BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket EP 757

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES

OPENING COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Pursuant to the Notice of Proposed Statement of Board Policy served in this docket on October 7, 2019 ("Notice"), the National Grain and Feed Association ("NGFA") hereby files Opening Comments on the Surface Transportation Board's ("Board", "Agency" or "STB") proposed policy statement on principles the Agency would consider in evaluating the reasonableness of demurrage and accessorial rules and charges.

I. Identity and Interest of NGFA

Established in 1896, the NGFA consists of more than 1,100 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, processing and export industry. The NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

II. Support for NGFA Opening Comments from Other Collaborating Organizations

The NGFA has been authorized to convey that its Opening Comments are supported by the Agricultural Retailers Association ("ARA"), Pet Food Institute ("PFI"), National Oilseed Processors Association ("NOPA"), and North American Millers' Association ("NAMA").

ARA is a not-for-profit trade association founded in 1993 that consists of more than 200 member companies and represents the interests of agricultural retailers and distributors that sell and distribute seeds, nutrients, crop protection products, farm equipment, precision technology and agronomic services to farmers. ARA also has 12 affiliated state and regional associations. Established in 1958, PFI is the trade association and voice of U.S. cat and dog food makers. Its member companies make 98 percent of the dog and cat food produced in the United States, generating more than $30 billion in domestic dog and cat food sales and an additional $1.4 billion in international exports in 2018. PFI also represents more than 50 associate and affiliate members that supply ingredients, raw materials, and related services to dog and cat food makers. NOPA, founded in 1930, is a national trade organization representing the U.S. soybean, canola, flaxseed, safflower seed and sunflower seed crushing industries. Its members include 13 companies that operate 60 soybean and six softseed solvent extraction plants in 22 states and produce meal and oil used in human food, animal feed, fuel and industrial applications. NOPA-member companies process 95 percent of all soybeans in the United States. NAMA is the national trade association of the wheat, corn, oat, and rye milling industries. Its member companies operate mills in 38 states, Canada and Puerto Rico, representing more than 90 percent of total industry production capacity.

III. NGFA's General Views on Policy Statement on Demurrage and Accessorial Rules and Charges

As it has previously, the NGFA commends the Board for the excellent public hearing it conducted on May 22-23, 2019, which provided a much-needed opportunity for a diverse array of rail customers and their associations to express real-world factual examples of egregious railroad practices concerning demurrage and accessorial charges that are neither commercially fair, reciprocal, or commercially achievable or practicable (without incurring charges). The NGFA believes the hearing provided ample and overwhelmingly convincing facts and evidence of the urgent need for the Board to take forceful and decisive action by directing railroads to amend their existing tariffs to come into conformance with these basic standards of commercial fairness, reciprocity, and commercial achievability in the normal course of business. The NGFA also again commends Chairman Ann Begeman for directing that Class I carriers starting in 2018 submit to the STB the amount of revenue being generated through demurrage and accessorial charges, which provided much-needed additional transparency to this matter; we urge that this continue for the foreseeable future.

NGFA's strong preference, as expressed in its Written Submission in Docket No. EP 754, and reiterated and reinforced in its Supplemental Comments, is that the STB utilize its statutory authority and Agency precedent to determine proactively that certain railroad rules governing demurrage and accessorial practices and charges are unlawful, and direct that railroads comply by amending their tariffs accordingly. The NGFA further urged the STB then to oversee the implementation of its directives, which could be accomplished in part through submissions by rail customers of tariff provisions and rules not believed to be in conformance with the Board's rules and directives. For example, rail customers could have submitted "show-cause" filings or petitions, calling on the Board to declare that a given carrier had not complied with the Agency's

policy directives and to take corrective action. We believe this would be a much more accessible, cost-effective and timely approach than the STB issuing general policy guidelines to be fleshed out only through formal complaint proceedings.

The NGFA provided a lengthy discussion of the legal support for the Board to take this approach, including the Board's actions in EP 661 *Rail Fuel Surcharges*, in which there was no complaint or declaratory order seeking a ruling from the STB on the reasonableness of railroad fuel surcharges that were assessed as a percentage of the linehaul rate. Nonetheless, the Board proceeded under its authority under 49 U.S.C. §10702 "to adopt rules of general applicability for future conduct to address an unreasonable practice." In that proceeding, the Board conducted a public hearing (as it did in EP 754) and then subsequently issued a decision with proposed guiding principles to govern rail fuel surcharges. After soliciting and considering public comments on its proposals, the Board – correctly and commendably in the NGFA's view – issued final guidelines and directed freight railroads to conform their fuel surcharge practices accordingly within a specified time period. The Board's actions in EP 661 had the necessary and intended effect, as the Class I railroads eliminated fuel surcharges expressed as a percentage of the rate from their common carrier terms and conditions.

