BEFORE THE
SURFACE TRANSPORTATION BOARD

248896

EX PARTE NO. 759

DEMURRAGE BILLING REQUIREMENTS

OPENING COMMENTS ON BEHALF OF CN

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The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter "CN") respectfully submit these comments on the Notice of Proposed Rulemaking that the Board served on October 7, 2019 in the above-captioned proceeding ("NPRM").

CN shares the Board's desire that demurrage invoices enable customers to understand the basis of the charges and to dispute charges they believe to be inappropriate. But the actions that the Board is proposing in this NPRM are not commensurate with any documented problem. As CN showed at the hearing and in its supplemental comments, CN already provides extensive information to its customers that enables them to understand the basis of demurrage charges, to manage their pipelines to avoid demurrage in the first place, and to dispute charges that a customer believes to be wrong. No one contradicted this testimony or produced any evidence that CN's bills are insufficient or unclear.

Creating uniform national regulation of the content of demurrage invoices is a re-regulatory decision. CN is concerned that the Board's proposal would increase potential disputes and generate unnecessary paperwork. This is inconsistent with Congress's directions to this agency, and it is a sharp break from this agency's policies of removing unnecessary demurrage regulations and from the instructions that federal agencies have received about the need to reduce regulatory burdens. It would be far more consistent with the statutory scheme for the Board to continue to rely on market forces to incentivize a railroad to provide better customer service to its customers so the agency regulate only where necessary to address specific,

documented problems with a particular carrier's demurrage billing practices as demonstrated in an individual demurrage case. At most, the Board should make clear that a carrier has a general duty to provide sufficient information for customers to understand demurrage charges and that customers who believe that a railroad's invoicing is unreasonably deficient can challenge the carrier's practices in an individual case.

Even more concerning than the Board's proposed changes to invoices are the NPRM's significant revisions to the final demurrage rules the Board adopted just five years ago, primarily based on the unsupported claims of a single large terminal operator. Allowing terminals and their customers to enter contracts regarding demurrage that will bind a railroad who is not party to those contracts is inconsistent with the sound findings the Board reached in Ex Parte 707 and would undermine demurrage's purpose of incentivizing efficient car and asset utilization. And the NPRM's proposal fails to grapple with multiple practical problems, including the impossibility of a railroad attempting to enforce contracts to which it is not a party and the unequal bargaining power that large terminals have over their smaller customers. This proposal should not be adopted, although the Board could confirm that a railroad has authority to enter contracts for direct billing if it believes that such clarification is necessary.

I. THE BOARD SHOULD NOT ADOPT ITS PROPOSAL TO MICROMANAGE DEMURRAGE INVOICING BY PRESCRIBING SPECIFIC DETAILED INFORMATION ON INVOICES.

The NPRM's proposal to adopt uniform nationwide standards for demurrage invoices is an unwise and unnecessary expansion of the Board's regulatory reach.

The NPRM mandates that every demurrage invoice issued by a Class I carrier include or be accompanied by eleven categories of detailed information. *See* NPRM at 14. While CN already provides customers with each of these eleven categories of information (and much more besides), it is inconsistent with the Board's mission and mandate to expand its regulations into a new area without sufficient cause. And these regulations could have the counterproductive effect of increasing the complexity of demurrage disputes and requiring a railroad to generate and customers to receive unnecessary paperwork.

A. CN Already Provides Ample Demurrage Information To Customers.

The factual predicate for the NPRM's proposal to regulate the content of demurrage invoices appears to be a concern that some railroads are not providing their customers with adequate supporting information for demurrage charges. This concern has no application to CN, which already provides customers with each of the eleven categories of information specified by the proposed regulations.

As demonstrated in the sample invoice documents in Attachment 1, this information is included on the invoice itself (Figure 1) or on the Invoice Backup – Summary or Invoice Backup – Details that are made available to every customer (Figures 2 and 3). Attachment 1 demonstrates that none of the complaints that Ex Parte 754 commenters made about railroad demurrage invoices apply to CN. Date and time information for each car is clearly provided on the Invoice Backup –Detail Page, as is consignee information for shipments to terminals. *See* Attachment 1 Figure 3. No commenter at the Ex Parte 754 hearing provided an example of an

insufficiently detailed invoice or other concrete evidence of a systematic problem with demurrage invoices that requires uniform regulation to address.

Indeed, CN already has gone far beyond the minimum invoicing requirements set forth in the NPRM. CN's testimony in Ex Parte 754 explained the detailed tools that CN customers can use to assess and understand their demurrage charges. In particular, the Verified Statement of Keith Courtoreille appended to CN's Supplemental Comments included examples of the different tools that CN has developed for customers.[1] These sophisticated tools include a First Mile / Last Mile eBusiness tool designed to give our customers transparent visibility into the pipeline of railcars inbound into their facility, the cars currently at their facility, and those that are outbound. *Id.* at 8-10. This allows customers (including terminal receivers) to plan in advance for rail service at their facility, thereby enabling them to minimize demurrage charges and promote efficient utilization of cars and rail track and yard capacity.

CN similarly explained its electronic tools allowing customers to view railcars en route to their facilities and to order in railcars before they arrive, while they are still on a train. *See id.* at 10-11. This functionality was developed to help customers (including terminal receivers) avoid delays and demurrage charges for cars dwelling at the local serving yard. This tool facilitates a customer's ability to

[1] *See* V.S. of Keith Courtoreille, Supplemental Comments on Behalf of CN, Ex Parte No. 754 (filed June 6, 2019) (enclosed as Attachment 2).

easily order cars before the cut off for its next scheduled service, especially for cars arriving during the weekend or at times when the customer facility is closed.

