SURFACE TRANSPORTATION BOARD

49 CFR Part 1333

[Docket No. EP 757]

Policy Statement on Demurrage and Accessorial Rules and Charges

AGENCY: Surface Transportation Board.

ACTION: Statement of Board policy.

SUMMARY: The Surface Transportation Board (STB or Board) is issuing this policy statement, following public notice and comment, to provide the public with information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges.

DATES: This policy statement is effective on May 30, 2020.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Demurrage is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply.[1] Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (*i.e.,* ''free time'') for loading and unloading. *See Pa. R.R.* v. *Kittaning Iron & Steel Mfg. Co.,* 253 U.S. 319, 323 (1920) (''The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.''); 49 CFR 1333.1; *see also* 49 CFR pt. 1201, category 106.[2] Accessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges. *See Revisions to Arbitration Procedures,* EP 730, slip op. at 7–8 (STB served Sept. 30, 2016). As discussed below, this policy statement pertains to accessorial charges that, like demurrage charges, are designed or intended to encourage the efficient use of rail assets.

On October 7, 2019, the Board issued, for public comment, a notice of proposed statement of Board policy providing information with respect to certain principles it would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. *See Policy Statement on Demurrage & Accessorial Rules & Charges* (*NPPS*), EP 757 (STB served Oct. 7, 2019).[3] As described in the *NPPS,* EP 757, slip op. at 2–3, that action arose, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges* (*Oversight Proceeding*), Docket No. EP 754. The Board commenced the *Oversight Proceeding* by notice served on April 8, 2019 (*April 2019 Notice*), following concerns expressed by users of the freight rail network (rail users)[4] and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring.[5]

In response to the *NPPS,* the Board received 44 comments and 13 replies.[6] After considering the comments received, along with the record in the *Oversight Proceeding,* the Board is issuing this statement of Board policy. Through this policy statement, the Board expects to facilitate more effective private negotiations and problem solving between rail carriers and shippers and receivers on issues concerning demurrage and accessorial rules and charges; 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 Board is not, however, making any binding determinations by this policy statement. Nor is the Board promoting complete uniformity across rail carriers' demurrage and accessorial rules and charges; the principles discussed in this policy statement recognize that there may be different ways to implement and administer reasonable rules and charges.

[1] The Board's authority to regulate demurrage includes, among other things, transportation under the exemptions set forth in 49 CFR 1039.11 (miscellaneous commodities exemptions) and section 1039.14 (boxcar transportation exemptions). The Board recently amended those regulations to state more clearly that the exemptions do not apply to the regulation of demurrage. It also revoked, in part, the class exemption for the rail transportation of certain agricultural commodities at 49 CFR 1039.10 so that the exemption does not apply to the regulation of demurrage, making it consistent with similar class exemptions covering non-intermodal rail transportation. *Exclusion of Demurrage Regulation from Certain Class Exemptions* (*Demurrage Exclusion Final Rule*), EP 760 (STB served Feb. 28, 2020).

[2] In *Demurrage Liability* (*Demurrage Liability Final Rule*), EP 707, slip op. at 15–16 (STB served Apr. 11, 2014), the Board clarified that private car storage is included in the definition of demurrage for purposes of the demurrage regulations established in that decision. The Board uses the same definition for purposes of this policy statement.

[3] Notice was published in the **Federal Register**, 84 FR 54,717 (Oct. 10, 2019).

[4] As used in this policy statement, the term ''rail users'' broadly means any person or business that receives rail cars for loading or unloading, regardless of whether that person or business has a property interest in the freight being transported. This policy statement uses the terms ''warehousemen'' or ''third-party intermediaries'' to refer more specifically to those entities with no property interest in the freight.

[5] The *April 2019 Notice* announced a public hearing, at which Class I carriers were directed to appear, and shippers, receivers, third-party logistics providers, and other interested parties were invited to participate. The notice also directed Class I carriers to provide specific information on their demurrage and accessorial rules and charges; required all hearing participants to submit written testimony (both in advance of the hearing); and permitted comments from interested parties who did not appear. The Board received over 90 pre-hearing submissions; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments. That record, which is detailed in the *NPPS* and summarized below, is available in Docket No. EP 754. *See NPPS,* EP 757, slip op. at 22–25 (Appendix listing the parties who provided comments or testimony in the proceeding).

[6] The Board received comments and/or reply comments from: The American Chemistry Council (ACC); the American Forest & Paper Association (AF&PA); American Fuel & Petrochemical Manufacturers (AFPM); the American Iron and Steel Institute (AISI); the American Short Line and Regional Railroad Association (ASLRRA); ArcelorMittal USA LLC (AM); Archer Daniels Midland Company; the Association of American Railroads (AAR); Auriga Polymers, Inc. a wholly owned subsidiary of Indorama, NA, on behalf of Indorama Ventures affiliates (Auriga/Indorama); the Automobile Carriers Conference; Barilla America, Inc. (Barilla); BNSF Railway Company (BNSF); Canadian National Railway Company (CN); Canadian Pacific Railway Company (CP); The Chlorine Institute (CI); The Corn Refiners Association (CRA); CSX Transportation, Inc. (CSXT); Diversified CPC International, Inc. (Diversified CPC); Dow, Inc. (Dow); The Fertilizer Institute (TFI); the Freight Rail Customer Alliance (FRCA); Growth Energy; the Industrial Minerals Association—North America (IMA–NA); the Institute of Scrap Recycling Industries, Inc. (ISRI); International Paper; the International Warehouse Logistics Association (IWLA); The Kansas City Southern Railway Company (KCS); Kinder Morgan Terminals (Kinder Morgan); the National Association of Chemical Distributors (NACD); the National Coal Transportation Association (NCTA); the National Grain and Feed Association (NGFA) (supported by the Agricultural Retailers Association; the Pet Food Institute; the National Oilseed Processors Association and the North American Millers' Association); The National Industrial Transportation League (NITL); the National Mining Association; the North American Freight Car Association (NAFCA); Omaha Public Power District (OPPD); Peabody Energy Corporation; Plastic Express/PX Services (Plastic Express); the Portland Cement Association (PCA); the Private Railcar Food and Beverage Association, Inc. (PRFBA); Union Pacific Railroad Company (UP); and the Western Coal Traffic League and Seminole Electric Cooperative, Inc. (WCTL/SEC). Two comments were filed after the comment deadline of November 6, 2019. In the interest of a more complete record, the late-filed comments are accepted into the record.

When adjudicating specific cases, the Board will consider all facts and arguments presented in such cases.

The Board encourages all carriers, and all shippers and receivers, to work toward collaborative, mutually beneficial solutions to resolve disputes on matters such as those raised in the *Oversight Proceeding*[7] and intends for this policy statement to provide useful guidance to all stakeholders.

Historical Overview and General Principles

The *NPPS,* EP 757, slip op. at 4–7, provides a detailed historical overview and summary of general principles related to demurrage. The Board here addresses some of the more general comments raised by commenters before turning to comments about the specific issues addressed in the policy statement.

