

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE NO. 757 and EX PARTE NO. 759

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES AND DEMURRAGE BILLING REQUIREMENTS

WRITTEN TESTIMONY ON BEHALF OF NATIONAL COAL TRANSPORTATION ASSOCIATION

National Coal Transportation Association (NCTA) respectfully submits the following as its written testimony in response to the Notices of Proposed Rulemaking that the Surface Transportation Board (Board) served in both above-captioned proceedings on October 7, 2019.

1. NCTA is a national organization consisting of electric utilities, coal producers, and entities that have an interest in the production and transportation of coal for the purposes of generating electricity. This group includes entities that produce, repair, and manage all facets of railcar components parts and systems, and also those entities that provide services and products for various operations and environmental compliance requirements at the power plant site. NCTA members have a continuing interest in the direct and ancillary costs of operating and maintaining a modern fleet of railcars to transport coal. NCTA members are also very interested in the fair treatment of shippers regarding the total cost of service, including the cost of building and maintaining the shipper's facilities.

2. Demurrage and accessorial charges are of vital interest to NCTA and its members. Accordingly, John Ward, NCTA's Executive Director, provided written testimony and appeared in person the Surface Transportation Board (STB) Oversight Hearing on Demurrage and Accessorial Charges (Docket No. EP 754) on May 23, 2019.

3. NCTA deeply appreciates that the Board has responded to the testimony and submissions received from over 90 interested parties in response to the Oversight Hearing. NCTA is encouraged by the Board's demurrage policy guidance, demurrage billing requirements and call for good faith negotiation and problem solving between shippers and railroads on demurrage practices and charges. In the proposed policy statement and demurrage requirements, 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.

4. In the proposed demurrage requirements, specifically, the Board proposes two changes to its existing demurrage regulations, (1) minimum information to be included on or with those invoices, and (2) a requirement that Class 1 carriers send any demurrage invoice related to transportation involving a warehouseman to the shipper if the shipper and the warehouseman agree that the shipper should be responsible for paying demurrage invoices, and not require the warehouseman to guarantee payment.

5. NCTA expresses support of the Board for the proposal for the following required minimum billing content to be provided with any demurrage invoice:

- a. The unique identifying information (e.g., reporting marks and number) of each car involved
- b. The following shipment information, where applicable:
 - The date the waybill was created
 - The status of each car as loaded or empty
 - The commodity being shipped (if the car is loaded)
 - The identity of the shipper, consignee, and/or care-of party, as applicable
 - The origin station and state of the shipment.
- c. The dates and times of (1) actual placement of each car, (2) constructive placement of each car (if applicable and different from actual placement), (3) notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable), and (4) release of each car.

6. NCTA also states support that the Board requires that prior to sending a demurrage invoice, Class 1 carriers shall take action to ensure the demurrage charges are accurate and warranted, consistent with the purpose of demurrage.

7. NCTA would like the Board to also include in the Demurrage Billing Requirements that the carriers must use a reasonable time-frame for issuing demurrage billing. As noted by many stakeholders during the two-day Oversight Hearing on Demurrage and Accessorial charges held in May 2019, many shippers have experienced delays in receiving large volumes of demurrage bills as long as six months after the fact. It is extremely burdensome for a shipper to process and reconcile bills that date back as far as six or nine months after the fact. This also proves extremely difficult for those who would dispute such billing. We believe a three month or 90-day time frame limit would be more appropriate for a carrier to issue any demurrage billing to customers. This time allowance would provide a reasonable time for the carrier to issue

the bills and give the customer the benefit of current history from which to research any recent demurrage activity for dispute resolution or billing reconciliation.

8. The coal producers and utilities that make up a large portion of NCTA membership would like to continue to cooperate with the rail carriers in regards to rail system efficiency. NCTA notes the need for accuracy and timeliness in demurrage billing requirements. The proposed rulemaking shows a great deal of progress in responding to the needs of shippers in this area.

9. However, the NCTA is concerned that the Board's proposed demurrage policy statement does not 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.

