BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

Written Submission of American Fuel & Petrochemical Manufacturers

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers ("AFPM") is pleased to provide its written submission to the Surface Transportation Board ("STB" or "the Board") in conjunction with its May 22, 2019 hearing on rail carriers' demurrage and accessorial charges. We thank the Board for holding this hearing and for your consideration of written testimony from impacted stakeholders.

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. To produce essential goods, AFPM members rely on a safe, reliable and efficient rail system to move materials to and from refineries and petrochemical facilities. Rail transportation is vital to our members, as well as to manufacturers and customers downstream who depend on our products. Some 3.7 million carloads of our members' feedstocks and products — crude oil, NGLs, refined products, plastics and synthetic resins — were delivered by rail in the U.S. in 2018. To that end, three principles guide AFPM's efforts around transportation and infrastructure issues impacting our members:

1. **Safety & Security** - Ensure the ability to ship feedstocks and products, safely and securely.
2. **Free & Open Markets** - Promote free and open energy markets that benefit the U.S. economy.
3. **Ability to Build & Repair** - Ensure the ability to build, use, repair, maintain and replace energy infrastructure.

The following testimony addresses a number of key challenges faced by our member companies and other freight rail shippers. The Board has an important oversight role in looking at the impact of freight rail policies on rail shippers. Our testimony today focuses on how unreasonable and unchecked demurrage and accessorial charges are in direct contradiction to free and open energy markets. We look forward to working with you to address these challenges.

II. THE LAW PROHIBITS THE RAILROADS' UNREASONABLE PRACTICES.

The primary claim under the Interstate Commerce Commission Termination Act ("ICCTA") that is at issue here is pursuant to 49 U.S.C. § 10702(2), which requires that a railroad "establish reasonable…practices" related to "transportation and service". "[I]n section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or a practice is reasonable; instead, it gave the Board 'broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.'" *North America Freight Car Ass'n, et al. v. BNSF Railway Co. ("NAFCA"),* STB Docket No. NOR 42060 (Sub-No. 1), slip op. at 8 (STB served January 26, 2007) (quoting *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005)). "This broad discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts." *Id.* Moreover, the Board "may adopt rules of general applicability for future conduct to address an unreasonable practice, even though [the Board's] authority to award shipper-specific remedies is limited to a

formal complaint proceeding" where the specific facts are examined. *Rail Fuel Surcharges,* STB Docket No. EP 661, slip op. at 8, (STB served January 26, 2007). Applying that broad discretion and ability to adopt rules of general applicability to the facts at hand, the Board should find the rail carriers' demurrage and accessorial charges addressed herein to be a *per se* unreasonable practice and adopt corresponding rules.

First, with respect to demurrage charges, the Board has looked at the policy behind these tariffs to see if a railroad is being reasonable in their application. "The principle underlying demurrage is straightforward: when a shipper holds a rail car beyond a reasonable time, it is taking up a railroad asset for which the railroad should be compensated. Demurrage charges therefore serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient." *NAFCA,* slip op. at 8. *See also* § 49 CFR 1333.1. Moreover, "when a shipper's privately owned rail cars are idled on the railroad's tracks, it is depriving the railroad of the use of that track." *R.R. Salvage & Restoration, Inc. – Pet. for Decl. Order – Reasonableness of Demurrage Charges,* STB Docket No. NOR 42102, slip op. at 4 (STB served July 20, 2010).

In addition to the unreasonable practice violation for demurrage charges, a second claim could be brought for demurrage-related issues under 49 U.S.C. § 10746, which provides:

> "A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to –
>
> (1) Freight car use and distribution; and
>
> (2) Maintenance of an adequate supply of freight cars to be available for transportation of property."

As the following discussion demonstrates, the rail carriers' changes to demurrage tariffs do not promote any of these policies behind demurrage and specified in Section 10746. These changes appear to only be for revenue producing purposes.

Similarly, with respect to accessorial charges, the Board examines whether they are reasonable. Accessorial services are those elements of through transportation of freight that are practically and feasibly separate from those services performed under a line-haul rate and charges. As a result, if a rail carrier establishes an unreasonable accessorial charge, this would be a violation of Section 10702(2). The question then becomes whether the accessorial or demurrage charge or the way they are applied is unreasonable.