The primary purpose of CN's First Mile / Last Mile and order-in modules is to give customers the tools to eliminate or minimize demurrage in the first place. But CN's tools do so by giving customers access to detailed real-time information that affords them significant visibility into their supply chain and into the factors that can cause demurrage charges to accumulate. In short, CN's customers have access to ample information that they can use to understand the basis of demurrage charges and to dispute any charges they believe to be inappropriate. There is no problem here that requires the agency to adopt nationwide, uniform regulation of the content of demurrage invoices.

B. Prescribing National Invoicing Requirements Is Unnecessary and Could Generate Needless Litigation.

While CN believes that its current invoicing practices are already in compliance with the NPRM proposal, the Board should not adopt the proposal, for three reasons.

First, the Board does not have a sufficient factual record that could justify a move in this re-regulatory direction. While the Ex Parte 754 hearing included generalized complaints from some shippers alleging some railroads were not providing sufficient information about demurrage bills, those complaints were countered by hard evidence from CN about the extensive information that is actually provided. The Board should not adopt an extensive set of prescriptive national invoicing regulations without an adequate basis.

Indeed, the Board's predecessor agency long ago rejected policies that would mandate nationwide paperwork requirements for demurrage bills. *See Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail, Carriers of Property*, Ex Parte No. 285, 47 Fed. Reg. 58273 (1982). In that decision, the ICC repealed former rules mandating the records that railroads were to keep to support demurrage charges, on the grounds that a railroad should be given the flexibility to design its own systems in light of "the Federal policy of less government interference in the day-to-day operations of the rail industry." *Id.* The Board should not reverse the principle underlying this ICC decision by adopting requirements for the content of demurrage invoices that would bind all Class I railroads.

Second, the NPRM's proposed rules suggest that invoices will not be deemed valid unless they include all eleven specific categories of information. This could have unintended consequences and lead to increased demurrage litigation and increasing complexity of the litigation. For example, what if a waybilling error by the originating shipper causes a demurrage bill to show the wrong commodity for a particular car? This would have no material effect on the demurrage billpayer's ability to understand and potentially dispute demurrage for that car, but under the proposed new rules, a billpayer could argue that it should be deemed an invalid invoice. Litigation over whether invoices comply with the Board's new rules could complicate future demurrage disputes and make resolving these disputes more expensive and time-consuming for a railroad and its customers.

Third, CN has concerns about the proposed requirement that carriers "take appropriate action to ensure that charges are accurate." CN works to promote the accuracy of its invoices, and has a process in place to review optional services invoices to ensure they are accurate and to offset any impacts from CN service failures before they are issued. As mentioned at the hearing, CN has a dedicated team of more than ten full-time employees that reviews the accuracy of its invoices using a highly structured process, with the focus being proactive adjustment of optional services invoices before they are issued. *See* Ex Parte 754 Hearing Day 2 Tr. at 834-35 (May 23, 2019) (describing CN review process for optional services invoices). But if the NPRM's proposal were interpreted to require that every single invoice be manually double-checked before it is sent, significant additional resources would have to be deployed to perform busy work of reviewing invoices that already have a high degree of accuracy. This would slow down the invoicing process (ultimately making it harder for customers to evaluate invoices on a timely basis) and would make it harder for CN to focus pre-invoicing time on the invoices that are more likely to require review. This could also open up a new front for litigation, as parties would now have to litigate over whether a railroad's efforts to ensure accuracy of its invoices constituted the requisite "appropriate action."

CN is also concerned that a blanket requirement that every demurrage invoice undergo a manual review could undermine CN's 18-15-15 guarantee, under which CN commits to bill for demurrage and other optional services within 18

business days of when the services were performed.[2] If the NPRM is adopted unchanged, CN might be forced to reassess whether this guarantee will continue to be realistic, and may be forced to change its practice to provide less prompt invoicing and dispute resolution.

C. If the Board Chooses to Regulate the Content of Demurrage Invoices, It Should Adopt a General Standard Requiring Sufficient Information to Allow the Billpayer to Determine the Basis for Demurrage Charges.

For the above reasons, CN does not believe that any new regulation of the content of demurrage invoicing is necessary. But if the Board nevertheless chooses to adopt some specific regulation of the content of demurrage invoices, it should consider a flexible standard rather than the detailed, eleven-category prescription in the NPRM. The Board could accomplish the same purpose with a general standard requiring a railroad to provide information sufficient to allow the party responsible for demurrage to determine the basis for the demurrage charges and a reasonable process to dispute those charges. Any such rule should make clear that a railroad is free to provide this information through other electronic means and platforms (and not "on or with" the invoice itself). The Board should not adopt paperwork regulations that hamper a carrier's ability to use more sophisticated means to communicate with customers, including through electronic communication

[2] In the second and third steps of the 18-15-15 guarantee, CN currently guarantees that it will provide a response within 15 business days to a dispute of an invoice that is made through CN's electronic portal within 15 business days.

or other means, such as software platforms or portals designed to share information with customers.

In place of the Board's proposed new 49 C.F.R. § 1333.4 language in the NPRM, CN suggests that the Board consider the following alternative language:

> Class I carriers shall ensure that recipients of demurrage invoices have access to sufficient information to be able to understand the basis for the charges and to dispute charges believed to be unwarranted. This information can be provided either on or with the demurrage invoice or through another electronic means, including through a software platform or portal.

II. THE BOARD'S PROPOSAL TO ALLOW TERMINALS TO FORCE DIRECT BILLING WITHOUT RAILROAD CONSENT SHOULD NOT BE ADOPTED.

Under the NPRM proposal, shippers and receivers can unilaterally decide demurrage responsibility amongst themselves without railroad involvement. This is a sharp departure from the recognized purpose of demurrage, which is to make sure that incentives to avoid demurrage are placed on the appropriate party to reduce railcar delays by promptly loading and unloading railcars. The proposal that a railroad would not be able to participate in a decision on whether a terminal or its customer is responsible for demurrage would eliminate a railroad's ability to ensure that demurrage is creating an incentive for efficient utilization of cars and railroad track and yard capacity consumed by dwelling cars.