By contrast, the Board in EP 757 has chosen to issue broad policy principles and guidance, rather than formal rules and determinations, on rail carriers' demurrage and accessorial charges. The Board states that through its proposed policy statement, it "expects to facilitate more effective private negotiations and problem solving between rail carriers and shippers and receivers…to help prevent unnecessary future issues and related disputes from arising; and, when they do arise, to help resolve them more efficiently and cost-effectively." The STB further

states that it is "not, however, making any binding determinations by this proposed policy statement." Notice at 3.

The NGFA is disappointed by the Board's proposal not to establish bright-line rules to govern the commercial fairness, commercial achievability and reciprocity of rail carriers' demurrage and accessorial tariffs. We urge the Board to reconsider the approach recommended by the NGFA, which we hasten to reiterate would provide clarity on certain egregious practices while not supplanting the process of disputes being resolved through the filing of a formal complaint. First, while it is possible that finalizing and improving the guidance and principles in the Policy Statement might lead to more disputes being resolved commercially, the reality is that the Class I railroads maintain overwhelmingly dominant market power, with largely non-competitive railroad duopolies existing in the Eastern and Western United States. As has been amply demonstrated, the Class I railroads have little interest or incentive to be forthcoming or altruistic in amending their demurrage and accessorial policies voluntarily to conform with even the best principles and guidance developed by the Board. The NGFA's view is informed and reinforced by the fact that in the six months since the Board's May 22-23 public hearing, it is unaware that ***any*** of the Class I railroads officially[1] have amended their demurrage and accessorial tariffs in a substantive or meaningful way to make them more commercially fair, reciprocal or commercially achievable under real-world business circumstances. As such, the NGFA concurs completely with the Board's statement that "…many of the broader issues raised during, before and after the hearing remain." Notice at 9. In NGFA's view, there is very little

[1] The NGFA is aware that the Union Pacific (UP) Railroad on May 31, 2019 sent an email to at least some of its customers indicating it was making a "program adjustment" to amend its November 2018 unit train forecasting tariff (UP Accessorial Tariff 6004 General Rule Item 9613) to reduce the fee applicable to customer cancellation of a unit train with less than 48 hours of the original release date from the previous $10,000 per occurrence to $2,500 per occurrence. Further, UP has indicated unofficially its intent to change its so-called "not prepared for service" tariff (UP Accessorial Tariff 6004 General Rule Item 9613). But to NGFA's knowledge, neither of these changes has officially been made in UP's applicable tariffs.

prospect that the current situation will improve in any demonstrable way unless significant improvements are made to the Board's proposed approach.

Second, as the NGFA has stated in prior comments and testimony, the concept that general guidelines and principles will be fleshed out informal complaint proceedings – even for the most egregious rail demurrage and accessorial practices and charges – will depend on whether the process and procedures for resolving them is extremely accessible, timely, simple and cost-effective. Later in this statement, the NGFA offers several recommendations in this regard. However, it also should be noted that most formal complaints brought by individual shippers at the Board are settled prior to reaching a decision, which means more often than not a formal complaint does not translate into precedent that is known by or useful to the industry as a whole.

Third, the NGFA also is troubled by the general lack of provisions in the Board's proposal to address reciprocity (with the exception of credits and a few other policy principles that tangentially touch on reciprocity). As such, we recommend within these Opening Comments several additions to the proposed Policy Statement that we believe are essential if the Board is to fulfill its previously stated objectives that demurrage and accessorial practices and charges meet the tests of both commercial fairness and reciprocity.

Fourth, the Board's guidance and principles devote very little discussion addressing accessorial charges and practices. Instead, the Policy Statement applies overwhelmingly to demurrage charges. For example, the Historical Overview and General Principles section of the Policy Statement almost exclusively involves a discussion of the history and general rules governing demurrage. In the specific areas in which the Board proposes to apply its general principles, the sections on Free Time and Bunching in the Policy Statement again are tailored

exclusively to demurrage charges and practices. While the Invoicing and Dispute Resolution section does mention accessorial charges to some degree, it, too, is focused primarily on demurrage billing and invoicing practices.

