



National Grain and Feed Association Oral Statement Talking Points for Surface Transportation Board Public Hearing on Railroad Demurrage/Accessorial Charges and Practices (EP 754)

Presented May 22, 2019

Introduction

Good afternoon, Chairman Begeman, Vice Chairman Fuchs and Commissioner Oberman. I am Randy Gordon, president and CEO of the National Grain and Feed Association (NGFA). I am accompanied by NGFA Transportation Counsel Tom Wilcox, a partner in the Washington-based law firm of GKG law.

We appreciate the opportunity to summarize the major points in the NGFA's May 8, 2019 filing, as well as to bring additional information to the Board's attention that we believe only strengthens and reinforces the need for the Board follow up this public hearing with further action to facilitate the adoption of commercially fair and practicable, as well as reciprocal, demurrage and accessorial charges and policies by the Class I railroads.

The NGFA consists of more than 1,100 member companies that operate grain-handling, feed and feed ingredient, grain and oilseed milling and processing, biofuels, exporting and other grain-related businesses.

Combined, NGFA's members operate more than 7,000 facilities and handle more than 70 percent of the nation's grain and oilseed crop. We're also pleased to note that NGFA's written statement is supported by the Corn Refiners Association, National Oilseed Processors Association, North America Freight Car Association and North American Millers' Association.

Let me start by thanking Chairman Begeman and the Board for focusing on this important issue, and the obvious diligence with which you've done so. Doing so has put a spotlight on the fact that many current railroad practices related to demurrage and accessorial charges are neither commercially fair, commercially practicable given the operations of their customers' facilities, nor reciprocal in nature. We believe that in far too many cases, current demurrage and accessorial charges and practices merely exemplify the market power of today's Class I railroads, reflected in their ability to unilaterally impose one-sided terms and conditions on their customers "just because we can," as one railroad executive told an NGFA member. There is no question that the Board's attention has brought increased transparency on these practices and triggered what has been a pent-up groundswell of concern among rail customers, as evidenced by the heavy participation in this hearing.

Frankly, NGFA members in some segments of our industry believe they are at a "tipping point" in their relationship with their Class I rail carriers.

In our time today, NGFA wishes to do three things:

- First, we want to highlight several examples of Class I railroad tariffs that we believe contain commercially unfair, commercially unachievable and non-reciprocal demurrage and accessorial

charges and practices, and ways they could be modified to be less egregious. Several of these examples were contained in our admittedly lengthy written statement, and have been documented by NGFA's Rail Shipper/Receiver Committee since December 2018. But we have several additional examples we'd like to bring to the Board's attention today.

- Second, NGFA wishes to highlight the disparity in dispute-resolution procedures available to shippers and receivers for challenging inaccurate or unjustifiable demurrage and accessorial charges, including several that we believe are designed to intimidate aggrieved parties from ever filing a dispute.
- Third, and most importantly, NGFA would like to present for the Board's consideration a path forward to develop policy principles and guidance directing that the railroads modify their tariffs to be more commercially fair, practicable and reciprocal, and the legal basis and justification we believe the Board has for doing so.

I will address the first two elements, and ask that Mr. Wilcox discuss the third.

Before doing that, though, it's important to reiterate the huge change in the rail marketplace since the advent of demurrage and accessorial practices. In addition to the obvious profitability of the Class I railroads post-Staggers Act, today's rail customers – not the railroads – supply the vast majority of the nation's railcar fleet, including 100 percent of the tank cars, nearly 80 percent of the grain hopper cars, and more than 70 percent of the total railcar supply.

In addition, many rail shippers and receivers have invested tens of millions of dollars at individual facilities to acquire, expand, operate and maintain track and other physical loading and receiving assets, as well as hired additional personnel to perform tasks previously done by Class I railroads (including loading and unloading of cars, inspecting cars and trains prior to departure, intraplant switching of railcars, assembling unit and manifest trains, building side tracks for car storage and other tasks).