Rail users generally support the proposed policy statement and endorse its key principles. Many rail carrier commenters also either generally support or do not take exception to the general principles discussed in the proposed policy statement. In particular, several Class I carriers voiced support for two key principles: That there may be different ways to implement and administer reasonable demurrage rules and practices, and that disputes pertaining to demurrage are best resolved on a case-specific basis that considers all pertinent facts. (*See* BNSF Comments 2–3; CSXT Comments 3; UP Comments 2; CN Reply Comments 3.) AAR, however, raises objections, which are shared by some carriers, to certain language in the proposed policy statement related to compensation and the imposition of demurrage charges for delays beyond a rail user's reasonable control. (*See* AAR Comments 1–6; CSXT Comments 1–2; CP Comments 15–16; KCS Comments 3, 5.)

In its discussion of general principles, the Board stated that the overarching purpose of demurrage is to incentivize the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those resources beyond a specified period of time. *NPPS,* EP 757, slip op. at 6–7 (citing *Kittaning,* 253 U.S. at 323).[8] That period of time must be reasonable,[9] and further, it is unreasonable to charge demurrage for delays attributable to the rail carrier. *See, e.g., R.R. Salvage & Restoration, Inc.,* NOR 42102 et al., slip op. at 4 (''a shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay''). The Board also reiterated its concerns about demurrage charges for delays that a shipper or receiver did not cause. *NPPS,* EP 757, slip op. at 7 (citing *Utah Cent. Ry.—Pet. for Declaratory Order—Kenco Logistic Servs., LLC,* FD 36131, slip op. at 12 n.38 (STB served Mar. 20, 2019); *Exemption of Demurrage from Regulation,* EP 462, slip op. at 4 (STB served Mar. 29, 1996)). The Board stated that where demurrage charges are imposed for circumstances beyond the shipper's or receiver's reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency—the stated rationale for and objective of the rail carriers' demurrage rules and charges.[10]

In its comments, AAR claims that the proposed policy statement ''ignore[s] the compensation function of demurrage.'' (AAR Comments 4.) But the Board's regulations and the *NPPS* recognize this dual role, *see NPPS,* EP 757, slip op. at 2 (citing 49 CFR 1333.1), and the Board recognizes and reaffirms here that carriers should be compensated when a rail user unduly detains rail assets. As noted by one rail carrier in the *Oversight Proceeding,* ''Congress framed the purposes of demurrage not in terms of cost recovery . . ., but rather in terms of incentives.'' CN Comments 8, June 6, 2019, *Oversight Proceeding,* EP 754. In other words, under the operative statutory framework, demurrage rules and charges must serve an incentivizing function. And, as AAR itself recognized in the *Oversight Proceeding,* demurrage and storage charges have long been considered ''primarily a penalty to deter undue car detention, and to a lesser extent, compensation to the railroad for expenses incurred.'' AAR Comments 4, June 6, 2019, *Oversight Proceeding,* EP 754 (quoting *R.Rs. Per Diem, Mileage, Demurrage & Storage—Agreement,* 1 I.C.C.2d 924, 933 (1985)).[11] When carriers established individualized demurrage programs in the post-Staggers Act[12] era, they stopped breaking out demurrage charges into incentivizing (punitive) and compensatory (per diem) components. Cases involving disputed charges are no longer decided on that basis, and, in the *Oversight Proceeding,* AAR eschewed a return to the former system.[13] The compensatory function of demurrage is achieved, along with its incentivizing function, by permitting the delivering carrier to retain the charges assessed for a rail user's undue detention of rail assets.

AAR also argues that ''[t]he law is well settled that assessment of demurrage charges in no way depends upon a finding of shipper or consignee fault.'' (AAR Comments 6 (quoting *Foreston Coal Int'l* v. *Balt. & Ohio R.R.,* 349 I.C.C. 495, 500 (1975).) AAR's argument, however, fails to take full account of the caselaw on this issue. As an initial matter, AAR overlooks that each case stands on its own facts, as the agency retains broad discretion to determine whether demurrage charges, under all the circumstances of a particular case (including fault), are reasonable under section 10702 and comport with the statutory requirements specified in section 10746.[14] Also overlooked is the fact that, as AAR acknowledged in the *Oversight Proceeding,* historically under ''straight'' demurrage programs,[15] ''the

[7] For example, KCS reportedly forgave significant demurrage bills because the shipper had agreed to spend at least an equal amount to build capacity to store its own cars. KCS Comments 5, May 8, 2019, *Oversight Proceeding,* EP 754.

[8] *Accord Increased Demurrage Charges, 1956,* 300 I.C.C. 577, 585 (1957) (''The primary purpose of demurrage regulations is to promote equipment efficiency by penalizing the undue detention of cars.'' (citation omitted)).

[9] *See, e.g., Kittaning,* 253 U.S. at 323 (''[T]he shipper or consignee . . . is entitled to detain the car a reasonable time . . . .''); *R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges,* NOR 42102 et al., slip op. at 4 (STB served July 20, 2010) (time period must be reasonable).

[10] *See, e.g.,* citations *infra* note 23.

[11] As the Interstate Commerce Commission also explained in that decision, ''[d]emurrage and storage charges are assessed by railroads against shippers or receivers for undue detention of equipment.'' 1 I.C.C.2d at 933. ''Unlike per diem and allowances, the primary purpose of demurrage and storage charges is not to compensate the owner of the car, but to enhance efficient car use by ensuring the prompt turnaround of equipment.'' *Id.* at 934.

[12] Staggers Rail Act of 1980, Public Law 96–448, 94 Stat. 1895.

[13] *See* AAR Comments 8, June 6, 2019, *Oversight Proceeding,* EP 754 (stating that ''[a]fter Staggers, it was no longer necessary or appropriate to require railroads to use uniform demurrage tariffs that included prescribed terms, compensatory and penalty elements, and regulated rates'').

[14] *See, e.g., N. Am. Freight Car Ass'n* v. *BNSF Ry.,* NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007) (stating that Congress ''gave the Board 'broad discretion to conduct case-by-case fact-specific inquiries to give meaning to [section 10702's statutory] terms, which are not self-defining' '' and explaining that ''[t]his 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'' (citing *Granite State Concrete Co.* v. *STB,* 417 F.3d 85, 92 (1st Cir. 2005))); *N. Am. Freight Car Ass'n* v. *STB,* 529 F.3d 1166, 1170–71 (DC Cir. 2008) (agency has ''wide discretion in formulating appropriate solutions'' when dealing with complex matters within its expertise, including claims involving statutory obligations under section 10702 and section 10746 (citation omitted)).

[15] Historically, the detention of freight rail cars was governed by a uniform code of demurrage rules and charges, which offered shippers and receivers

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shipper or receiver was not assessed demurrage if severe weather or other circumstances beyond their control prevent[ed] them from returning cars on time.'' AAR Comments 5, June 6, 2019, *Oversight Proceeding,* EP 754. AAR also overlooks more recent Board decisions, discussed in the *NPPS,* EP 757, slip op. at 6–7, expressing concern about holding a rail user liable for demurrage attributable to delays beyond its reasonable control. Several carriers acknowledged at the oversight hearing various circumstances in which it would not be appropriate to charge a customer for delays the customer did not cause,[16] and UP and ASLRRA affirmatively state that demurrage should not be charged to rail users for delays beyond their reasonable control.[17]

In sum, the Board finds that AAR's arguments are misplaced, as there have been long-standing concerns about rail users being held responsible for circumstances beyond their reasonable control. The proposed policy statement properly focused on the foundational questions that arise in determining whether demurrage rules and charges are reasonable and designed to fulfill national needs related to freight car use and distribution, and to maintenance of an adequate car supply, under 49 U.S.C. 10746.[18]

As noted above, rail users generally support the proposed policy statement, and several agree with the Board that the principles outlined in the *NPPS* would help prevent disputes from arising, and, when they do arise, help resolve them more efficiently and cost-effectively.[19] Some voiced concern that carriers would not voluntarily change certain rules and practices and called for further prescriptive actions.[20] Such prescriptive actions are not appropriate for inclusion in a policy statement, and the Board declines at this time to take further regulatory action beyond the actions taken in *Demurrage Exclusion Final Rule,* Docket No. EP 760, and the actions under consideration in *Demurrage Billing Requirements,* Docket No. EP 759. However, the Board will remain open to argument that these concerns and suggestions should be considered in future proceedings in assessing the reasonableness of demurrage rules and charges and whether they comport with the objectives specified in section 10746. Further, carriers are encouraged to thoughtfully consider rail users' concerns and suggestions—along with the principles discussed below—as potential solutions that would promote the goals of transparency, timeliness, and mutual accountability stakeholders broadly profess to embrace.