The Board does provide some proposed guidance regarding accessorial charges in the Overlapping Charges and Credits section of the Policy Statement, but these discussions also are tied to the general principles governing demurrage charges and practices. The general principles the Board has articulated for demurrage charges and practices also apply to accessorial charges and practices, and the Board should clarify and reinforce this in the final version of this Policy Statement. To the extent the Board believes different general principles apply to accessorial charges and practices, it should identify and explain these differences clearly. In summary, the NGFA believes the Board needs to amend its Policy Statement to address accessorial-related issues appropriately.

IV. NGFA's Recommendations if the Board Retains its Current Approach

For these and other reasons articulated herein, the NGFA believes the Board should adopt and incorporate within its Policy Statement several important procedural rules and processes if it ultimately decides to require rail users to adjudicate individual demurrage and accessorial complaints by filing formal cases at the Agency.

The NGFA provides the following specific recommendations:

- **Propose a Rulemaking or Otherwise Adopt a Streamlined and Abbreviated Procedural Schedule for Resolving Demurrage and Accessorial Complaints:** The Board should adopt the concept recommended by its Rate Reform Task Force, which has been modified for inclusion in the Agency's Final Offer Rate Review proposal (EP 665, Sub. No. 2), by implementing an abbreviated and compressed procedural

timeline for considering and ruling on demurrage and accessorial complaints brought by rail users. Expeditious resolution is essential given the impact that rail carriers' egregious demurrage and accessorial tariff practices and charges can have on rail customers' near-term business operations, economic well-being and ability to serve customers, including agricultural producers and downstream users. The NGFA recommends that the Board impose a timeline once a case is filed of no longer than 45 days, and preferably less, to resolve disputes over whether a demurrage and accessorial charge may be assessed in accordance with the Board's policy statements. An even shorter time frame should apply for resolving disputes involving appropriate invoicing and dispute-resolution tariff terms and conditions and practices, which, as discussed later, are more amenable to a declaratory order petition.

To expedite the process, the NGFA believes the Board should impose page limits on submissions filed in such cases, as well as require carriers to suspend the effective dates of their challenged tariffs for the duration of the time period in which the case is being considered and resolved. Further, the Board should consider the appropriate relief (e.g., withdrawal of the tariff changes, requiring amendment of the charge or practice, etc.) to shippers and receivers for demurrage and accessorial tariffs that are challenged successfully, with reparations awarded if warranted.

To effectuate these recommendations, the NGFA believes the Board could develop a streamlined procedure modeled after the "show-cause" proposal contained in NGFA's previous filings in EP 754. In this way, rather than filing a formal case, an affected rail user could submit to the Board "show-cause" filings or petitions seeking to have the STB issue declaratory orders if it believed a given railroad had not

complied with the Agency's demurrage and accessorial principles. The rail carrier then would be able to reply using the streamlined procedural process and timetable recommended above. This would enable the Board to make incident-specific factual determinations while still providing a timely and cost-effective procedure and process for adjudication.

Establishing an expedited timeline and streamlined procedural process is essential if the Board's Policy Statement is to make any meaningful contribution to facilitating reasonable commercial behavior by rail carriers and minimizing or averting economic damage to rail users resulting from carriers' demurrage and accessorial tariffs and practices.

- **Bifurcate the Process in Determining Reasonableness of Charges versus Billing and Tariff Terms, Conditions and Practices:** As noted previously, the Board should establish a separate streamlined process and procedural schedule for considering and resolving disputes involving railroad demurrage and accessorial billing and dispute-resolution practices within 15 days after being filed. The Policy Statement guidance, supplemented by the additional detailed guidance suggested below, should enable the Board to resolve such disputes expeditiously without the need for the full procedures associated with formal complaint proceedings.

  While the Policy Statement contains some useful guidance on billing and dispute-resolution, the number of disputes involving billing for demurrage and accessorial charges would be reduced further if the Board were more precise in its guidance on what "appropriate action" it expects rail carriers to take to ensure that invoices are accurate before they are issued to shippers or receivers in the first place. The NGFA

offered several recommendations in this regard in its Supplemental Comments, including notifying and consulting with the affected rail customer to validate the accuracy and legitimacy of the charge *before* the invoice is issued, and to provide for human – not just electronic – interaction if requested by the rail customer. At a minimum, the carrier should be required to provide a summary of the "appropriate action" it has taken regarding challenged invoices.