Meanwhile, the number of tariff provisions pertaining to demurrage, car storage and accessorial charges has expanded significantly during the past six years, and those charges have increased dramatically. Further, these tariff changes often are being imposed unilaterally with little to no recognition of the investment made by customers in their facilities and operations. In fact, in the longer-term, we believe the current statutory 20-day notice requirement for tariff changes needs to be increased significantly to provide sufficient protection to rail customers. In some cases, they are being implemented with less than the required 20-day notice, such as Norfolk Southern's \$100 per-car charge that took effect immediately for situations where it removed or reattached a locomotive to a train.

Examples of Commercially Unfair/Impracticable and Non-Reciprocal Demurrage and Accessorial Charges and Practices

NGFA's written statement notes the majority of complaints received from its members have been associated with demurrage and accessorial charges and practices implemented by the Union Pacific and Norfolk Southern Railways.

But these practices are not limited to those two carriers, and NGFA believes this matter needs to be addressed by the Board by establishing a specific set of policy principles.

- First, each tariff should be evaluated from the standpoint of commercial fairness and whether it is achievable given best practices of the shipper or receiver. One example cited by many parties in this proceeding is the reduction of “credit” days to zero. Such provisions should be presumptively unreasonable. A minimum of 24, or even 48, hours of free time should be permitted to load or unload a train once it is actually placed at a rail customer’s facility. In this regard, UP concedes in its May 8 statement to the Board that its unilateral reduction in free time to unload cars to 24 hours from the previous 48 is a major factor in its increased demurrage revenues.
- Second, tariffs should be required to contain clearly stated and monetarily comparable reciprocal provisions that will apply to the railroad if it is at fault or the rail customer is not responsible for delays – such as spot-and-pull delays – including private cars. A classic example here is UP’s so-called “not-prepared-for-service” tariff requirement (Tariff 6004, Item 9055). Even as amended by UP on May 8 – curious timing given this was the date written responses were due in this proceeding! – this tariff *still does not adequately address* situations where UP is the cause of the customer not being ready for service. For instance, NGFA is told UP cannot even inform shippers within eight hours of when its crews will arrive to spot or pull a car.

The same principle applies to UP’s policy (General Rule Item 9613) that penalizes rail customers \$10,000 per occurrence if they cancel unit trains within 48 hours of the forecasted date of release. Reciprocity should require that an equivalent penalty should apply to UP when its crews and locomotives do not arrive to pick up a loaded train within 48 hours. We cite other UP examples, such as unit train laydown charges, asset utilization charges and deadhead charges that are neither commercially fair nor reciprocal.

BNSF Railway also states, in its May 8 filing with the Board, that its “practice is to excuse demurrage charges” imposed on affected shippers if BNSF is responsible for delays and inefficiencies that result in such charges. But there is no mention of reciprocity.

- Third, some Class I railroad tariffs previously contained language that excused demurrage and accessorial charges caused by the rail carriers’ bunching of cars. Bunching is a significant reason for many accessorial charges being assessed in today’s industry. Consequently, tariffs should be required to contain language that specifically spells out when charges will be waived because of bunching.
- Fourth, some railroads’ debit-and-credit systems are vague, while others are commercially unfair. In this category, NGFA cites two specific examples in NS’s tariff (NS Tariff 6004) on credit days and storage charges for private cars, which is skewed heavily toward the customer always paying demurrage, regardless of the specific circumstances. Rail tariffs should be specific and unambiguous regarding debit-and-credit procedures.
- In other cases, NGFA believes that charges being imposed clearly are commercially unfair and unreasonable. These include several Canadian Pacific Railway and CSX Transportation Co. tariffs, as well as several additions that NGFA members just recently identified and which are not included in NGFA’s written statement.