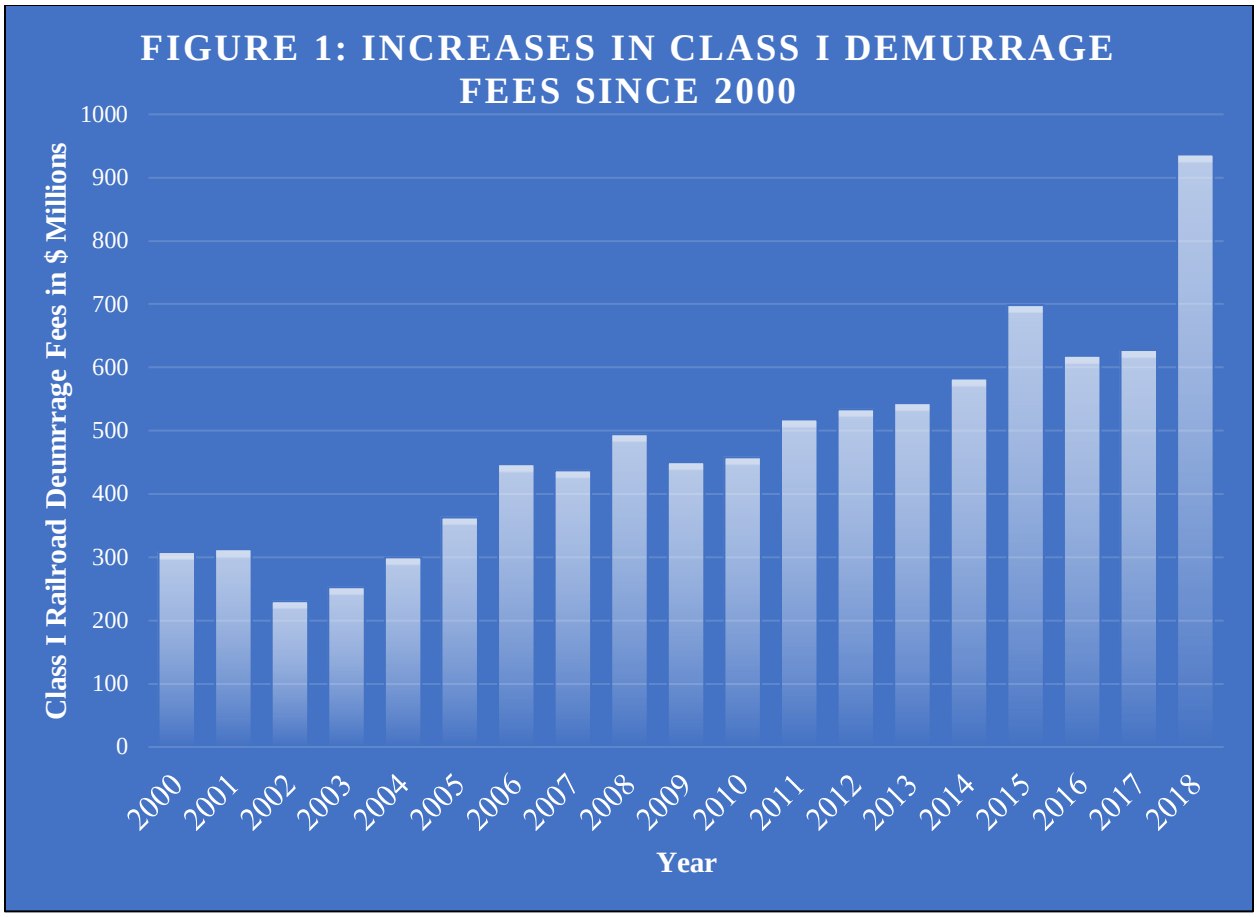
III. DEMURRAGE AND ACCESSORIAL FEES

Rail shippers are often saddled with burdensome demurrage tariff charges that are easily triggered; whereas rail carriers face limited to no penalties should they not provide an adequate level of service. This situation seems inherently unreasonable and one-sided. With many refiners and petrochemical manufacturers "captive" to a single rail carrier, they are at the mercy of rail carriers regarding service and rate determinations. Our members are frequently faced with late or partial rail shipments in direct conflict with agreed-upon service agreements. The result is lost profits, angry customers and partial orders that disrupt the supply chain and goods delivered to the American consumer. In addition, delayed shipments cause refineries and petrochemical manufacturers to incur overtime or trucking costs to make up for a missed railcar. While rail carriers are enjoying record profits, rail customers and American consumers are paying more and getting less. There must be a method to recoup losses caused by rail carriers' failures. AFPM is encouraged by this and other efforts the Board has initiated to ensure reasonable rail practices in this time of change in the industry.