- **Establish an Advisory Committee to Provide Input on Implementation of the Board's General Principles on Demurrage and Accessorial Practices:** The NGFA recommends that the Board consider establishing a Demurrage and Accessorial Advisory Committee to assist in monitoring the implementation of its general principles. This concept would be similar to the approach adopted by the Federal Maritime Commission ("FMC"), which on September 6, 2019, approved the establishment of a "Shipper Advisory Board" to assist in the implementation of recommendations of one of its Fact Finding undertakings (Fact Finding 28).[2] Such an advisory committee would help enable continued monitoring by the Board of changes in carriers' demurrage and accessorial rules, practices and charges that may warrant modifications of the Board's general principles.

  Indeed, FMC's approach, involving the issuance of an "interpretive rule" providing "guidance as to what it will consider in assessing whether a demurrage or detention practice is unjust or unreasonable" under the Shipping Act (46 U.S.C. §§ 801-842) is not dissimilar to what the Board is proposing in this docket. Specifically, the FMC's interpretive rule incorporates a "non-exclusive list" of general guidance contained in

[2] Federal Maritime Commission, https://www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/, September 6, 2019.

its Fact Finding 28 final report issued in December 2018 that found significant benefits would accrue to the "U.S. international ocean freight delivery system and the American economy as a whole" from: 1) transparent, standardized language for demurrage and detention practices; 2) clear, simplified and accessible demurrage and detention billing practices and dispute-resolution processes; 3) explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and 4) consistent notice to cargo interests of container availability. The FMC notes that the Shipper Advisory Board will "most immediately" assist in implementing the Fact finding 28 recommendations, "but in the future will advise the agency on matters of concern and priority to domestic importers and exporters….to enhance the competitiveness of the U.S. freight delivery system."

- **Updating the Board's Policy Principles:** The NGFA believes the Board also should articulate in its Policy Statement that it is a "living document" and will be revisited from time-to-time by the Board and updated as conditions warrant. Further, we believe the Board, like the FMC, should indicate within the Policy Statement that it is a "non-exclusive list" of principles, and that other matters also may be considered by the Board as part any adjudication of demurrage and accessorial complaints that are filed.

V. NGFA-Recommended Refinements to the Board's Proposed Policy Guidance

The NGFA offers the following comments on specific aspects of the Board's proposed general policy principles:

- **Free Time:** The NGFA fully agrees with the Board's statements that "…rail carriers presented limited data on the extent to which changes to their demurrage

rules and charges caused reductions in loading and unloading times, as compared to the times prior to the changes." Further, we fully concur that the Board – like rail users – has every reason to be "…troubled by the impacts of reductions in free time to rail users and the potentially negative consequences of providing no credit days for private cars if rail carriers do not have 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." Id. at 11. In addition, the Board rightfully notes that it has "serious concerns about the reasonableness of reductions in free time that make it more difficult for shippers and receivers to contend with variations in rail service and do not serve to incentivize their behavior to encourage the efficient use of rail assets." Id. at 12. But unfortunately, the Board fails to address adequately within its proposed guidance these findings – as well as myriad others articulated by the NGFA and other organizations comprised of rail users.

Thus, the NGFA believes the Board should amend its policy guidance to state that rail carriers generally should provide a minimum of 24 to 48 hours of free time to load or unload agricultural products after ***actual placement*** of the cars at the facility during its normal business hours (unless otherwise mutually agreed to by the shipper and carrier and provided that the rail customer has not directed that the cars be held by the railroad in constructive placement at a rail serving yard). In addition, the Board's guidance should state that it will look with disfavor on providing zero free time. We cannot envision that ***any*** of the conditions cited by

the Board as potentially justifying reductions in free time (e.g., advances in "technology or productivity," "service improvements," reducing systemic problems with inefficient behavior or practices by shippers or receivers" or other "rail…tariff provisions or program features") would make NGFA's recommended 24- to 48-hour allowance for free time unjustified or unreasonable. Id. at 13. Without some policy yardstick for assessing whether the allowance of free time is reasonable, this guidance principle will have limited meaning or utility.