Free Time

In the *NPPS,* EP 757, slip op. at 7–10, the Board described the background and current issues surrounding free time—the period of time allowed for a rail user to finish using rail assets and return them to the railroad before demurrage charges are assessed.[21] The Board explained that free time, which railroads may set within reasonable limits, helps temper adverse impacts to rail users of delays arising from service variability, and plays a role in the credit and debit rules and practices of many rail carriers. *NPPS,* EP 757, slip op. at 8.

The *NPPS* also explained that, until recently, rail carriers typically provided at least 24 hours of free time (or one credit day) to load rail cars and at least 48 hours of free time (or two credit days) to unload cars.[22] *NPPS,* EP 757, slip op. at 8 (citing *Portland & W. R.R.—Pet. for Declaratory Order—RK Storage & Warehousing, Inc.,* FD 35406, slip op. at 5 (STB served July 27, 2011).) Some Class I carriers use alternative rules and practices for private cars in which no credit days are given as a proxy for free time. *NPPS,* EP 757, slip op. at 8–9.

Recent reductions in free time implemented by several Class I carriers were a major focal point of the *Oversight Proceeding.* At least one rail carrier reduced the number of credit days for loading and unloading private cars, in some circumstances, from two to zero. Some other rail carriers reduced free time for unloading from 48 to 24 hours (or two credit days to one) for both private and railroad-owned cars. In its *April 2019 Notice,* the Board directed the Class I carriers to submit information on a list of specified subjects, including all tariff changes since January 2016 pertaining to the amount of free time allowed for loading and unloading rail cars and the reason(s) for the change. *April 2019 Notice,* EP 754, slip op. at 2–3.

Rail carriers that reduced free time identified similar objectives and rationales for doing so: to better align the behavior of shippers and receivers in order to promote network fluidity for the benefit of all rail users through improved service reliability and reduced cycle times. These carriers

two alternative methods for computing demurrage: Straight demurrage and average demurrage. Under the straight demurrage plan, which historically applied in the absence of any other arrangement with the rail carrier, charges were applied and billed on individual cars at daily rates when cars were detained beyond the allowable free time. *See NPPS,* EP 757, slip op. at 4. The Board mentions straight demurrage programs here not to suggest a return to the former system but rather to give a more complete account of the law and history on the issue.

[16] *See, e.g.,* UP Comments 10–11, 14, 23, June 6, 2019 (filing ID 247892), *Oversight Proceeding,* EP 754; Hr'g Tr. 146:11 to 147:1, May 22, 2019, *Oversight Proceeding,* EP 754 (CSXT agreeing that demurrage should not be assessed where charges penalize a shipper who is powerless to avoid or abate the detention); Hr'g Tr. 923:8 to 924:16, May 23, 2019, *Oversight Proceeding,* EP 754 (BNSF agreeing that ''it's not a strict liability standard in the law or in practice'' and noting language in its tariffs excusing demurrage for force majeure events beyond the control of a shipper).

[17] *See* UP Comments 3 (also endorsing same principle for accessorial charges); ASLRRA Comments 4.

[18] In response to AAR's assertion that a policy statement cannot be used to change the law, (*see* AAR Comments 5), the Board reiterates that this policy statement articulates what the Board may consider in future decisions and does not constitute a binding determination by the Board or seek to change the law. *See NPPS,* EP 757, slip op. at 3–4. The general principles and non-binding considerations discussed in a statement of Board policy—particularly one that was published for public comment—are well within the bounds of appropriate agency action.

[19] *See, e.g.,* ACC Comments 3; ISRI Comments 8, 12 (also noting that the policy statement appropriately ''provid[es] flexibility to account for differing factual circumstances inherent in the receipt and shipment of goods by rail''); Barilla Comments 2–3 (principles will ''establish a foundation for the railroads and their customers to recognize one another as partners when addressing issues and potential [rule] changes in the future''; also noting that some rules discussed at the oversight hearing have since been removed); AF&PA Comments 3 (principles in the policy statement provide ''provide valuable guidance for the future administration of demurrage and accessorial charges''); IMA–NA Comments 2 (same); CI Comments 1 (policy statement ''should assist in resolving many of the problems with demurrage and accessorial rules and charges'').

[20] Several parties state that the Board should require railroads to comply with and incorporate the policy statement into their tariffs. (*See, e.g.,* Kinder Morgan Comments 2, 11–12; AISI Comments 6–7; PCA Comments 3–4; WCTL/SEC Comments 5. *See also* AM Comments 5; NCTA Comments 4–5; NGFA Comments 3, 21–22 (arguing that the Board should adopt binding rules or final guidelines and direct railroads to conform within specified time); FRCA Comments 5 (arguing that ''the Board should require carriers to certify that their rules and practices comply with Board's standards'' and impose penalties if noncompliance is demonstrated).)

[21] As the Supreme Court has noted, ''the duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate.'' *Kittaning,* 253 U.S. at 323.

[22] Tariff provisions typically define the amount of free time provided in terms of 24-hour periods or ''credit days,'' which commonly begin to run at 12:01 a.m. the day following actual or constructive placement (a status assigned when a rail car is available for delivery but cannot actually be placed at the receiver's destination because of a condition attributable to the receiver such as lack of room on the tracks in the receiver's facility, *see Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc.,* FD 34920, slip op. at 3 n.6 (STB served May 30, 2008)).

stated that the reductions were made to enable them to optimize network efficiencies and provide better, more reliable service; that the changes were not made to generate revenue; and that their hope is that recent revenue increases generated from demurrage charges will be temporary as shippers and receivers adapt and respond because, in the words of one rail carrier, ''the intention is to improve service, not drive cost increases for our customers.'' [23] Rail carriers' post-hearing submissions largely reiterated these points and expressed willingness to work with customers to help them align their behavior to better meet the reductions in free time. While the Board recognizes that some changes and rail carrier outreach occurred following the hearing, it is apparent that many issues related to free time remain.