A. THE EXPONENTIAL RISE IN FEES DOES NOT ACCURATELY REPRESENT THE CURRENT OPERATING ENVIRONMENT.

AFPM member companies have noticed a trend of an increased number in the instances of demurrage and accessorial fees being levied year over year and more frequent price hikes in those fees (quarterly vs. annual) paired with a more unpredictable service environment. AFPM member companies have expressed that they are particularly impacted by a dramatic increase in the number of times these fees have been applied in recent years. Members noted that monthly demurrage costs have in some cases doubled since 2015. While refiners and petrochemical manufacturers have felt the impacts of increased fees, they are not alone. In 2018, Class I rail carriers levied almost $1 billion dollars in demurrage charges on top of over $900 million in accessorial charges to rail shippers. As an entire industry, the amount collected for **demurrage fees has increased over 200% since 2000. (See Figure 1)**. This type of skyrocketing increase in the number of times fees are assessed and the amount of the fees is certainly evidence that the railroads are using this practice in an unreasonable way. In addition, demurrage fees seem to be particularly impacting hazardous materials shipments. AFPM member companies have noted that demurrage fees for hazardous materials shipments are often double those of non-hazardous materials.

While the increase in the use of these fees may lead one to conclude that rail shippers are much less efficient and hence being levied more penalties, this is not the case. In fact, the increase in fees collected is the result of a variety of factors including a decrease in service flexibility for rail shippers, a focus on maximizing revenue by rail carriers, and an increase in the number of captive shippers due to industry consolidation. Communication about the changes in these fees to rail shippers is also lacking. Rail carriers simply impose new fees or changes to existing fees with no justification, approval or discussion with rail shippers.



2018 data retrieved from Surface Transportation Board Non-Docketed Public Correspondence, Accessed 2/22/19, https://www.stb.gov/stb/elibrary/NDP_Correspondence.html. All other data retrieved from Surface Transportation Board Complete R-1 Railroad Annual Reports, Accessed 2/21/19, https://www.stb.gov/stb/industry/econ_reports.html.

For example, one AFPM member company noted a situation in which its demurrage rates for empty cars increased by 100% and loaded cars increased by 50%. In conjunction with this change, the rail carrier notified the rail shipper that it would no longer support a longstanding lease track contract in its railyard, fully knowing that the rail shipper had insufficient onsite railcar storage. These changes forced the rail shipper to invest significant capital in onsite railyard expansion in order to maintain cost effective rail logistics. Multiple AFPM members have been forced into making significant multi-million dollar investments in new or expanded rail storage facilities due to unreasonable increases in demurrage fees (in many cases doubling of fees with little to no notice). This demonstrates how rail carriers use rates, fees, and their power

over captive shippers to influence behavior in ways that solely benefit the rail carrier, thereby being unreasonable in nature.

In addition to the sheer number of times fees are levied by the railroads, the frequency of price hikes is increasing. AFPM member companies have noticed that fee increases occur on almost a quarterly basis with little to no justification or explanation. These increases have no relation to inflation or the use of rail assets by shippers. Basically, there is no other reason for the increases other than increasing revenue which has nothing to do with the policy behind demurrage.

A recent example demonstrates this lack of transparency. Approximately two years ago, rail shippers, including AFPM members, were notified that some rail carriers were eliminating fuel surcharges and instead building the surcharge into their tariff rate. After this announcement, these same rail shippers saw a significant spike in rates due to the incorporation of the surcharge.

In the past year, these same rail carriers chose to no longer include fuel surcharges in their tariff rates and instead opted to levy the surcharge as a separate accessorial charge. Unlike when the fuel surcharge was included in the rate, rail shippers did not see a corresponding reduction in their rates when the surcharge was removed in favor of an accessorial fee. In fact, rates were increased again, and the rail carriers were now collecting not only a higher rate but additional accessorial fees. This is just one example that demonstrates the interplay of rates and fees and the lack of transparency when it comes to accessorial fees. Moreover, it demonstrates the complete lack of reciprocity between the railroads and shippers with respect to these types of fees. The way the railroads have handled these changes is completely unreasonable.