In addition, the Board should include in its policy guidance a statement to the effect that rail carriers should make their tariffs reciprocal, by providing remuneration to rail customers if carriers fail to make actual placement of cars in accordance with the train's trip plan within the same time frame that they provide to the shipper or receiver through allowance of free time.

- **Bunching:** The NGFA appreciates the Board's recognition that bunching of rail cars at shippers' and receivers' facilities is a major problem that must be addressed. Bunching not only results in unjustified demurrage and accessorial charges from carriers, but causes significant business interruptions and resulting costs – creating congestion and tying up track space that often prevents loading or unloading of cars or shipping of loaded trains, with deleterious impacts on the affected facility, its suppliers (including farmers) and downstream customers.

  The NGFA appreciates and supports the Board's Policy Statement that reads: "[w]here rail carriers operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled."

However, we encourage the Board to more clearly state that in these cases of carrier-caused disruptions and variations in service, demurrage and accessorial charges generally would not be justified. For example, shippers transport agricultural products to numerous different destinations with numerous associated transit times. This "customer mix" invariably results in bunching of empty return cars and, subsequently, demurrage charges. These incidents have increased given unilaterally imposed reductions in service frequency as an outgrowth of carriers' implementation of the so-called precision schedule railroad operating model. The NGFA believes service variability (e.g., missed service days when, contrary to historical transit times calculated using several weeks' worth of rolling averages, switches are not provided by railroads) also needs to be addressed from a reciprocity standpoint in the Board's Policy Statement. Simply put, if the railroad is operating in a predictable manner, shippers and receivers are expected to perform efficiently. From a reciprocity standpoint, if the railroads don't perform predictably, shippers and receivers still are expected to perform efficiently, but should have a remedy (e.g., reparations) if unpredictable railroad performance causes bunching, variations in service or related issues. As such, the NGFA recommends that the Board add provisions to its policy guidance to the effect that carriers should provide reciprocity to rail shippers and receivers when the carriers' actions are responsible for bunching or result from variations in service, missed switches, etc., at origin or destination.

- **Overlapping Charges:** The NGFA commends the Board for recognizing within its general policy guidance the practice of several Class I railroads in assessing

congestion and other fees in addition to demurrage and accessorial charges – in essence "double-dipping" by imposing charges on the same issue – and at times doing so when the railroad is responsible for the congestion or delay. This is not unlike the previous behavior of carriers that imposed fuel surcharges at levels far exceeding their actual increased cost of fuel or that already had been embedded in their line-haul freight rates. The Board rightfully states that it would have "significant concerns about the reasonableness of any tariff provision that sought to impose a charge, in addition to the otherwise-applicable demurrage charge, for congestion or delay that is not within the reasonable control of the shipper or receiver to avoid. Notice at 15.

However, the NGFA encourages the Board to expand upon its policy guidance by also referencing the fact that rail carriers' imposition of private car storage charges and embargoes to address congestion also will be considered by the STB in determining the fairness of congestion and demurrage charges.

Further, the NGFA urges the Board to add to its guidance a reciprocity component by recommending that carriers' tariffs contain clearly stated and monetarily comparable reparations if the carrier causes private cars to dwell while in the railroad's custody during the time between empty release and loaded billing, and constructive or actual placement at destination.

- **Invoicing:** The Board rightfully references the evidence presented by the NGFA and a broad range of other organizations representing rail users about the fact that demurrage and accessorial charges are "difficult, time-consuming and costly to dispute; that invoices are often inaccurate or lack information needed to assess the

validity of the charges; and that erroneous invoices are issued even when the tariff expressly provides for relief or the rail carrier has acknowledged its responsibility for the problem, compelling the shipper or receiver to initiate a protracted dispute-resolution process." Notice at 16.

The NGFA also believes it is appropriate and necessary for the Board to retain in its policy guidance, at a minimum, the information it proposes be provided by carriers within their invoices on a car-specific basis: 1) the unique identifying information of each car; 2) the waybill date; 3) the status of each car as loaded or empty; 4) the commodity contained in the car(s) being shipped or received; 5) the identity of the shipper, consignee and/or "care of" party; 6) the origin station and state of shipment; the dates and times of actual placement, constructive placement (if applicable) and release; and 7) the number of credits and debits issued for the shipment (if applicable). But rather than "encouraging" carriers to provide this information, we believe the Board's policy should state that its expectation is that such information will be included in invoices as a matter of commercial fairness, and that failure to provide it would be one of the determining factors in adjudicating invoice-related disputes. In that regard, it should be noted that most of the above-cited data elements already are contained in demurrage billings, which are needed during the audit process in which shippers and receivers now feel obliged to engage.

