments at 5 (citing cases concerning the need to be compensated for the use of cars and tracks they occupy).

In conclusion, NAFCA strongly supports the *Policy Statement*, while continuing to urge the Board to more aggressively adopt guidelines and rules that promote true reciprocity and fairness in demurrage and accessorial charges and practices. True reciprocity, which creates meaningful incentives for the railroads to efficiently utilize private rail cars, will lead to the entire National railcar fleet being operated more effectively and adequately protect the investment of railroads and private entities alike. While NAFCA believes the Board's policy guideline challenged by AAR in its Comments and discussed herein is correct, fair, and amply supported by the law, if the Board revises it to permit railroads to collect some portion of their demurrage charges regardless of shipper fault, then it must adopt a reciprocal requirement for railroads to compensate parties who supply them private railcars under the same circumstances. Finally, NAFCA reiterates its recommendations contained in its Opening Comments that the Board should (1) clarify and expand the final *Policy Statement* to (1) make it applicable to accessorial charges and practices and provide guidance on standards for challenging the level of such charges; (2) expand the circumstances where variations in rail service excuse demurrage and accessorial

charges; and (3) provide more detailed guidance on acceptable invoicing and dispute resolution procedures.

Respectfully submitted,



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