STB should continue to monitor the demurrage and accessorial fees and require Class I rail carriers to report on these fees quarterly. Recently, the Board began collecting more

information from Class I rail carriers about demurrage and accessorial charges across the industry. Specifically, Chairman Ann Begeman sent a letter to the Class I rail carriers in December 2018 asking that, for transparency's sake, each of the major rail carriers operating in the U.S. disclose their quarterly revenues from demurrage and accessorial charges – itemized separately – for each quarter of 2018 and 2019. This has brought transparency to these charges that previously operated in the dark. Chairman Begeman also noted that because Class I rail carriers' accessorial charges are not uniform, each carrier is to identify the specific accessorial items that account for its respective reported revenues and provide the agency with access to the tariffs that cover those items. AFPM applauds this effort and encourages the Board to continue collecting this data in an effort to avoid abuse by levying these fees as a way to boost revenue.

STB should research the extent of the abuse of such fees and strengthen oversight, including implementing mechanisms or regulations to combat abuse of fees. STB should analyze the data it has received thus far and request or gather additional historical data to determine if such fees are being abused. This additional data could include prior year data on fees levied as a percentage of revenue, credits issued and stipulations around those credits, and other data as the Board sees the need. As fees are not uniform, STB could also consider ways to foster more consistent application of fees, and conversely, credits to create a more reasonable and equitable balance between rail shippers and carriers.

B. PRECISION SCHEDULED RAILROADING EXACERBATES FEE ABUSE.

Based on these railroad reports, the combined operating income of the Class I rail carriers topped $16 billion for the first half of 2018, and rail carriers are now into their second decade of increasing profits, setting new records virtually every year, including just this last quarter.[1]

[1] See https://www.railwayage.com/freight/class-i/psr-short-term-gains-but-at-what-cost/

These rising profits have been bolstered by Precision Scheduled Railroading ("PSR"). PSR is an operating methodology that major U.S. rail carriers are implementing to streamline the movement of locomotives and railcars across their networks.

PSR focuses on point to point movements rather than a hub and spoke model that has been traditionally used in the U.S. This system has recently gained notoriety as it was implemented by CSX Corporation and subsequently by several other U.S. Class I rail carriers. PSR places emphasis on reducing a rail carrier's operating ratio, which measures operational costs as a percentage of revenue, and thus returning profits to investors. While rail carriers and their stock analysts have praised this operating practice, rail shippers have met this recent sea change in operating practices with considerable skepticism given the problems with initial roll-outs, associated service degradation, and lack of flexibility.

The point-to-point schedules that PSR relies on are significantly different from a hub and spoke system. And while customer service is often touted as one of the pillars of PSR, rail shippers would note that - to date - PSR has negatively impacted customer service. In theory, PSR offers a more efficient system for shippers and decreases dwell time, which is at the heart of the rise in fees. But in practice, PSR has decreased flexibility and resulted in erratic and unpredictable scheduling. This often results in unloading or loading crews not being available when needed, and thus increased demurrage fees. Charging fees that result from a railroad's actions is a clear example of how these practices are unreasonable.

To encourage customers to adjust their operations to make PSR work, rail carriers are imposing fees when customers take too long (by the rail carrier's sole measurement) to unload railcars, are not ready to pick up shipments, and take other actions that could cause slowdowns on the rail network. PSR has disrupted typical schedules for rail shippers, shifting loading and

unloading operations to off hours such as nights and weekends where staff is not available or entitled to overtime pay. These rigid schedules have been pushed on rail shippers with little to no customer input. Further, what constitutes "too long" regarding time for loading and unloading by shippers is frequently being decreased by rail carriers. All these changes result in a rise in fees levied.

An example of PSR's impact on rail shipper operations was recently provided by an AFPM member company. Specifically, as a rail carrier was implementing PSR, it began charging "Deadhead Delivery and Pickup Fees" ($3,200 per move) for unit trains when locomotives must be deadheaded in or out. The rail carrier in this scenario noted this fee was designed to incentivize loading and unloading unit trains in 24 hours or less. The rail carrier imposed these additional fees on ethanol shippers who have not established a supply chain capable of loading trains within a 24-hour timeframe.[2] Rail carriers have historically supported an operating model where tank cars are loaded daily until a sufficient number of cars have been filled to constitute a completed train.