The NPRM appears aimed at solving a problem that does not need a regulatory solution: that a railroad supposedly refuses to agree to reasonable direct billing arrangements, despite terminal customers who supposedly want to enter agreements to accept all demurrage charges. CN is willing to reach agreement with

customers on billing arrangements when it is clear that all parties are interested in that arrangement and that appropriate incentives are in place. Indeed, CN has occasionally entered into confidential contracts agreeing to directly bill demurrage to a terminal customer, if under the circumstances it is clear that demurrage will continue to work as an effective incentive. Such agreements are only workable where one entity assumes responsibility for payment of all demurrage bills. Any dispute amongst the terminal and shipper regarding demurrage liability must be resolved between themselves following payment to the railroad. But in many situations "direct demurrage billing to terminal customers" is being advocated by certain terminals who appear uninterested in facilitating efficient car utilization and capacity of the interstate rail network and appear solely focused on not having to pay demurrage for the delays they cause. CN is concerned that customers of those terminals are not in the position to minimize demurrage where the terminal orders in railcars from the serving yard and will not have information to understand why a terminal orders in the cars of a different customer.

A. The Board's Current Final Rule was Adopted After a Multi-Year Rulemaking Process With Broad Stakeholder Participation in Ex Parte 707 and Struck the Right Balance.

The terminals advocating that demurrage liability be shifted to their customers are making the exact same arguments that the Board rejected in Ex Parte 707, where it found in its expertise that railcar receivers (including warehousemen and terminals) are best positioned to reduce delays and avoid demurrage. After compiling an extensive record through comments on both an Advance Notice of Proposed Rulemaking and a Notice of Proposed Rulemaking, the

Board concluded that it was appropriate to place responsibility for demurrage on the receivers of railcars, who are "in the best position to expedite the loading or unloading of rail cars at origin or destination." *Demurrage Liability*, Ex Parte 707, at 8 (Apr. 9, 2014) ("*Ex Parte 707 Final Rule*"). Allowing demurrage to be assessed on railcar receivers "would enable carriers to adopt tariffs that place responsibility for delaying the return of rail cars on the party in the best position to expedite the movement of those cars." *Demurrage Liability*, Ex Parte 707, at 10 (May 3, 2012) ("*Ex Parte 707 NPRM*").

The Board reached that conclusion with the support of customer interests, who supported the Board's appropriate allocation of demurrage responsibility to railcar receivers. For example, the National Industrial Transportation League argued that "the receiver of rail cars that caused the loading or unloading delays [should] . . . be responsible for demurrage" and that adoption of "[t]his fault-based approach properly places accountability on the party that fails to efficiently handle the rail cars."[3] While some terminals resisted the Ex Parte 707 approach, NITL correctly observed that the concerns of these interests "were generally limited to an assumption that the rule would increase their exposure for demurrage."[4]

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[3] Comments of National Industrial Transportation League at 4, *Demurrage Liability*, Ex Parte No. 707 (filed Aug. 24, 2012).

[4] Reply Comments of National Industrial Transportation League at 2, *Demurrage Liability*, Ex Parte No. 707 (filed Sept. 21, 2012) ("The League and the railroad commenters generally recognized the need for a clear rule that eliminates legal uncertainties and allows for the reasonable use of demurrage to promote the efficient use of railcars. Accordingly, the League and railroad commenters generally supported the adoption of a conduct-based rule for demurrage liability. While many of the intermediary commenters expressed concerns over the conduct-based

CN believes that the Board, in reviewing the fully developed record in the rulemaking and in its expertise, in Ex Parte 707 struck the right balance, by holding that terminals, warehousemen, and other railcar receivers can generally be liable for demurrage if they are provided with proper notice. Terminals and warehousemen ultimately have the operational control over the last mile from serving yard to facility because they order in the railcars and decide how to operate their facility. Furthermore, terminals and warehousemen control the commercial relationship with customers shipping to terminals and control what commercial arrangements they will enter into with their own customers. They could choose to manage the pipeline of goods flowing to the terminal to include terms in their commercial contracts preventing shippers from "flooding" receivers with more cars than they can handle and passing on charges for demurrage caused by a shipper's conduct rather than the terminal's. *See EP 707 Final Rule* at 17 (expressing preference that rules would "encourage[e] warehousemen . . . and shippers . . . to address demurrage liability in their commercial arrangements").

B. The Baseline Demurrage Rules Should Not Be Altered By Contracts to which a Railroad is not a Party

While the Board's existing Part 1333 rules contemplate that parties can contract for different arrangements, they make clear that the only contracts that can alter the baseline rules are those between "a serving railroad and its customers." 49 C.F.R. § 1333.2. The Board has never held that the rule recognizing

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approach, their concerns were generally limited to an assumption that the rule would increase their exposure for demurrage.").

receivers as appropriate recipients of a railroad's demurrage invoices could be altered by contracts between a receiver and its customers to which a railroad is not a party. The courts have rejected arguments that such contracts could supplant the legal rules.[5]

The most vocal advocate of billing demurrage to terminal customers rather than to terminals is Kinder Morgan, which is involved in multiple lawsuits with railroads across the country over its nonpayment of demurrage invoices at its terminals. CN filed one of these actions against Kinder Morgan over Kinder Morgan's failure to pay for the demurrage it incurs for cars that dwell in CN's Chicago-area Glenn Yard while awaiting Kinder Morgan's instructions to deliver them to its Argo terminal, a liquids and ethanol transloading facility. Kinder Morgan has refused to pay a single demurrage invoice to CN in nearly four years, because of an apparent decision by Kinder Morgan to simply ignore the Board's final rule in Ex Parte 707.[6]