In the *Oversight Proceeding,* interested parties from many industries expressed multiple concerns about the recent reductions in free time. Several stated that they lacked the physical capacity or capital needed to expand facilities to meet the reduced free-time periods. Many reported that bunching or otherwise unreliable service is a major obstacle to meeting the reduced free-time periods, and that the recent reductions have made it more difficult and costly to deal with unreliable service because the free time that has been eliminated had served as an important buffer against unpredictable railroad performance. Rail users that rely on private rail cars expressed additional objections and concerns and noted that there has been a significant industry shift from rail carrier ownership of rail cars to private car ownership since the enactment of section 10746. *See NPPS,* EP 757, slip op. at 9–10 (describing comments submitted in Docket No. EP 754). Although rail carriers presented data in the *Oversight Proceeding,* generally on a system-wide basis, reflecting recent improvements in some metrics, they presented limited data on the extent to which changes to their demurrage rules and charges succeeded in reducing loading and unloading times, as compared to the times prior to the changes. *See NPPS,* EP 757, slip op. at 11.

Comments from rail users on the *NPPS* broadly reiterate these concerns and suggest that the Board should take more binding action.[24] Comments from rail carriers on the *NPPS* were largely silent about its discussion of free time. CP states that its customers adapted to free-time reductions implemented in 2013 by adding track capacity, using CP tools to better manage their pipeline, and adjusting labor schedules, and that CP is moving more cars while demurrage charges have decreased. (CP Comments 7.) UP states that it has worked collaboratively with customers over the past year and that ''the vast majority'' have successfully adapted to a reduction in free time from 48 hours to 24 hours. (UP Reply 2.)

Demurrage serves a valuable purpose to encourage the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those assets beyond a specified period of time. That period of time must be reasonable and consistent with the overarching purpose of demurrage. The Board continues to have serious concerns about the adverse impacts of reductions in free time to rail users, including 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 rail users have a reasonable opportunity to evaluate their circumstances and order incoming cars before demurrage begins to accrue. Some of these reductions to free time or credit days may make it more difficult for rail users to contend with variations in rail service and therefore may not serve to incentivize their behavior to encourage the efficient use of rail assets.[25] In some circumstances, which would need to be examined in individual cases, such reductions may not be reasonable or consistent with rail carriers' statutory charge to compute demurrage and establish related rules in a way that fulfills the national needs specified in section 10746. Where, for example, carrier-caused circumstances give rise to a situation in which it is beyond the rail user's reasonable control to avoid charges, the overarching purpose of demurrage is not fulfilled.

As stated in the *NPPS,* EP 757, slip op. at 12, such circumstances might include, for example, charging demurrage that accrues as a result of a missed switch (both cars scheduled to be switched and incoming cars impacted by the missed switch); charging demurrage for transit days to move cars from constructive placement in remote locations; or charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the rail user has had a reasonable opportunity to process the excess volume of incoming cars. Changes in historical practices on which the rail user has long relied (*e.g.,* regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties) may also be taken into account.[26]

Lastly, the Board remains concerned that, in some circumstances, such reductions in free time may jeopardize important goals of the nation's rail transportation policy by rendering freight rail service less likely to meet the needs of the public and, if other modes are even effectively an option for a rail user, less competitive with other transportation modes.[27]

The Board recognizes that reductions in free time might be justified if there were evidence to show, by way of example, that (1) advances in technology or productivity have made compliance with the shorter time frames reasonably achievable; (2) service improvements resulting from more efficient use of rail assets would facilitate the ability of shippers and receivers to adjust to the reductions; (3) reductions are necessary to address systemic problems with inefficient behavior or practices by shippers or receivers; or (4) rail carriers have implemented tariff provisions or program features—such as credits for

[23] UP Comments 2, May 8, 2019, *Oversight Proceeding,* EP 754; *see generally id.* at 1–2; UP Comments 3, June 6, 2019 (filing ID 247876), *Oversight Proceeding,* EP 754; Norfolk Southern Railway Company (NSR) Comments 2–3, May 8, 2019, *Oversight Proceeding,* EP 754; CSXT Comments 3–5, May 8, 2019, *Oversight Proceeding,* EP 754. BNSF stated that it ''puts a tremendous amount of energy and resources into the area of demurrage and storage for the express purpose of collecting less demurrage revenue.'' BNSF Comments 5, May 8, 2019, *Oversight Proceeding,* EP 754.

[24] *See, e.g.,* TFI Comments 4–5; NITL Comments 4–5; CRA Comments 5–6; AF&PA Comments 4–5; AISI Comments 7–8; Dow Comments 3–4; Diversified CPC Comments 3; NGFA Comments 11–12; ISRI Comments 4–5; Joint Reply (ACC, CRA, TFI, NITL) 8–9.

[25] Parties are, of course, free to negotiate and enter into contracts that provide for any period of free time (including zero credit days) to which the parties agree. 49 CFR 1333.2; *Demurrage Liability Final Rule,* EP 707, slip op. at 25 (noting that the Board's rules specifically allow parties to enter into contracts pertaining to demurrage).

[26] On the other hand, circumstances within a rail user's reasonable control might include, for example, taking reasonable steps to: Ensure that its facility is right-sized for its expected volume of incoming traffic when it receives reliable, consistent service; manage its pipeline to mitigate incoming car volumes that exceed its capacity; and order and release cars in the manner specified by reasonable tariff requirements.

[27] *See* 49 U.S.C. 10101 (stating, in pertinent part, ''[i]n regulating the railroad industry, it is the policy of the United States Government . . . (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; . . . [and] (14) to encourage and promote energy conservation'').

bunching, service variabilities, and certain capacity constraints—that place the avoidance of demurrage charges within the reasonable control of the rail user.

The Board also recognizes an important goal of demurrage in incentivizing the behavior of rail users to encourage the efficient use of rail assets, which benefits rail carriers and users alike. Rail carriers and users have a shared responsibility in this endeavor—rail carriers to implement and administer reasonable rules and charges designed to accomplish this goal, and rail users to recognize and accept responsibility for promoting efficiencies within their reasonable control.

Although the Board will not, as certain commenters suggest, take more binding action pertaining to free time,[28] it will closely scrutinize demurrage rules and charges where free time has been reduced, or where no credit days have been provided. The Board encourages all stakeholders to take the principles and considerations discussed above into account going forward. The Board will do likewise in future proceedings, along with all evidence and argument the parties present.

Bunching

Bunching-related issues were identified as a common problem by rail users across a broad range of industries in the *Oversight Proceeding.* Some rail carriers in that proceeding stated that they award credits for bunching in some instances but did not describe with specificity how these credits are awarded or did not otherwise address the concerns expressed by rail users. *See NPPS,* EP 757, slip op. at 13–14 (describing comments submitted in Docket No. EP 754).

In response to the *NPPS,* rail users reiterate that bunching is a significant problem that has increased following changes to rail carriers' operating plans,[29] has become even more difficult to contend with due to free-time reductions,[30] and often is not sufficiently addressed in either carrier tariffs or the initial invoices.[31] Some commenters request the Board to elaborate on what it would consider ''reasonable rules and practices for dealing with . . . variability in service and carrier-caused bunching''; [32] two propose mechanisms keyed to trip-plan compliance; [33] and some state that upstream bunching is an issue best resolved among the railroads participating in the movement without involving the rail user.[34]

Certain rail carriers and ASLRRA express concerns about addressing upstream bunching in the policy statement. CP argues that any attempt by the Board to address upstream bunching is contrary to law insofar as past decisions have held rail users responsible for demurrage unless the delivering carrier is at fault. (CP Comments 10 (citing *Chrysler Corp.* v. *N.Y. Cent. R.R.,* 234 I.C.C. 755, 758 (1939).) In addition, these commenters note that because the delivering carrier may have no knowledge of or ability to control upstream events, it should not be forced to bear the costs of delays arising from off-line events. (CP Comments 10–12; KCS Comments 3 n.2; ASLRRA Reply 4–5.)