For 24-hour loading to be possible, significant capital investment would be required to build new storage tanks onsite to accumulate inventory and to add rail loading rack capacity. The rail carrier in this scenario also encouraged rail shippers to sync arrival of inbound empty trains with loaded outbound trains such that locomotive power can be efficiently swapped between trains. While this is sometimes feasible, variability in rail transit times makes this impossible to manage for every unit train arrival/departure, and when the rail carrier causes this timing mismatch to occur, shippers are still charged the deadhead fees. This real-world example shows the burden rail shippers face with PSR implementation. Further, the rail carriers

[2] Typically, most of the largest scale ethanol unit train origin facilities across the U.S. produce enough product to load approximately only one unit train per week.

implementing PSR are forcing rail shippers to make significant capital investments, to change operations, and/or to pay hefty fees.

While rail carriers will note that they offer credits to shippers when they are late to pick up cars, such credits are often saddled with stipulations, do not offset the corresponding demurrage fees, and often expire in a short amount of time (*i.e.,* at the end of a month). Put simply, rail carriers have implemented new fees under the guise of PSR which drive rail shippers into a less flexible operating environment where most benefits are realized by the rail carriers - and their investors. While the burdens are shouldered by rail shippers, these fees clearly are a revenue source for the rail carriers and a way to decrease the operating ratio rather than a way to improve service.

STB should closely monitor the implementation of PSR and evaluate the impacts on rail shippers. This operating model is designed to eliminate waste, but it often is accompanied with service degradation. Decreased schedule flexibility, fewer available routes, and increased demurrage charges are just a few of the adverse effects PSR inflicts on shippers. The Board should be mindful of how fees have increased with the implementation of PSR and should take action to remedy rail carrier abuses.

AFPM understands the carrier's desire to incentivize operational efficiency; however, we are concerned that there is little recourse for shippers when a rail carrier provides substandard service. STB could also engage shippers when it comes to monitoring demurrage and accessorial fees. Our members stand ready to document fee abuse and service failures and to inform the Board of the operational challenges they face across the network. We share the Board's concern for commercial fairness. Ultimately, a fair and competitive rail system that benefits the entire U.S. economy should be more important than maximizing rail stock valuations at all costs.

C. CAPTIVE SHIPPERS ARE PARTICULARLY VULNERABLE TO FEE ABUSE.

The U.S. rail industry has consolidated from more than 40 rail carriers in 1980 to just a handful of rail carriers today. In fact, four Class I rail carriers account for more than 90 % of all rail freight. These four major rail carriers have a high degree of monopoly power in their service areas – and rail-to-rail competition is virtually nonexistent. This lack of competition and industry consolidation has led to a growing number of "captive" rail shippers. A shipper is considered captive when that shipper is dependent upon a single rail carrier to move their freight. A 2012 analysis of U.S. Freight Rail Stations by State determined at that time approximately 78% of rail shippers were "captive."[3]

Captive shippers are often at a competitive disadvantage and have a weak negotiating position with the Class I rail carriers. Access to only one rail line obviously gives a rail carrier unique pricing power that does not exist in competitive markets and also gives the rail carrier unique power in levying fees. In fact, AFPM member companies have noted that due to fear of reprisal in the form of sub-par or delayed service, they are often reluctant to fight demurrage and accessorial fees. In addition, with no other realistic alternative to move bulk freight, captive shippers are particularly vulnerable to excessive fees and less likely to challenge those fees.

STB should work diligently to complete the competitive switching rule. A more competitive rail operating environment will alleviate many issues including, but not limited to, unfair shipping rates, service issues, and fee abuse. AFPM supports the Board taking swift action on the pending rulemaking related to competitive switching.

[3] See https://railvoices.org/wp-content/uploads/2012/12/US-Map.pdf

D. RAIL CARRIERS FACE NO PENALTIES FOR INADEQUATE SERVICE.

As previously mentioned, while rail carriers are enjoying record profits, rail customers and American consumers are paying more and getting less. Rail shippers are often saddled with burdensome demurrage or accessorial charges that are easily triggered; whereas rail carriers face limited to no penalties should they not provide an adequate level of service. Rail carriers will often cite lack of a crew or locomotive as a rationale for delayed service, and thus receive no penalties under its fee regime. While this may be a valid reason for failure to serve, a similar explanation by a rail shipper would be met with a fee. Rail shippers simply want a level playing field where they are treated reasonably.