These include: 1) a \$500-per-car diversion charge even if CP is responsible and even if the reason is to divert empty cars to load-balance private cars (CP Tariff 2, Item 41); 2) a \$535-per-car charge if a car must be switched onto a train after being set-off at an unplanned location, with no reciprocity provided if CP causes the set-off (CP Tariff 2, Item 23); 3) a \$125-per-mile special train service even if CP is at fault; and 4) a \$110 fee to collect justified refunds.

Dispute-Resolution

Next, let me briefly highlight NGFA's concerns regarding existing procedures available to rail customers to resolve disputes involving demurrage and accessorial charges. By omitting or eliminating tariff language that specified when demurrage and/or accessorial charges would be waived, credits issued, or the absence of customer fault recognized, the Class I railroads have given themselves sole discretion to make such determinations if a dispute occurs. NGFA's written statement documents the one-sided nature of most of these dispute-resolution mechanisms, and the rail carriers' own filings document that they collect the vast majority of their claimed amounts.

One railroad – BNSF Railway – states in its tariff that it will arbitrate “all disputes, claims, questions or controversies arising out of charges assessed” under its Tariff Book (4022-M, 13000-Series) and Demurrage Book (6004, Item 5000) involving the transportation of grain or grain products under the NGFA's Rail Arbitration Rules unless the parties otherwise agree. In addition, NGFA learned for the first time from the UP's filing on May 1, 2019 in response to the Board's April 8 data request pursuant to this docket that it *purportedly* “has agreed to arbitrate contested demurrage and accessorial charges using a number of commodity or mode-specific rules,” and cites NGFA's Rail Arbitration and the Board's Arbitration Program as being among them. However, NGFA has not been able yet to locate specific language to that effect in UP's tariffs.

In addition, in response to questions posed earlier in this public hearing, NGFA's Rail Arbitration Rules, established in 1996, require NGFA rail carrier and rail customer member companies to arbitrate “disputes involving the *application of* a railroad's demurrage rule(s) or term(s).” [Emphasis added.] Thus, the railroad tariff's commercial fairness, practicability or reciprocity is *not* subject to compulsory arbitration under NGFA's system – only how those tariffs are “applied” – even if the application of those terms is commercially unfair, unachievable in practice and non-reciprocal. Thus, as a full-throated proponent of alternative dispute resolution, the NGFA believes that absent a clear set of STB-established basic ground rules outlining what demurrage and accessorial practices are – and are not – acceptable, arbitration, too, would be a cumbersome process by forcing the current myriad of questionable practices to be resolved in individual disputes rather than having some eliminated by the existence of basic principles of whether a tariff is commercially fair, practicable and reciprocal.

An example that NGFA believes clearly is commercially unreasonable is one already cited by Commissioner Oberman: NS's Conditions of Carriage (#1E, Rule 300) asserting its right to recover “all reasonable costs of collection (including, but not limited to reasonable attorneys' fees, investigation costs, expert fees and litigation costs),” as well as finance charges against any unpaid demurrage and storage charges, accessorial charges and other types of charges. There is no reciprocity if a rail customer prevails. In NGFA's view, this language has a chilling effect on a rail customer's willingness to challenge an NS charge. NGFA's written statement cites UP tariff language that has a similar effect. NGFA also is informed that under CP's 15-day timely dispute process, it typically responds to a customer dispute by asserting that its computer system prevails,

and rendering a verdict “dispute declined,” with no further explanation. In these instances, too, we believe the Board should rule that such language is presumptively commercially unfair and non-reciprocal.