10. NCTA also notes the Board's proposed policy refers to the need for transparency and mutual accountability between shippers and railroads. The Board does not propose to make any binding determinations, but instead expects that its restraint will facilitate more effective private negotiations and problem solving between rail carriers and shippers. The risk is that the lack of detail will require rail customers to bring specific cases regarding egregious demurrage and accessorial rules and charges to the STB.

11. This approach will likely add cost and delay to an already time consuming and burdensome process of disputing demurrage charges in question. NCTA, along with many other organizations and companies representing rail users appearing at

the May 22-23 public hearing, urged the STB to use its existing authority to adopt specific rules governing demurrage and accessorial practices, and require railroads to modify their tariffs accordingly, and for the STB to then conduct follow-up monitoring of rail carrier's tariffs, rather than require shippers to pursue relief through filings or petitions seeking relief.

12. A wide range of shippers stressed the need for a measure of reciprocity at the two-day Oversight Hearing. While EP 757 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 for 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.

13. NCTA submits 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. NCTA further submits that the Board should consider requiring in tariff rule language a similar approach that FERC 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.

14. The NCTA notes that the Board 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 NCTA and many other 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.

15. The Board also does not address shippers' concern that implementation of Precision Scheduled Railroad (PSR) has disrupted and undermined service for shippers. PSR has, with very limited exception, 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. One carrier recently more than doubled accessorial charge to disconnect locomotives and reconnect locomotives for the purposes of laying down a train set (UP Tariff 6603, Item 550). Furthermore, even after a customer pays these charges, there is no certainty that the locomotive power will be

returned on the date requested. NCTA members report a number of instances where a train was not returned to service until several days or weeks passed after an advance notice request for return to service.

16. PSR seeks to lower the carrier's operating ratio by, among other things, minimizing capital assets, converting switch rail operations to batch processing, adopting lean manufacturing principles, simplifying work tasks, and eliminating low return functions through cutting back of services. How PSR benefits the rail freight customer remains unclear. NCTA members have experienced bunched railcars, insufficient locomotive 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 per the demurrage and accessorial rules. These increased charges do not incent shipper behavior to improve efficiency, but instead force shippers to receive an inferior and inadequate level of service.

17. The STB by its own mandate has jurisdiction over railroad rate and service issues such as those created by PSR, and those rates for captive shippers and all practices and charges are to be reasonable. Again, it appears the burden is placed upon shippers to bring forward these unfair practices to the Board's attention. We would like to see the Board use its existing authority to address the usefulness and fairness of such practices as PSR.

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

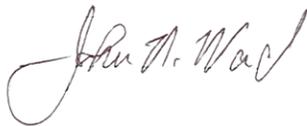
19. The coal customer’s financial investment has enabled the railroads to reduce their rolling stock, locomotive power, crews and surge capacity. However, in return for this massive investment, the railroads impose demurrage charges for any train delays beyond times set by the railroad for loading and unloading and reduce the availability of locomotives and crews to the point of unpredictability in service for trains at origin and destination. The Board’s policy statement does not address the lack of basic fairness, reciprocity, and reasonable protection for the shipper’s huge capital investment that so far appears to be an unconsidered and unrecoverable expense simply to receive whatever service the carriers decide they wish to provide.

20. NCTA sincerely appreciates and commends the Board for this opportunity to submit written comments in regards to the policy statement on demurrage and accessorial rules and charges in EP 757 and demurrage billing requirements in EP 759. The coal producers and utilities that make up a large portion of NCTA membership would like to continue to work with the rail carriers to improve rail system efficiency and

achieve mutual operational and/or financial benefits. While the rail carriers continue to experience robust financial prosperity, the coal industry itself continues to be fraught with financial difficulties, competing energy market forces and public policy headwinds. We believe it is imperative that the coal industry continue to supply a stable, reliable, and cost effective fuel supply to consumers worldwide. We also firmly believe the STB must ensure there is fairness and reciprocity of risk and rewards between carriers and coal shippers.

In addition, NCTA joins in the comments of the Western Coal Traffic League and the Freight Rail Customer Alliance, many of whose members are also NCTA members.

Respectfully submitted,

A handwritten signature in cursive script that reads "John N. Ward".

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