PSR-related accessorial fees are aimed at penalizing customers for not conforming to rail carriers' operating schedules and desired efficiencies. Rail carriers have no such "skin in the game" when it comes to the impacts felt by shippers from service failures. Rail carriers are unwilling to accept any liability for consequences of delays that are out of the shippers' control, including shortages of locomotives, crew shortages / call-offs, or congestion-related delays.

AFPM members have experienced poor railroad performance including delays of scheduled unit trains due to lack of power availability, crew issues, or inconsistent transit times. Any such delays can critically impact ethanol shippers. For example, a train's estimated arrival time to a destination is critical to meet a maritime vessel's arrival to load fuels for export. That said, should a rail carrier cause a delay, the rail shipper must bear the cost of marine vessel demurrage while awaiting the delayed unit train's arrival. In addition, the delivery of empty tank cars back to an ethanol plant is critical to avoid inventory containment and production delays. However, if a rail carrier is late delivering an empty unit train back to a refinery or ethanol plant, the rail carriers are not levied any penalty, while the plant's production schedule is disrupted.

Lastly, as transit times are consistently longer than planned, rail shippers must add additional private tank cars to a shipper's fleet to limit the impact of sporadic service. Unplanned cost for these excess cars is borne by the shipper and is not able to be passed along to the end customer or the rail carrier.

While rail carriers will note they offer credits to shippers when they are late to pick up cars, such credits are often saddled with stipulations, are not equitable to demurrage fees, and often expire in a short amount of time (*i.e.*, at the end of a month). Furthermore, like the fees levied by rail carriers, the credits offered by rail carriers vary by carrier and are frequently changing. There must be a method to recoup losses caused by a rail carrier's failures that levels the playing field.

STB should consider efforts to create a more equitable fee and credit system or an analogous alternative. As Chairman Begeman noted in her December 2018 letter to Class I rail carriers, accessorial charges are not uniform, and this can be an issue. If a fee and credit system is to be used as a mechanism to encourage efficiency, it must be applied equally to all parties. Additional research and thought must go into creating a more equitable system, and STB should lead such efforts. Some revisions to restore balance and uniformity across carriers could greatly benefit the entire rail system and help rail shippers and carriers reach the shared goal of improving operational efficiency.

E. THE PROCESS TO CHALLENGE FEES IS NOT UNIFORM AND BURDENSOME.

Like the rate dispute resolution process, the process of disputing demurrage and accessorial fees is onerous for shippers. It places the burden of proof on the shippers to demonstrate that fees were generated as a result of railroad service failures. Rail carriers have no

incentive to streamline the dispute process or proactively waive fees when they are at fault. When more than one carrier is involved, often service issues with the originating carrier (*e.g.* bunching of manifest shipments) result in demurrage being assessed by the destination carrier. The destination carrier has no recourse against the originating carrier, so the shipper and/or destination terminal bear the burden of the demurrage.

STB should revise the rate and demurrage dispute resolution process to be less burdensome. Challenging a rate before the STB is prohibitively expensive and complex, and it is especially burdensome to rail shippers. Similarly, challenging demurrage fees can be extremely difficult because rail carriers have control of the process. AFPM applauds STB's work to date, including the formation of a rate review task force under EP 733 and its recent Rate Reform Report which lays out various recommendations to improve the rate case process.[4] While AFPM is currently analyzing the extensive rate reform report we are encouraged with the task force's analytical approach in developing the report, the acknowledgement that the rate process status quo is not acceptable, and the thoughtful recommendations related to substantive reforms of the process. The report makes it clear that the STB's rate review procedures are too complex and burdensome and that the railroad industry yields extensive market power over their customers.

AFPM supports efforts to: permit alternative means to resolve rate disputes (including the use of competitive benchmarking), expedite the process of rate reviews, address issues related to long-term revenue adequacy and rate increases, and balance the burden of proof between rail shippers and carriers during rate or fee disputes. We encourage STB to implement the reforms recommended in their recent report and consider demurrage and accessorial fees when doing so.