The types of factual scenarios described by CP, KCS, and ASLRRA are among the reasons why bunching should be addressed on a case-by-case basis in order to permit the Board to properly consider all relevant circumstances pertaining to an assessment of demurrage. Further, it is the Board's view that carriers should consider the actions of upstream carriers when administering their demurrage rules and charges. CP's claim that Board consideration of upstream bunching would be contrary to law overlooks the points discussed above and in the *NPPS* explaining that demurrage rules and charges must be designed to incentivize rail users' behavior.[35] Where rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the rail user to avoid, the overarching purpose of demurrage is not fulfilled.[36] When analyzing the appropriateness of demurrage charges, rail carriers should consider these principles both when cars originate with the serving carrier and when cars originate on an upstream carrier—as at least one carrier professes to do.[37] The Board encourages all rail carriers to take these considerations into account in their administration of demurrage rules and charges, particularly in evaluating whether their automatic billing processes sufficiently account for carrier-caused bunching (especially for cars that originate on their network [38] or bunching attributable to missed switches), and in resolving bunching disputes. In any future proceeding, the Board expects to take these considerations into account as well, along with any additional evidence and argument the parties may choose to present.

Accessorial Charges

Some commenters request that the Board clarify the definition of accessorial charges for purposes of the policy statement,[39] and ask that the policy statement include a more robust

[28] *See, e.g.,* TFI Comments 4–5; NITL Comments 4–5; CRA Comments 5–6; AF&PA Comments 4–5; AISI Comments 7–8; Dow Comments 3–4; Diversified CPC Comments 3; NGFA Comments 11–12; ISRI Comments 4–5; Joint Reply (ACC, CRA, TFI, NITL) 8–9.

[29] *See, e.g.,* CRA Comments 7 (stating that bunching has increased amid changes implemented by some railroads, despite members' best efforts to spread out car deliveries, resulting in demurrage charges that are not within their reasonable control); NGFA Comments 13 (stating that bunching of empty return cars has increased due to ''unilaterally imposed reductions in service frequency as an outgrowth of carriers' implementation of the so-called precision schedule railroad [(PSR)] operating model''); AFPM Comments 8 (stating that ''[b]unched deliveries increased in frequency following changes to rail carriers' operating plans''); NCTA Comments 6–7 (stating that PSR has disrupted and undermined service and created problems such as bunched rail cars and insufficient locomotive availability).

[30] *See, e.g.,* AF&PA Comments 4–5 (stating that challenges of contending with free time reductions are aggravated by erratic service); TFI Comments 5 (same); NITL Comments 4 (same); CRA Comments 5–6 (same); Auriga/Indorama Comments 2 (same). *See also* ACC Comments 2 (stating that free time is necessary to account for carrier-caused bunching and service variability); Dow Comments 3–4 (proposing minimum free time be keyed to service variability).

[31] *See, e.g.,* AISI Comments 8–9 (stating that carriers' tariffs and billing practices do not properly address railcar bunching); PCA Comments 5 (stating that tariffs often fail to address bunching); Kinder Morgan Comments 9–10 (same).

[32] NAFCA Comments 7; *see also* OPPD Comments 5–6; WCTL/SEC Comments 5.

[33] AFPM Comments 9; NGFA Comments 12–13.

[34] ISRI Reply 5–6; Joint Reply (ACC, CRA, TFI, NITL) 4.

[35] The Board also notes that relief for upstream bunching was available under the former uniform code for rail users that chose the straight demurrage plan. *See NPPS,* EP 757, slip op. at 4–5 & n.13.

[36] As noted above, such circumstances might include, for example, charging demurrage that arises from bunched deliveries substantially in excess of the number of cars ordered until the rail user has had a reasonable opportunity to process the excess volume of incoming cars. Other circumstances that could bear on an assessment of bunching include the considerations described in note 26, above.

[37] UP reportedly employs ''a case-by-case process within which customers are credited for carrier-caused bunching.'' UP Comments 10, June 6, 2019 (filing ID 247892), *Oversight Proceeding,* EP 754 (explaining that UP ''takes into account customer choices and actions, the actions of [UP's] interline partners, and [UP's] own actions in determining whether a customer should be charged for bunching-related demurrage'' and reiterating that ''[UP] does *not* charge the customer for bunching that is beyond the customer's reasonable control'').

[38] The Board recognizes that carriers may lack information needed to take upstream bunching into account in their initial invoices, but encourages them to do so when resolving bunching-related disputes. The Board further encourages carriers to seek to reconcile any costs incurred as a result of actions by the upstream carrier with that carrier.

[39] *See* NAFCA Comments 4; OPPD Comments 3.

discussion of how its general principles apply to accessorial charges.[40]

As stated in the *April 2019 Notice,* EP 754, slip op. at 2 n.1, and the *NPPS,* EP 757, slip op. at 2 & n.3, accessorial charges are generally understood to include anything other than line-haul or demurrage charges. Upon further consideration, however, the Board notes that many accessorial charges do not serve the same efficiency-enhancing purpose as demurrage or implicate issues raised in the Docket No. EP 754 *Oversight Proceeding.*[41] The Board therefore clarifies that, insofar as the purpose of an accessorial charge is to enhance the efficient use of rail assets in the same way as demurrage, the principles discussed in the policy statement would generally apply. The Board further clarifies that references to accessorial charges in the policy statement are intended to encompass only such types of charges.[42]

Overlapping Charges

Many participants in the *Oversight Proceeding* voiced concerns about additional charges that had recently been instituted by two Class I carriers for claimed customer-caused congestion or delay. *See NPPS,* EP 757, slip op. at 15 (describing comments submitted in Docket No. EP 754 relating to a so-called ''congestion'' charge imposed by NSR and a ''not prepared for service'' charge imposed by UP).

As noted in the *NPPS,* both rail carriers have since responded to these specific concerns. *See NPPS,* EP 757, slip op. at 15 (noting announcements that NSR would discontinue the ''congestion'' charge and that UP had clarified and limited the application of the ''not prepared for service'' charge). The Board was encouraged by these actions but nevertheless found it important to provide forward-looking guidance indicating that it would have concerns about such overlapping demurrage-type charges. *See id.* Commenters generally either broadly supported or did not address the Board's proposed guidance. ACC, however, argues that the discussion in the *NPPS* did not fully capture the concerns about overlapping charges, which may arise even when one of the charges might be considered reasonable. (ACC Comments 3.) The Board clarifies that, when adjudicating specific cases, it would have significant concerns about the reasonableness of a tariff provision that sought to impose an overlapping charge intended to serve the same purpose as demurrage, or a charge arising from the assessment of demurrage for congestion or delay that is not within the reasonable control of the rail user to avoid.[43] In an individual proceeding, the Board remains open to evidence and argument that such a charge could in some instance be reasonable, but no such information was presented in Docket No. EP 754 or in this proceeding.