Let me now ask Mr. Wilcox to discuss how NGFA respectfully suggests the Board proceed to address these and other concerns raised by rail customers in this proceeding, and the legal basis we believe the Board has for doing so. **Tom....**

NGFA Recommendations to the Board

1. The length of NGFA’s submission is due in part to the fact that NGFA has been looking closely at these issues since last summer. That review included an examination of the various statutory provisions and decisions that would govern the Board taking action in the area of demurrage and accessorial charges.
2. NGFA believes the Board has ample authority to direct the railroads to modify their current tariffs to be more reciprocal and commercially fair, and it should do so as an outcome of this proceeding.
3. NGFA’s comments starting at page 29 summarize the Board’s authority and applicable precedent.
 - a. Includes 49 USC §§10702, 10746, 11121 and 11222.
 - b. We cite several decisions where the Board held that mere statements from railroads about how they intend to interpret their tariffs in dealing with their customers – many such statements the Board has been hearing from Class Is in connection with this hearing – are not acceptable if there is no support in the tariff language. [See page 35 of NGFA’s statement.]
4. At a minimum, to be reasonable, demurrage and accessorial tariff provisions clearly should establish the conditions when a shipper is not liable for demurrage and accessorial charges, either because of carrier fault or other circumstances beyond the shipper’s control. But true reciprocity and fairness goes a step beyond waiver or nonpayment of charges because the harm to shippers extends beyond the amount of the charge to the harm to their investment in cars and other assets, and harm to their business operations., Accordingly, reciprocity means holding railroads accountable for their inefficient use of private railcars and other rail customer assets through assessment of charges or other penalties to incentivize efficiency.
5. The general approach of the STB for demurrage and accessorial charges has been that if a shipper has been unable to resolve a dispute commercially, relief was best addressed through the Board’s alternative dispute resolution (ADR) process or by filing a formal complaint. Example: EP 707, 4/12/14 Decision at 23-24.
6. But, ADR has not shown itself to be an effective solution. More significantly, as the Board is hearing in detail in this hearing, the advent of PSR over the past several years has resulted wholesale changes to nearly all Class I railroad demurrage and accessorial practices. The pace and breadth of the changes has been rapid and staggering.
7. Resolving all issues through individual formal complaints would be impossible and administratively burdensome.

8. In addition, as Randy noted previously, the rail industry is very different from when demurrage and accessorial rules were first developed. Nearly 3/4ths of all railcars now are privately owned or leased; and shippers have spent billions on assets and functions railroads used to provide.
9. Therefore, NGFA believes there is a pressing current need for the Board to act by developing and providing specific guidance and policy direction to restore balance and to improve the industry as a whole.
10. As discussed on pages 34-35 of NGFA's statement, the process the STB followed in EP 661, *Rail Fuel Surcharges*, lends itself to the circumstances and issues in this proceeding:
 - a. There was no complaint and no declaratory order. But the Board proceeded under its Section 10702 authority "to adopt rules of general applicability for future conduct to address an unreasonable practice." The Board first conducted a hearing like this one, then a few months later issued a decision with proposed guiding principles and rules to govern railroad fuel surcharge practices.
 - b. After taking public comments on its proposals the Board issued final guidelines and directed the railroads to conform their practices to the findings in the decision within 90 days.
 - c. NGFA suggests that such a process should be used here, with the additional component that the Board retain oversight to monitor changes to railroads' tariffs rather than require compliance questions to be pursued in a formal complaint proceeding.
 - d. Shippers could file "show-cause" filings if they believed a particular railroad has not complied with the Board's directives.
 - e. An alternative could be a process where shippers filed petitions for declaratory order asking the Board to declare whether the changes are consistent with the Board's policy directives.
11. While not a substitute for the Board's complaint process, the issuance of specific guidelines hopefully would eliminate many current issues, and make the overall situation more balanced, fair and efficient overall.
12. In any event, NGFA believes it is very clear that the Board needs to step in and take action to provide guidance and restore some balance, and it has the authority to do so as part of this proceeding. NGFA would be pleased to provide the Board with any additional information it believes it needs to develop and implement specific policy direction and guidance regarding rail demurrage and accessorial charges and practices.

Conclusion

The NGFA appreciates the Board's actions to date regarding this important issue, and its consideration of our recommendations. We'd be pleased to respond to any questions you may have. Thank you.