[4] *See* STB Rate Reform Task Force Report https://www.stb.gov/__85256593004F576F.nsf/0/A35993C296D44A93852583EB0050D594?OpenDocument

F. OT-5 IS FLAWED AND ASSOCIATED FEES SHOULD BE BARRED.

Loading Authority ("Circular OT-5" or "OT-5") governs the assignment of reporting marks, mechanical designations, and application for use of private rail equipment. These rules are issued by the Association of American Railroads ("AAR") and apply to rail shippers as part of AAR's interchange agreements.[5] OT-5 requires that controlling entities (owners or lessees) of private tank cars apply for loading authority, which helps aid in capacity planning for each rail carrier. Under AAR Circular OT-5, prior to loading private cars, approval must be obtained from the origin line haul carrier using the Railinc OT-5 registration system. Application approval for shipper-provided cars cannot be denied by the carrier(s) except for reasons of safety, mechanical factors, or inadequate storage space. In recent months, rail carriers have been requiring additional updates in the registration system for each movement of a tank car and fining rail shippers who do not provide such updates. Railroads are fining shippers when railcars arrive at an origin that was not listed in the original OT-5 application. It is simply unreasonable for a railroad to ask that all potential origins for a 50-year asset be listed at the time of application. These fines do not promote safety or efficiency and are clearly a means for the rail carriers to increase revenue.

Although the circular has been around since 1989 and was last updated in 2009, it has recently become an issue for shippers as rail carriers are using OT-5 as a mechanism to levy fees. Specifically, rail carriers are more strictly verifying the information and penalizing shippers when records are not complete or updated. We are seeing shippers being hit with shipping delays and hefty charges from the rail carriers. For example, several AFPM members expressed their frustration with the OT-5 registration after they were levied accessorial fees by the rail

[5] See AAR CIRCULAR NO. OT-5-K published January 1, 2009 https://www.railinc.com/rportal/documents/18/260773/OT-5.pdf

carriers in excess of $500 per tank car. This is particularly frustrating as Circular OT-5 has no mention of fees for not updating approved OT-5s. AAR OT-5 Circular was never intended for carriers to charge penalties for non-compliance. In addition, responses from the rail carriers regarding denials of OT-5 also can be incredibly slow, taking months and making business planning difficult. This surprise tactic of levying fees when none were levied in the past for loading authority that is nearly impossible to predict is once again unreasonable.

Lastly, the information technology ("IT") system used to implement the OT-5 is Railinc.[6] The creation, maintenance, and upgrades of the IT system that supports input of OT-5 data is funded by tank car owners (*i.e.*, rail shippers). Specifically, tank car owners are levied an annual per car fee for upgrades of this system. Rail carriers (through AAR) and North American Freight Car Association are engaged in a collaborative process to revamp loading authority procedures, with all parties recognizing that the current system is flawed. This revamp of this system will also be funded by an increase in the annual per car fees. So ironically rail shippers are being levied fines by rail carriers for violations of OT-5 using a system that is funded by rail carriers while both shippers and carriers acknowledge the system is flawed.

STB should support revisions to the Circular OT-5, and rail carriers should not charge penalties for non-compliance until these needed revisions are implemented. STB should support a collaborative effort between railroads, car owners and shippers to arrive at an acceptable method to provide railroads with the assurance they need for new cars entering the system while protecting the business interests of shippers and car owners. Despite this ongoing reform process, carriers have begun issuing penalty charges to private car owners, lessors, and lessees for various items related to the OT-5 Circular rules. Rail carriers implementing such tariff

[6] See https://www.railinc.com/rportal/en/home

penalty charges cite the desire to ensure safe railcars are shipping on their lines and sufficient storage is available for private cars. These objectives are redundant with existing DOT regulations, AAR Interchange Rules, and rail carrier demurrage tariffs. STB should further declare all accessorial charges levied related to OT-5 non-compliance are unreasonable and null and void and require railroads to issue refunds to parties that have paid invoices for these charges.

IV. CONCLUSION

AFPM thanks STB for its time and consideration of our testimony related to the oversight of demurrage and accessorial charges. AFPM emphasizes the importance of a fair and competitive rail market to the energy industry and more broadly the U.S. economy. It also stresses the importance of "reasonable" demurrage or accessorial fees. Collecting additional data and hearing from all relevant stakeholders is essential to the formation of important policy decisions to protect rail shippers from these obvious abuses by rail carriers. AFPM shares STB's goal of ensuring the flow of commerce on our nation's rail system. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

Rob Benedict,
Senior Director Petrochemicals, Transportation,
and Infrastructure
American Fuel & Petrochemical Manufacturers