The NGFA also encourages the Board to expand on its proposed invoice and dispute-resolution guidance in the following ways:

- The Board should clarify and expand upon what it means when stating that rail carriers are to take "appropriate action to ensure that demurrage charges are accurate and warranted," including whether a shipper or receiver should have recourse if it believes the railroad has not appropriately verified the accuracy of its invoices (e.g., the shipper or receiver could be absolved of paying the railroad's invoice, without penalty, pending submission of the dispute to the Office of Public Assistance, Governmental Affairs and Compliance or an STB mediator). Notice at 17. As the Board knows, there is no penalty currently imposed on the railroad for inaccurate invoicing of demurrage, accessorial and other charges, and the rail customer bears the burden of proof to demonstrate that the rail carrier is in error – another example of a lack of reciprocity. As one NGFA member company noted recently, it contests roughly 50 percent of the invoices it receives from carriers, a process that necessitated that it hire additional accounting personnel to fulfill just that function.

- **Dispute-Resolution:** The Board should state in its guidance and general principles that carriers are to clearly articulate within their tariffs their specific dispute-resolution process, including whether they are willing to arbitrate such disputes and, if so, through which forum (e.g., NGFA's, the STB's or others). Id. Further, the Board should be much more specific in its guidance on appropriate dispute-resolution terms. For instance:

- The Board should be more precise on what constitutes a "reasonable time" for a shipper or receiver to request additional information from a carrier and to dispute an erroneous charge (e.g., NGFA has recommended a minimum of 30 days) and for the rail carrier to respond to the shipper or receiver's challenge. Notice at 17.
- The Board should provide within its Policy Statement specific examples of the type(s) of "costs or charges that could deter shippers and receivers from pursuing a disputed claim," such as tariff provisions extracting attorney fees, excessive interest charges, administrative fees, etc. Notice at 17.

The NGFA also believes it would be beneficial for the Board to express within its Policy Statement, as it has previously on other matters, its encouragement that disputes be resolved through arbitration and/or mediation.

- **Credits:** The Board correctly captures the concerns voiced by the NGFA and other organizations regarding rail carriers' restrictive and often unusable credit policies, as well as the lack of reciprocity therein. We commend the Board in its Policy Statement for stating that it "will evaluate how credit rules and practices are administered in determining the reasonableness of demurrage rules and charges when adjudicating specific cases, including, in particular, whether the shipper or receiver has been afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the carrier." Notice at 18. The NGFA also supports the Board's view that its – and shippers and receivers – concerns would be "allayed if shippers and receivers were

compensated for the value of unused credits at the end of each month, rather than the credits merely expiring." Notice at 18.

- **Notice of Major Tariff Changes:** The NGFA supports the Board's recognition that the amount of advance time railroads provide before implementing tariff changes needs to accommodate – as a matter of commercial fairness – the shipper and receiver's realistic ability "to evaluate, plan and undertake any feasible reasonable actions to avoid or mitigate new (demurrage or accessorial) charges. Id. at 19. The severity of this issue has been exacerbated by the advent and implementation of PSR by six of the seven Class I carriers, some of whose actions have undermined, and in some cases negated, millions of dollars of investment made by agricultural facilities in loading and unloading capacity, sidetrack improvements and other enhancements, often made at the encouragement of the very rail carriers that subsequently unilaterally altered their operating plans, often on short notice.

  Therefore, here, too, we believe it is appropriate for the Board to add a provision to its policy guidance regarding reciprocity by stating that railroads, at a minimum, should phase-in tariff changes based upon a recognition of the negative impacts on investments made by shippers and receivers in their facilities, and provide meaningful compensation to rail customers whose investments have been undermined or negated based on the actions of rail carriers in changing their operating plans to maximize their revenues.