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[5] *See, e.g.*, *Illinois Central R.R. Co. v. Kinder Morgan Liquids Terminals, LLC,* No. 16-cv-8044 (N.D. Ill. Nov. 3, 2016) ("Kinder Morgan attempts to expand the scope of the exclusion under 49 CFR § 1333.2 to include private contracts between a terminal and its customers (shippers). This argument is misplaced. A plain reading of the demurrage regulations clearly provides in the absence of a private contract between *a common carrier and its customers* that the demurrage regulations will apply. Therefore, Kinder Morgan is excused from demurrage liability only if CN is a party to the agreements.").

[6] Indeed, KM has pressed an affirmative defense asserting that the Board's final rule in Ex Parte 707 is legally invalid (despite KM's failure to appeal that final rule). *See* Mem. in Support of Motion for Partial Summary Judgment, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. filed May 21, 2019) (Doc. 106); Answer to Amended Complaint at 19, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. Filed May 23, 2017) (Doc. 35).

CN's litigation against Kinder Morgan is a telling illustration of the flaws with the NPRM's proposal to force a railroad to be governed by terminal-customer agreements to which a railroad is not a party. While Kinder Morgan has alleged that it has various agreements with its customers that assign demurrage liability to its customers, those agreements have a host of conflicting provisions that have added significant complexity to the demurrage litigation. Kinder Morgan has filed a third party complaint against its customers, alleging that they breached their contracts in which they agreed to pay for demurrage incurred by Kinder Morgan.[7] That third party complaint shows that in nearly all cases Kinder Morgan's customers did not accept demurrage liability in all circumstances. Some of Kinder Morgan's customers only agreed to accept demurrage that was not "attributable to" Kinder Morgan. Some only agreed to accept demurrage not caused by Kinder Morgan's "negligence." Some only agreed to accept demurrage not caused by Kinder Morgan's "negligence, willful conduct, or omission."[8] Indeed, several of Kinder Morgan's customers have refused to accept liability for demurrage incurred at Argo on the grounds that the demurrage is attributable to Kinder Morgan's negligence or contractual nonperformance.[9]

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[7] Kinder Morgan Liquids Terminals, LLC's Third Party Complaint, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. filed July 12, 2019) (Doc. 122).

[8] *Id.* at ¶¶ 43-49.

[9] *See, e.g.*, Third-Party Defendant Archer-Daniels-Midland Company's Answer, Affirmative Defenses, and Counterclaim to Kinder Morgan Liquids Terminals, LLC's Third Party Complaint, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. filed Sept. 27, 2019) (Doc. 182).

Kinder Morgan's third party complaint against its customers illustrates both the sheer complexities of potential terminal-customer contracts and the fact that terminal customers often agree only to pay a portion of demurrage invoices, and refuse to pay demurrage that the customer believes was caused by the terminal. The NPRM rule does not contemplate any of these complexities. Indeed, the NPRM would not even give a railroad the ability to see the actual demurrage liability language between a terminal and its customer.

The NPRM also could create situations where a railroad could be compelled to invoice demurrage differently at the same facility—directly billing to entities that have signed an agreement with the terminal, while billing the remaining demurrage to the terminal receiver. This would create considerable administrative complexities, because a railroad would have to continually evaluate information on the cars incurring demurrage at a particular facility in light of the current list of direct billing customers, and would have to create separate bills for the same facility on a regular basis. This would make it more challenging for a railroad to issue accurate invoices on a timely basis.

Even if a terminal and its customer entered a contract in which the customer unconditionally accepted responsibility for demurrage invoices accruing on its traffic, the Board should not adopt a rule forcing a railroad to abide by a contract to which a railroad is not a party. Demurrage is not simply a question of money. It is a tool designed to incentivize efficient car utilization and compensate the railroad for the use of its assets, whether cars or track. If a railroad is not a party to

contracts altering the default rules concerning which entity receives demurrage invoices, they cannot be confident that the proper incentives are being set. That is particularly true because terminals and their customers may have unequal bargaining power. For example, if the NPRM is adopted, a large terminal could condition access to its facility on a customer's willingness to agree with the terminal that the customer would accept all demurrage liability under all circumstances. Such an arrangement would destroy the incentive demurrage creates for the terminals to process railcars efficiently. (And the customer would have no recourse, since terminals do not have an analogous common carrier obligation.)

C. The NPRM Misstates Important Aspects of the Law.

The NPRM also appears to be based in some extent on misstatements of the law that terminals pressed at the Ex Parte 754 hearing. For example, the NPRM's suggestions that a rail carrier is already permitted to issue direct bills to shippers because they are "listed on the bill of lading" has no support in the actual language of the Part 1333 regulations. 49 C.F.R. § 1333.2 clearly defines the parties who are "subject to demurrage" to be "Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff." By only authorizing demurrage against persons "receiving rail cars," the regulations effectively forbid bills to nonreceivers in the absence of an explicit agreement to that effect. The footnote in the NPRM suggesting that a railroad could bill nonreceivers because they may be listed on the bill of lading or because they were "historically responsible for demurrage" cannot be reconciled with the final Ex Parte 707 rules, which explicitly and clearly changed

the law to "place demurrage liability on the receiver of rail cars, regardless of their designation in the bill of lading, if the carrier had provided the receiver with notice of its demurrage tariff." *EP 707 Final Rule* at 5.