Invoicing and Dispute Resolution

In the *Oversight Proceeding,* the Board heard repeatedly that demurrage charges are difficult, time-consuming, and costly to dispute and that invoices are often inaccurate or lack information needed to assess the validity of the charges. Commenters also stated that, under some carriers' rules and practices, charges must be disputed within limited time frames, while carriers are often slow to respond and disputes are often denied. Some tariffs have imposed costs or charges that serve as a deterrent to pursuing a dispute or a formal claim. *See NPPS,* EP 757, slip op. at 16 (describing comments submitted in Docket No. EP 754). Rail users reiterate these points in comments on the proposed policy statement,[44] and in *Demurrage Billing Requirements,* Docket No. EP 759, where the Board has proposed to specify certain information that Class I carriers must provide on or with demurrage invoices to enable recipients to, among other things, more readily verify the validity of the demurrage charges.[45] Two commenters also express concerns about untimely billing.[46]

While the Board recognizes that some rail carriers may already employ billing and dispute resolution rules and practices consistent with the principles discussed in this policy statement, the Board remains deeply troubled by these reports, which come from rail users in a broad range of industries that are highly dependent on rail service. If rail carrier rules and practices effectively preclude a rail user from determining what occurred with respect to a particular demurrage charge, then the user would not be able to determine whether it was responsible for the delay; the responsible party would not be incentivized to modify its behavior; and the demurrage charges would not achieve their purpose. Transparency, timeliness, and mutual accountability are important factors in the establishment and administration of reasonable rules and charges for demurrage.[47] Rail users should be able to review and, if necessary, dispute charges without the need to engage a forensic accountant or expend ''countless hours and extra overhead'' to research charges and seek to resolve disputes.[48]

As indicated in the *NPPS,* the Board encourages all Class I carriers (and Class II and Class III carriers to the extent they are capable of doing so), taking into account the principles discussed here, to provide, at a minimum and on a car-specific basis: The unique identifying information of each car; the waybill date; the status of each car as loaded or empty; the commodity being shipped; the identity of the shipper, consignee, and/or care-of party; the origin station and state of the shipment; the dates and times of actual placement, constructive placement (if applicable), notification of constructive placement (if applicable), and release; and the number of credits and debits issued for the shipment (if applicable).[49] The Board also expects

[40] *See* NGFA Comments 6–7, 19; NAFCA Comments 5; OPPD Comments 3–4.

[41] For example, some types of accessorial charges are imposed for services such as weighing rail cars or requests for special trains.

[42] Such charges would include, by way of example, the types of overlapping charges discussed below. The Board notes that, based on the descriptions given by the rail carriers, many of the accessorial charges identified in the May 1, 2019 Class I data submissions in Docket No. EP 754 would appear to meet this criterion, including the UP ''deadhead'' charge referenced by commenters in both that docket and this proceeding.

[43] The Board also notes that one commenter continues to express concerns about the ''deadhead'' charge assessed by UP. (*See* NGFA Reply 8–12.) Although not specifically addressed in the *NPPS,* it appears these charges could similarly raise issues related to overlapping charges or lack of control but, consistent with the guidance in this policy statement, such charges would need to be examined on a case-by-case basis.

[44] *See, e.g.,* NACD Comments 4; OPPD Comments 6–7; AFPM Comments 10–11; NGFA Comments 16–17; CRA Comments 8; NITL Comments 6–7.

[45] Comments submitted by Class I carriers in Docket No. EP 759 generally state that a substantial amount of information is already provided with the invoice or available through online platforms, while ASLRRA claims that small carriers lack the resources needed to provide detailed information to invoice recipients. Rail carriers largely did not address, in either this docket or Docket No. EP 759, other concerns voiced by rail users about the billing and dispute resolution process.

[46] *See* NCTA Comments 3–4 (reporting that shippers have experienced delays up to six months in receiving demurrage bills and suggesting that ''a three month or 90-day time frame limit would be more appropriate''); FRCA Comments 5 (requesting that carriers be required to make all invoice information available on a monthly basis to avoid the undisclosed accumulation of potential charges).

[47] These general principles are also important factors in assessing the reasonableness of rules and practices pertaining to the assessment of accessorial charges.

[48] *See* International Paper Comments 4, May 7, 2019, *Oversight Proceeding,* EP 754; *accord* Packaging Corporation of America Comments 4–5, 7–8, May 8, 2019, *Oversight Proceeding,* EP 754 (describing process that is ''hugely time and resource consuming'').

[49] In response to comments received in *Demurrage Billing Requirements,* Docket No. EP

Continued

rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage, and to send invoices on a regular and timely basis.[50]

With respect to the dispute resolution process more broadly, several commenters request elaboration or prescriptive action pertaining to the Board's initial guidance that shippers and receivers should be given a reasonable time period to request further information and to dispute charges, and the rail carrier likewise should respond within a reasonable time period.[51] The Board will not take prescriptive action at this time. However, the Board emphasizes that the time frames in question should be both reasonable and balanced. By way of example, the Board would have serious concerns about a process that imposed a short deadline to dispute charges or a process that placed no meaningful restrictions on the time carriers can take to respond. Similarly, the Board would have serious concerns about the reasonableness of costs or charges that could deter shippers and receivers from pursuing a disputed claim. Although the Board remains open to argument and evidence in individual proceedings, no apparent justification for imposing such costs or charges was provided in the record in the *Oversight Proceeding* or in this proceeding.

Finally, some commenters call for the Board to establish more streamlined formal dispute resolution procedures.[52] The Board notes that a variety of formal mechanisms already exist, both within and outside the Board's purview, for aggrieved parties to resolve demurrage and accessorial charge disputes in an efficient, cost-effective manner. For example, three Class I carriers have agreed to arbitrate certain demurrage disputes under the binding, voluntary program set forth in 49 CFR part 1108.[53] In addition, BNSF was commended by one commenter for including an arbitration provision in its tariffs, *see* NGFA Comments 28, May 8, 2019, *Oversight Proceeding,* EP 754, and UP reported that it has also agreed to arbitrate contested demurrage and accessorial charges using various external programs, *see* UP Response to Data Request 3 (pdf page 8), May 1, 2019, *Oversight Proceeding,* EP 754 (listing NGFA's Rail Arbitration Rules and AAR's Interchange Rules).[54]

The Board commends rail carrier commitments to address disputes about demurrage and accessorial rules and charges through arbitration or other streamlined dispute resolution procedures and strongly encourages all rail carriers to commit to doing so.[55] Likewise, the Board also strongly encourages rail users to make use of these procedures to resolve disputes that they are unable to resolve informally, and to keep the Board apprised of their endeavors to do so.[56] The Board hopes that such commitments by all stakeholders to make use of these procedures will make it unnecessary for the Board to revisit these issues. However, the Board remains open to doing so if stakeholders encounter obstacles to the effective use of the mechanisms already in place. The Board also expresses its commitment to resolve disputes brought before it in an expeditious manner. *See* 49 U.S.C. 10101(2) (''it is the policy of the United States government . . . to require fair and expeditious regulatory decisions when regulation is required'').