VI. Additional Demurrage and Accessorial Issues that Should Be Addressed in the Board's Policy Statement

The NGFA urges the Board to address these additional principles in its Policy Statement:

- **Clarify that the Board's General Principles Apply to Accessorial Practices and Charges:** As stated previously, the NGFA recommends that the Board insert an additional policy principle to clarify that its general principles apply not only to rail carriers' demurrage practices and charges, but also to accessorial practices and charges.
- **Provide a Policy Statement on the Legal Rules Applicable to Challenging Reasonableness of Accessorial Charges that are Not Fuel Surcharges:** The NGFA believes the Board should add a policy principle on the rules under which it will consider the reasonableness of accessorial charges that are not fuel surcharges. The NGFA recommends that the STB's Policy Statement affirm that the level of such accessorial charges can be challenged separately in a complaint proceeding without being part of a rate case. The Board also should articulate a policy on the reasonableness standard that it would apply in such cases, such as the whether the level of the charge meets the threshold test of appropriately encouraging the efficient utilization of assets for both rail carriers and rail shippers' and receivers' cars and tracks.
- **Prohibiting Intimidating Legal Language in Tariffs, Contracts of Carriage and/or Other Documents:** The NGFA in its May 8, 2019 written submission to the Board in EP 754, cited egregious language in some Class I railroad's tariffs that clearly are designed to discourage or outright prevent their customers from challenging tariff provisions that are commercially unfair, commercially unachievable and non-reciprocal. A classic case we cited was the Norfolk Southern Railway's Conditions of Carriage #1E, Rule 300 that stated in relevant

part: "…NS shall have the right to recover from the payor all reasonable costs of collection (including, but not limited to reasonable attorneys' fees, investigation costs, expert fees, and litigation costs), and assess finance charges against unpaid linehaul freight charges, switching charges, demurrage and storage charges, accessorial charges, and any other amounts owed under the governing rate authority, transportation contract, these Conditions, or any other document referenced in Rule 110." NGFA at 27. It is our understanding that NS subsequently modified this section of Rule 300, but the intent of such language to disincentivize shippers or receivers from challenging erroneous charges remains unchanged.[i]

We appreciate the Board's recognition of this matter in its Policy Statement. Notice at 17. However, we recommend the Policy Statement be broadened to prohibit other threatening or intimidating language – in addition to threats to impose costs or charges – in railroad tariffs, contracts of carriage or other documents that reasonably could be interpreted as designed to intimidate, discourage or prevent rail customers from exercising their lawful right to challenge demurrage and accessorial tariff practices and charges.

- **Applicability to Regional and Shortline Railroads:** Given the growing importance and geographical reach of many regional and shortline railroads, the NGFA believes the STB should apply its guidance and principles to Class II and III carriers, as well. Even though these carriers were not a principal focus of complaints brought by rail shippers and receivers during the Board's May 2019 public hearing, advising that they are subject to the same general guidance as the Class I carriers should serve as a deterrent and avoid creating a potential loophole. Class II

and III carriers that are operating based upon the principles of commercial fairness, commercial practicability and reciprocity have nothing to fear from the Board's policy principles.

VII. Conclusion

The NGFA appreciates the Board's multiple actions to date pursuant to these important issues, but respectfully again asks that it reconsider our original recommendation that the STB utilize its existing authority and precedent actions to adopt specific rules – rather than guidance – governing demurrage and accessorial practices and charges, and to require that railroads comply by accordingly amending their tariffs forthwith. This would enable rail customers to submit "show-cause" filings or petitions for declaratory orders if they believe a given carrier has not complied with the Agency's policy directives – a much more accessible, cost-effective and timely approach than requiring compliance questions to be pursued in formal complaint proceedings submitted by rail customers to the Agency.

Absent that, the NGFA respectfully requests that the Board consider the recommendations contained herein to develop as streamlined, timely, cost-effective and accessible a process as possible to enable rail shippers and receivers to adjudicate demurrage and accessorial disputes at the Agency.

The NGFA thanks the Board for considering its views.

Respectfully submitted,

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[i] NS current Rule 300 states, in relevant part: "…(5) NS shall have the right to recover from Payor all reasonable costs of collection (including but not limited to reasonable attorneys' fees, investigation costs, expert fees, and litigation costs) of all amounts owed to NS in the form of linehaul freight charges, and any other amounts owed under the governing rate authority, transportation contract, these Conditions, or any other publication referenced in Rule 110…. (7) NS shall have the right to assess a finance charge of one percent (1%) per month [twelve percent (12%) per annum] against unpaid linehaul freight charges, switching charges, demurrage and storage charges, accessorial charges, and any other amounts owed under the governing rate authority, transportation contract, these Conditions, or any other document referenced in Rule 110….The finance charge will accrue daily beginning on the due date until payment is received by NS."