Moreover, the NPRM's footnote suggestion that guarantees are "unsound in law and policy" is unsupported and incorrect. Guarantees are a common feature in multiple legal frameworks, and they are particularly common where one party is assuming what would have ordinarily been another party's liability.[10] The right of an obligee[11] to demand a guarantee by a third party is recognized by both the Restatement (Second) of Contracts and Uniform Commercial Code.[12] Indeed, the regulations of a number of federal agencies provide that the agency may require a third-party guarantee before the transaction is performed (typically in the context of a grant or loan).[13]

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[10] *See, e.g.*, *Jones Motor Co. v. Teledyne, Inc.*, 732 F. Supp. 490, 493 (D. Del. 1990) (motor carrier tariff "required the shipper to guarantee to pay the shipping charges if the third party [the consignor] refuses to do so"); *McEntire v. Indiana Nat'l Bank*, 471 N.E.2d 1216, 1219, 1222 (Ct. App. Ind. 1984) ("Equipment Lease Agreement" between Bank and borrower required that third parties sign a guaranty upon liabilities of borrower to the Bank.").

[11] An obligee is "[o]ne to whom an obligation is owed," which would be the railroad in the context of demurrage charges. BLACK'S LAW DICTIONARY 1104 (7th ed. 1999).

[12] *See* Restatement (Second) of Contracts § 251; UCC § 2-609.

[13] *See, e.g.*, 7 C.F.R. § 762.126(d)(4) (In program where USDA guarantees farm loans, "The lender or agency may require additional personal and corporate guarantees to adequately secure the loan."); 10 C.F.R.§ 800.202 (d) (In making loans to minority business enterprises seeking DOE contracts, the Secretary of DOE "may require pledges, personal guarantees and other collateral security… in amounts and on terms appropriate in the Secretary's judgment, to protect the interests of the United States."); 49 C.F.R.§ 22.13(h): (In program providing short-term loans by participating vendors for execution of contracts funded and supported by the Department of Transportation, "individuals who own at least a 20% ownership

Furthermore, the NPRM's suggestion that a receiver's guarantee of demurrage billed to another party is inappropriate ignores that the primary reason for a guarantee is not that the other party will become insolvent or simply refuse to pay its bills, but rather that the shipper may refuse to pay demurrage charges that it believes are the receiver's fault. In agreements shifting demurrage payment liability from a terminal to a third party, CN reserves all rights it may have to pursue collection from the terminal if the third party disputes or does not pay CN's demurrage invoices. These provisions make sense given the example from Kinder Morgan's third-party agreements illustrating that most agreements between a terminal and its customers do not in fact shift demurrage responsibility in all circumstances, as illustrated above in Section II.B. Terminal customers often refuse to accept liability that is caused by the terminal's negligence or its prioritization of other customers' traffic. In those circumstances, it is appropriate for terminals to be responsible for demurrage charges because they are the entity in the supply chain in the best position to order in railcars and minimize dwelling cars on rail tracks. A railroad should be able to collect demurrage from terminals in these instances, as the Board recognized in its final rule in Ex Parte 707. If a railroad is not allowed to reserve its ability to bill receivers for demurrage charges that a customer refuses to pay, it would become impossible to hold terminals

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interest in the borrower shall personally guarantee the STLP loan. DOT OSDBU, in its discretion and in consulting with the participating lender, may require other appropriate guarantees for loan as well.").

accountable for delays they cause. This will have adverse impacts on car utilization and rail track and yard capacity.

For all the above reasons, the Board should not mandate that a railroad be forced to be bound by a demurrage billing arrangement between a terminal and its customers to which the railroad is not a party. But CN would not object to a statement from the Board making clear that the baseline rules of Ex Parte 707 can be altered by contracts to which a railroad, a terminal, and terminal customers are all parties. For example, the below additional language for § 1333.2 would clarify that direct billing arrangements can be entered into by contract. (The proposed new language is underlined.)

> **§ 1333.2 Who May Charge Demurrage**
>
> Demurrage shall be assessed by the serving rail carrier, i.e., the rail carrier providing rail cars to a shipper at an origin point or delivering them to a receiver at an end-point or intermediate destination. A serving carrier and its customers (including those to which it delivers rail cars at origin or destination) may enter into contracts pertaining to demurrage, <u>including contracts allowing demurrage to be billed directly to a party other than the railcar receiver,</u> but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

D. The NPRM's Paperwork Reduction Act Notice Substantially Understates the Costs that the Proposed Rules Would Create.

CN also notes that the NPRM's Paperwork Reduction Act estimate is substantially understated in multiple respects.

<u>First</u>, while CN does not believe that any of its billing systems would need to be adjusted to comply with the proposed rules prescribing invoice elements, the NPRM's suggestion that billing system changes could be implemented with a one-

time investment of 40 hours per railroad does not appreciate the massive amount of planning, testing, and implementation that must accompany any such billing change, ranging from software development to internal training to communications with customers about changes. The time could easily encompass hundreds of hours.

Second, the NPRM's estimate of a one-time burden of 80 hours for a railroad to establish protocols to ensure that demurrage charges would be "accurate and warranted" is significantly understated. The NPRM appears to propose an ongoing review requirement for every individual invoice, which will require substantial ongoing time and effort. The NPRM does not address these costs, and instead acts as though the Board's addition of this requirement will require no additional hour burdens going forward.