Credits

A common concern voiced by rail users in the *Oversight Proceeding* is that various limitations imposed by rail carriers diminish the utility of credits as a means of offsetting debits that are incurred, while carriers' charges (*i.e.,* debits) do not ''expire'' until they are paid. *See NPPS,* EP 757, slip op. at 18 (describing comments submitted in Docket No. EP 754). In the *NPPS,* the Board provided preliminary guidance as to how it would expect to evaluate credit rules and practices when adjudicating specific cases. In response, rail users reiterate the concerns about credits and broadly endorse the Board's suggestion that its concerns would be allayed if rail users were compensated for the value of unused credits at the end of each month (rather than the credits expiring).[57] Some rail users call for further action or guidance from the Board.[58] Some rail carriers state that credits are intended to address specific problems associated with carrier-caused delay, and that allowing customers to keep credits long after that delay would undermine the purpose of the credit, encourage inefficient use of rail assets, and create operational and accounting complexities. (CSXT Comments 3–4; CP

759, the Board is serving today a supplemental notice inviting parties to comment on certain modifications and additions to the notice of proposed rulemaking's proposal regarding information that Class I carriers would be required to provide on or with demurrage invoices to promote transparency and accountability.

[50] The Board declines to discuss specific time periods but notes that it would have significant concerns if (absent extenuating circumstances) a carrier permitted demurrage or accessorial charges to accrue over several months without invoicing the customer. The Board also notes that, according to information contained in the record in Docket No. EP 754 and various demurrage cases, carriers often appear to bill on a monthly cycle.

[51] *See, e.g.,* WCTL/SEC Comments 8 (asserting that carriers should be required to ''respond meaningfully'' to disputed charges within 30 days); NGFA Comments 17 (requesting greater specificity; recommending a minimum of 30 days for rail user to request additional information and dispute an erroneous charge); NAFCA Comments 8–9 (requesting greater specificity and more definitive Board position that carriers' dispute resolution processes should be expedited); OPPD Comments 7 (requesting greater specificity).

[52] AFPM Comments 14; PRFBA Comments 1; NGFA Comments 3, 7–8, 21–22; *see also* NGFA Comments 17 (stating that tariffs should clearly articulate the carrier's dispute resolution process, including whether it is willing to arbitrate disputes and if so, in which forum).

[53] *See* UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), *Assessment of Mediation & Arbitration Procedures,* EP 699.

[54] The Board also notes that, in addition to binding arbitration, parties can make use of the informal mediation process conducted by the Board's Rail Customer and Public Assistance (RCPA) program or formal mediation under 49 CFR part 1109 to attempt to negotiate an agreement resolving some or all of the issues involved in a dispute.

[55] The Board also encourages carriers to specify their dispute resolution procedures in their tariffs, consistent with their broadly expressed commitment to transparency in the Docket No. EP 754 *Oversight Proceeding.*

[56] The Board notes that its RCPA program (202–245–0238; *rcpa@stb.gov*) is available to assist with informal resolution of disputes. In addition, rail users have several avenues available to them to keep the Board apprised of demurrage-related problems that they encounter, such as the Railroad-Shipper Transportation Advisory Council, the National Grain Car Council, and the Rail Energy Transportation Advisory Committee, all of which meet regularly to provide guidance and advice to Board members on rail transportation issues and areas of concern. The Board therefore finds it unnecessary to establish an advisory committee or task force on demurrage as proposed by some commenters. (*See* NGFA Comments 9–10; CRA Comments 10–11.)

[57] *See, e.g.,* AF&PA Comments 7–8; TFI Comments 8–9; WCTL/SEC Comments 7–8; ISRI Comments 7; NGFA Comments 18; ISRI Reply 7–8; Joint Reply (ACC, CRA, TFI, NITL) 7–8; WCTL/SEC Reply 8.

[58] *See, e.g.,* AF&PA Comments 8 (arguing that the Board should clarify that railroads must offer credits for delays beyond the control of the shipper or receiver and should identify credits on the invoice); Kinder Morgan Comments 10–11 (asserting that credits that expire should be deemed presumptively unreasonable unless the railroad provides appropriate compensation); AISI Comments 8 (same); ACC Comments 2 (stating that the Board should adopt a policy calling for credits to be issued for cars delivered more than a specific time early or late from the original estimated time of arrival); NGFA Comments 12–13 (stating that carriers should be required to make tariffs reciprocal and provide remuneration if rail cars are not placed in accordance with the trip plan within the same amount of free time allowed by the carrier).

The Board acknowledges rail users' claims that providing such reciprocity may also promote more efficient car supply, and that the shift in rail car ownership from railroad-owned to private cars documented in the record of the *Oversight Proceeding, see NPPS,* EP 757, slip op. at 9–10, raises issues from the perspective of private car users. The Board remains open to argument and evidence in future cases in which these issues may be raised.

Comments 12–14 (also claiming that ''allowing [rail users] to monetize such credits penalizes the carrier'' and ''raises similar concerns as banked credits'' about disincentivizing efficiency); UP Comments 5–6 n.7.) UP also states that its system is consistent with agency precedent that favorably discusses monthly reconciliation of credits and debits and the expiration of unused credits, and suggests that the Board modify the policy statement to be consistent with that precedent. (UP Comments 5 (citing *Red Ash Coal Co.* v. *Central R.R. of N.J.,* 37 I.C.C. 460, 462 (1916).)

The Board remains troubled by the lack of reciprocity between demurrage credits and charges, particularly where the expiration date of a credit, in effect, undermines the value of credits allocated for a problem or delay that was not within the reasonable control of a rail user. The Board also recognizes that credits issued for carrier-caused problems and delays serve a different purpose than credits that function as a proxy for free time, and that different types of credits might have different application methods or expiration time frames. As stated in the *NPPS,* the Board remains open to argument and evidence in future cases that involve these issues. However, the Board disagrees with the concerns raised by the rail carriers on this issue. The primary concern in the *NPPS* was ''whether the shipper or receiver has been afforded a reasonable opportunity to make use of the credits,'' and, contrary to the claims of some carriers, (*see* CSXT Comments 3; CP Comments 13; UP Comments 6 n.7), the Board did not suggest that credits should never expire. The Board's concerns about this issue would be allayed if rail users were compensated for the value of unused credits at the end of each month. Compensating rail users for the value of unused credits at the end of each month could hold rail carriers more accountable for service failures that undermine network efficiency and make rail users less likely to incur future demurrage charges that could be offset by the credits; [59] it would also be consistent with the conventional calendar month-end accounting practice discussed in *Red Ash*.[60]

The Board reiterates its initial guidance and declines to take further regulatory action related to credits at this time. The Board intends to 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 rail user has been afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the rail carrier. The Board reiterates that it would also take into account the purpose and function of the credits in question and that these concerns would be allayed if rail users were compensated for the value of unused credits at the end of each month (rather than the credits expiring). The Board remains open to argument and evidence on all credit issues, including those involving reciprocity.

Notice of Major Tariff Changes

Some commenters in the *Oversight Proceeding* indicated that carriers provided insufficient notice of major changes to demurrage and accessorial tariff provisions, particularly with respect to changes involving reductions in free time. Among other things, rail users commented that they were suddenly forced to try to redesign, on short notice, operations and infrastructure that had been designed around a 48-hour free-time provision, and noted that rail carriers had many months to adjust their operations to implement new operating plans but often expected customers to comply with their new rules and practices in 45 days. *See NPPS,* EP 757, slip op. at 19 (describing comments submitted in Docket No. EP 754). Rail users reiterate these points in this proceeding. Some comments call for prescriptive guidance that is not appropriate for inclusion in a policy statement; [61] others either tend to support or do not address the principles discussed in the *NPPS*.[62] UP states that it will continue to provide customers with ''reasonable notice of accessorial and demurrage tariff changes but not less than 60 days' notice.'' (UP Comments 3.)