Third, the NPRM unrealistically claims that each Class I carrier would take only 5 annual hours to implement the direct shipper billing proposal. The estimate is predicated on a conclusion that it would take a railroad only 5 minutes to permanently implement direct billing to a terminal customer. But in reality, direct terminal customer billing would require continuing efforts to separate and generate invoices. CN provides rail transportation to almost 500 terminals[14] in its United States network. CN conservatively estimates that each large terminal of more than 5 shippers would require 1 hour of processing time per month, every month, and each small terminal would require 30 minutes per month, plus additional time at

[14] This number reflects locations where a receiver accepts shipment from multiple customers at a single location.

start up were they to opt for direct billing. If some but not all terminal customers are forced by terminals to agree to direct billing, a railroad could be required to devote significant staffing needs to creating and separating the bills. And the Paperwork Reduction Act analysis entirely ignores the burden that its regulations would place on the small terminal customers who would be forced to begin reviewing and disputing demurrage bills, despite being in no position to actually control and understand decisions made by a terminal elsewhere in the country, such as failing to efficiently unload railcars and failing to order in a railcar from a serving yard.

III. THE BOARD SHOULD GIVE CARRIERS SUFFICIENT TIME TO NOTIFY CUSTOMERS OF ANY NECESSARY TARIFF CHANGES

If the Board were to adopt any changes to demurrage billing that require tariff changes, it should be sure to provide a railroad with sufficient time to implement conforming changes to its tariffs after publication of that rule. CN has committed to provide 60 days' notice of all major demurrage policy changes. If the Board follows its typical practice of making its order effective 30 days after it is served, then it would be impossible for CN to make any necessary amendments to its tariffs and provide effective notice to its customers before the 30 days expire.

Therefore, if the Board were to adopt any change that would require a carrier to alter its tariffs (such as the NPRM's proposed change to the Ex Parte 707 rules), CN suggests that a railroad should be allowed 30 days after the service date of any final rule to publish conforming tariffs, and then 60 days for those changes to go into effect.

Respectfully submitted,

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Dated: November 6, 2019

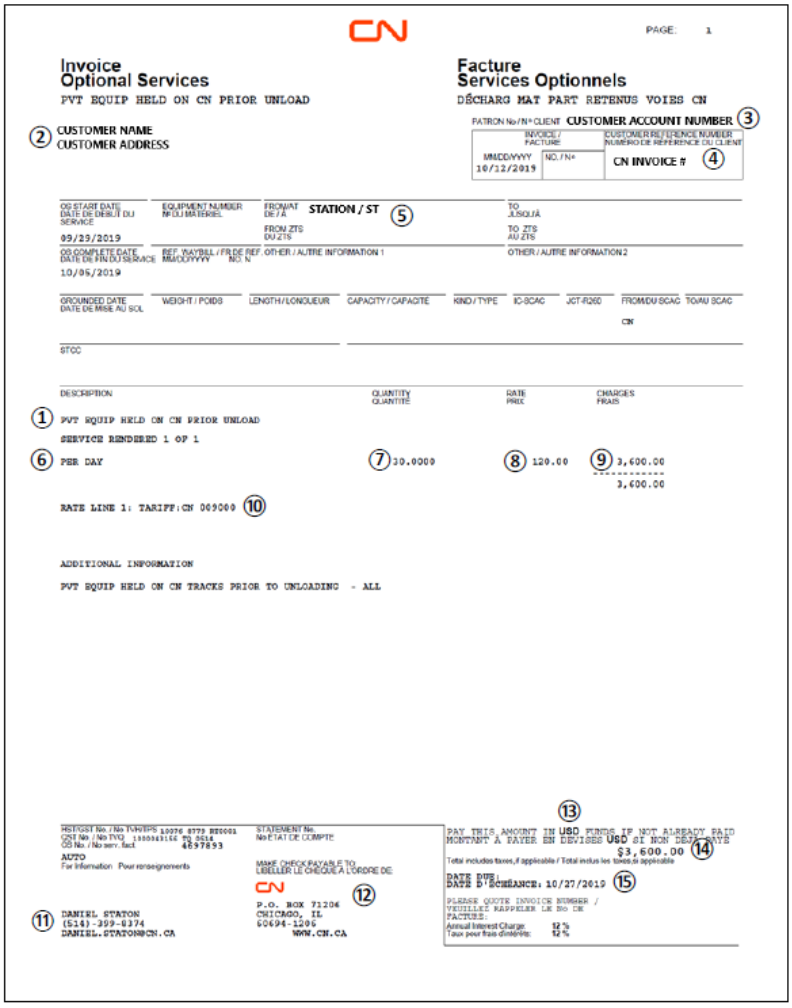
ATTACHMENT 1

SAMPLES OF CN OPTIONAL SERVICE INVOICE, INVOICE BACKUP SUMMARY, AND INVOICE BACKUP DETAIL

Figure 1: Sample Optional Services Invoice

CN Invoice Sample

① Charge description
② Customer name and address
③ Customer CN account number
④ CN invoice number
⑤ Station and State (where demurrage was incurred)
⑥ Unit of measure for charge calculation
⑦ Quantity of units
⑧ Rate per unit
⑨ Charge total
⑩ Charge Authority (Tariff or Contract) Dwell Days
⑪ CN Accounting Contact
⑫ Payment remittance instructions
⑬ Invoice currency
⑭ Amount to pay
⑮ Payment due date



CN

PAGE: 1

Invoice
Optional Services

Facture
Services Optionnels

PVT EQUIP HELD ON CN PRIOR UNLOAD

DÉCHARG MAT PART RETENUS VOIES CN

② CUSTOMER NAME
CUSTOMER ADDRESS

PATRON No / N° CLIENT **CUSTOMER ACCOUNT NUMBER** ③

INVOICE / FACTURE: MM/DD/YYYY 10/12/2019 | NO. / N° | CUSTOMER REFERENCE NUMBER / NUMÉRO DE RÉFÉRENCE DU CLIENT: CN INVOICE # ④

OS START DATE / DATE DE DÉBUT DU SERVICE	EQUIPMENT NUMBER / N° DU MATÉRIEL	FROM/AT / DE / À	TO / JUSQU'À
09/29/2019		**STATION / ST** ⑤ FROM ZTS / DU ZTS	TO ZTS / AU ZTS

OS COMPLETE DATE / DATE DE FIN DU SERVICE MM/DD/YYYY	REF. WAYBILL / FR DE REF. NO. N	OTHER / AUTRE INFORMATION 1	OTHER / AUTRE INFORMATION 2
10/05/2019			

GROUNDED DATE / DATE DE MISE AU SOL	WEIGHT / POIDS	LENGTH / LONGUEUR	CAPACITY / CAPACITÉ	KIND / TYPE	IC-SCAC	JGT-R260	FROM/DU SCAC	TO/AU SCAC
							CN	

STCC

DESCRIPTION	QUANTITY / QUANTITÉ	RATE / PRIX	CHARGES / FRAIS
① PVT EQUIP HELD ON CN PRIOR UNLOAD			
SERVICE RENDERED 1 OF 1			
⑥ PER DAY	⑦ 30.0000	⑧ 120.00	⑨ 3,600.00
			3,600.00

RATE LINE 1: TARIFF:CN 069000 ⑩

ADDITIONAL INFORMATION

PVT EQUIP HELD ON CN TRACKS PRIOR TO UNLOADING - ALL

HST/GST No. / No TVH/TPS 10076 8773 RT0001
QST No. / No TVQ 1000363166 TQ 0014
OS No. / No serv. fact 4897893

AUTO
For information Pour renseignements

⑪ DANIEL STATON
(514)-399-6374
DANIEL.STATON@CN.CA

STATEMENT No.
No ÉTAT DE COMPTE

MAKE CHECK PAYABLE TO:
LIBELLER LE CHÈQUE À L'ORDRE DE:

CN ⑫
P.O. BOX 71206
CHICAGO, IL
60694-1206
WWW.CN.CA

⑬

PAY THIS AMOUNT IN USD. FUNDS IF NOT ALREADY PAID
MONTANT À PAYER EN DEVISES USD SI NON DÉJÀ PAYÉ
$3,600.00 ⑭

Total includes taxes, if applicable / Total inclus les taxes, si applicable

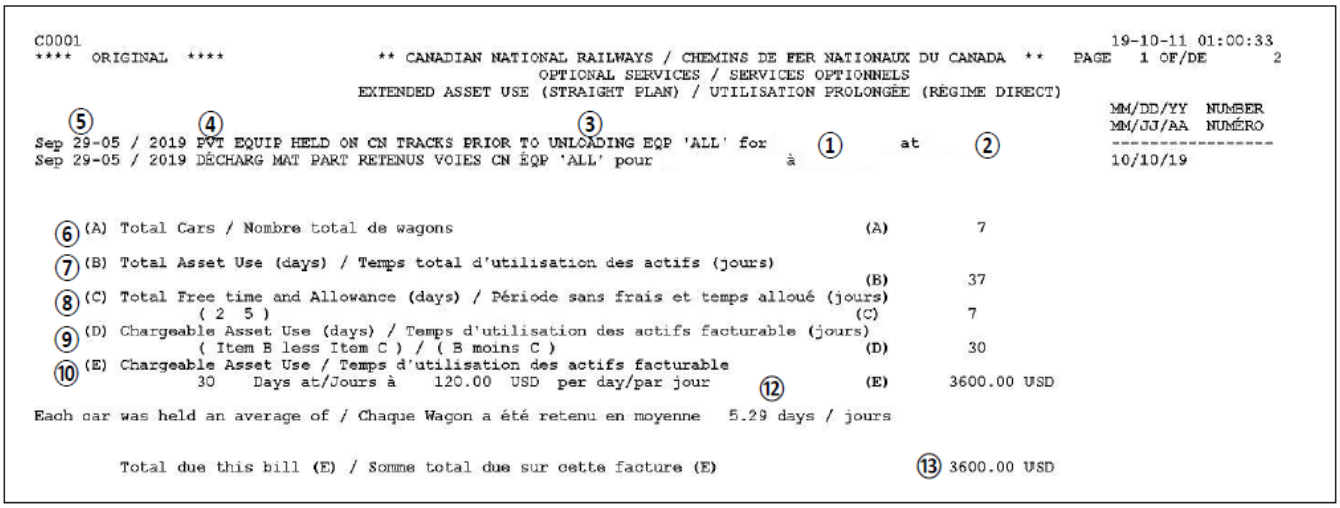
DATE DUE:
DATE D'ÉCHÉANCE: 10/27/2019 ⑮

PLEASE QUOTE INVOICE NUMBER /
VEUILLEZ RAPPELER LE No DE
FACTURE:
Annual Interest Charge 12 %
Taux pour frais d'intérêts 12 %

Figure 2: Invoice Backup – Summary

CN Invoice Backup – Summary Page

(1) Customer
(2) Station and State
(3) Demurrage type (Load, Unload, Other)
(4) Equipment ownership type (Private or Railway owned)
(5) Start date of demurrage period
(6) Total railcars included on the invoice
(7) Total asset use days (days that the cars dwelled)
(8) Total free days (Free days allowed in the governing tariff or contract PLUS additional free day provided to offset any CN caused dwell)
(9) Total chargeable days ("Debits" – equal to dwell days – free days)
(10) Chargeable asset use calculation ((9) chargeable days x (11) rate)
(11) Rate charged and currency (as governed by the applicable tariff or contract)
(12) Average number of days each railcar was held ((7) total asset use / (6) total cars)
(13) Total charges due