The Board reiterates the guidance it provided in the *NPPS.* As a matter of commercial fairness, and consistent with the principles discussed in this policy statement, railroads should provide sufficient notice of major changes to demurrage and accessorial tariffs to enable shippers and receivers to evaluate, plan, and undertake any feasible, reasonable actions to avoid or mitigate new resulting charges. The Board recognizes that a 20-day notice period is statutorily prescribed for changes to common carrier rates and service terms. 49 U.S.C. 11101(c). However, in the Docket No. EP 754 *Oversight Proceeding,* rail carriers themselves recognized that 20 days was not sufficient lead time in many cases, and noted that they generally provided between 45 and 60 days, periods that other commenters found were still insufficient. Rail carriers also described various other actions taken to help shippers and receivers adapt, such as delayed billing and working with those that needed more flexibility. *See NPPS,* EP 757, slip op. at 19.

The Board continues to encourage rail carriers to take these and other initiatives to support all rail users facing the financial, operational, or other challenges of adjusting to major tariff changes, to thoughtfully consider the amount of advance notice that should be given, and to be especially cognizant of and accommodating to any unique obstacles a shipper or receiver may face in adapting to demurrage and accessorial tariff changes.

Demurrage Billing to Shippers Instead of Warehousemen

In the *Oversight Proceeding,* several participants expressed concerns about the impact of demurrage on third-party intermediaries who handle goods shipped by rail but have no property interest in them (also commonly known as warehousemen, as noted above) following the Board's adoption of the final rule in *Demurrage Liability,* Docket No. EP 707 (codified at 49 CFR part 1333). The *NPPS* addressed these issues and noted that the Board had initiated a rulemaking on this subject. *See NPPS,* EP 757, slip op. at 20–21. The Board refers stakeholders to the decision being issued concurrently herewith in *Demurrage Billing Requirements,* Docket No. 759, for further direction and guidance pertaining to this issue.

General Concluding Considerations

The Board concludes by restating two fundamental principles that all rail carriers, and all shippers and receivers, are encouraged to keep in mind. First, demurrage rules and charges may be unreasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets. In other words, charges generally should not be assessed in circumstances beyond the shipper's or receiver's reasonable control. It follows, then, that revenue from demurrage

[59] Conversely, the Board notes that CP's claim that monetizing credits would ''raise[] similar concerns as banked credits'' about disincentivizing efficiency, (*see* CP Comments 14), is neither explained nor persuasive as a matter of policy.

[60] The Board also notes that the *Red Ash* case involved credits issued under an average demurrage plan to incentivize faster loading and unloading, not credits issued for service failures.

[61] *See* NGFA Comments 19; CRA Comments 10; AFPM Comments 12–13.

[62] *See, e.g.,* AF&PA Comments 8 (stating that it ''strongly agrees with the Board's views''); NITL Comments 8 (stating that it ''strongly supports the Board's proposed principles'').

charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose. Second, transparency, timeliness, and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges. Just as this policy statement recognizes that there may be different ways to implement and administer reasonable rules and charges, carriers are encouraged to recognize the importance of working with rail users to develop reasonable solutions to unique situations those shippers and receivers may face.

The Board expects to take all of the principles discussed in this policy statement into consideration, together with all of the evidence and argument that is before it, in evaluating the reasonableness of demurrage and accessorial rules and charges in future cases.

Congressional Review Act. Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this policy statement as non-major, as defined by 5 U.S.C. 804(2).

Decided: April 30, 2020.

By the Board, Board Members Begeman, Oberman, and Fuchs.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2020–09682 Filed 5–5–20; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200428–0122]

RIN 0648–BJ13

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Atlantic Herring Fishery; Framework Adjustment 6 and the 2019–2021 Atlantic Herring Fishery Specifications

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: We are approving regulations to implement Framework Adjustment 6 to the Atlantic Herring Fishery Management Plan, including the 2019–2021 fishery specifications and management measures, as recommended by the New England Fishery Management Council. This action is intended to establish the allowable 2020–2021 herring harvest levels and river herring and shad catch caps, consistent with the Atlantic Herring Fishery Management Plan. The specifications and management measures are necessary to meet conservation objectives while providing sustainable levels of access to the fishery.

DATES: Effective May 5, 2020.

ADDRESSES: Copies of this action, including the Environmental Assessment and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared in support of this action, are available at: *https://s3.amazonaws.com/nefmc.org/Herring-FW6-DRAFT-final-submission.pdf*r from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the internet at: *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Allison Murphy, Fishery Policy Analyst, 978–281–9122.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) for herring are located at 50 CFR part 648, subpart K. Regulations at § 648.200 require the Council to recommend herring specifications for NMFS' review and publish in the **Federal Register**, including: The overfishing limit (OFL); acceptable biological catch (ABC); annual catch limit (ACL); optimum yield (OY); domestic annual harvest; domestic annual processing; U.S. at-sea processing; border transfer; the sub-ACL for each management area, including seasonal periods as specified at § 648.201(d) and modifications to sub-ACLs as specified at § 648.201(f); and research set-aside (RSA) (up to 3 percent of the sub-ACL from any management area) for 3 years. These regulations also allow the Council to recommend river herring and shad catch caps as part of the specifications.

Under the Magnuson-Stevens Fishery Conservation and Management Act, NMFS is required to publish proposed rules for comment after preliminarily determining whether they are consistent with applicable law. The Magnuson-Stevens Act permits NMFS to approve, partially approve, or disapprove framework adjustment measures proposed by the Council based only on whether the measures are consistent with the fishery management plan, plan amendment, the Magnuson-Stevens Act and its National Standards, and other applicable law. Otherwise, NMFS must defer to the Council's policy choices. Under the regulations guiding the herring specifications process, NMFS must review the Council's recommended specifications and publish notice proposing specifications, clearly noting the reasons for any differences from the Council's recommendations. NMFS must then publish a notice approving, disapproving, or partially approving these measures. NMFS is approving measures to implement Framework 6 as well as specifications and river herring/shad catch caps for the herring fishery, consistent with the Council's recommendations.

A new stock assessment for herring was completed in June 2018. The assessment concluded that although herring were not overfished and overfishing was not occurring in 2017, poor recruitment would likely result in a substantial decline in herring biomass over the next several years. The stock assessment estimated that recruitment was at historic lows during the most recent five years (2013–2017), but projected that biomass could increase after reaching a low in 2019 if recruitment returns to average levels. The final stock assessment summary report is available on the Center's website (*www.nefsc.noaa.gov/publications/*). The Magnuson-Stevens Act requires NMFS to notify the Council if a fishery has become overfished or is approaching the condition of being overfished. According to the Act, ''a fishery shall be classified as approaching a condition of being overfished if, based on trends in fishing effort, fishery resource size, and other appropriate factors, the Secretary estimates that the fishery will become overfished within two years.'' In February 2019, we notified the Council that herring was approaching an overfished condition.

Based on the stock assessment and at the request of the Council, we reduced the 2018 ACL in August 2018 (83 FR 42450) (from 104,800 mt to 49,900 mt) and the 2019 ACL in February 2019 (84 FR 2760) (from 49,900 mt to 15,065 mt) through inseason adjustments to prevent overfishing and lower the risk of the stock becoming overfished. The ACL reduction for 2018 ensured at least a 50-percent probability of preventing overfishing, while the ACL reduction for