C0001 19-10-11 01:00:33
**** ORIGINAL **** ** CANADIAN NATIONAL RAILWAYS / CHEMINS DE FER NATIONAUX DU CANADA ** PAGE 1 OF/DE 2
OPTIONAL SERVICES / SERVICES OPTIONNELS
EXTENDED ASSET USE (STRAIGHT PLAN) / UTILISATION PROLONGÉE (RÉGIME DIRECT)

MM/DD/YY NUMBER
MM/JJ/AA NUMÉRO
10/10/19

(5) (4) (3)
Sep 29-05 / 2019 PVT EQUIP HELD ON CN TRACKS PRIOR TO UNLOADING EQP 'ALL' for (1) at (2)
Sep 29-05 / 2019 DÉCHARG MAT PART RETENUS VOIES CN ÉQP 'ALL' pour à

(6) (A) Total Cars / Nombre total de wagons (A) 7

(7) (B) Total Asset Use (days) / Temps total d'utilisation des actifs (jours) (B) 37

(8) (C) Total Free time and Allowance (days) / Période sans frais et temps alloué (jours) (2 5) (C) 7

(9) (D) Chargeable Asset Use (days) / Temps d'utilisation des actifs facturable (jours) (Item B less Item C) / (B moins C) (D) 30

(10) (E) Chargeable Asset Use / Temps d'utilisation des actifs facturable 30 Days at/Jours à 120.00 USD per day/par jour (12) (E) 3600.00 USD

Each car was held an average of / Chaque Wagon a été retenu en moyenne 5.29 days / jours

Total due this bill (E) / Somme total due sur cette facture (E) (13) 3600.00 USD

Figure 3: Invoice Backup – Details

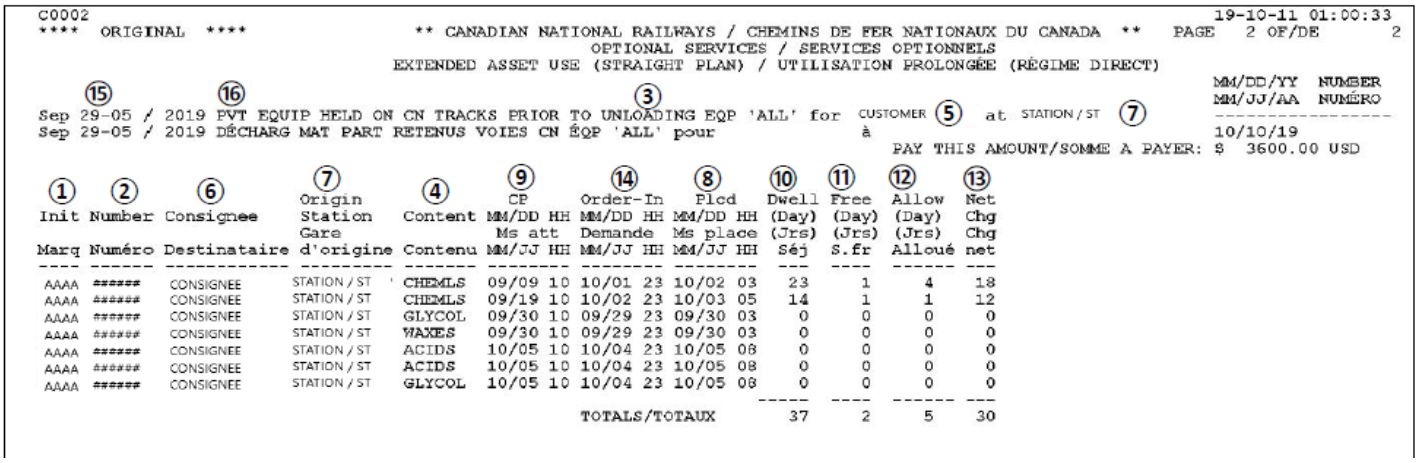
CN Invoice Backup Sample – Detail Page

1. Data Points Referenced by the STB

① ②**Car Identifiers**: Provided - railcar initials + railcar numbers
◯ **Waybill Creation**: Not provided for unloading invoices as it has no impact on calculation of unloading charges. Available on loading invoices ("Release Date").
③ **Loaded/Empty Status**: Provided "Unloading" indicates a "Loaded" status while "Loading" would indicate an "Empty" status
④ **Commodity being shipped:** Provided (if applicable)
⑤ ⑥ **Identify of shipper , consignee, and/or care of party as applicable**: Provided. Customer responsible for charges and consignee/shipper (as applicable)
⑦ **Origin station and state of shipment:** Provided. In addition the station and ST at which the charges were incurred is provided (Origin / Destination / Other)
⑧ **Dates / times actual placement of each car:** Provided
⑨ **Dates / times constructive placement of each car**: Provided (if applicable – some customers have traffic placed on arrival)
⑧ **Dates / times notification of constructive placement**: Available. Notification is always one calendar day prior to date of constructive placement
⑩ **Date of release of each car**: Available. Release date = (earlier of) ⑧ "Plcd" or ⑨"CP" + ⑩ "Dwell"
⑪+ ⑫ **Number of credits attributed to each car:** Provided. Credits = "Free" (tariff allowance) + "Allow" (additional free days added to offset an CN impact)
⑩ ⑬ **Number of debits attributed to each car**: Provided. ⑩ "Dwell" – ⑪ "Free" + ⑫ "Allow" + ⑬ "Net" (chargeable days or "debits")
⑭ **The date the unloading party ordered the car for placement by CN**: Provided

2. Additional Data Points Provided

⑮ Start date of the demurrage cycle (CN calculates charges weekly)
⑯ Equipment ownership (private and railway owned equipment are not combined)



C0002 19-10-11 01:00:33
**** ORIGINAL **** ** CANADIAN NATIONAL RAILWAYS / CHEMINS DE FER NATIONAUX DU CANADA ** PAGE 2 OF/DE 2
OPTIONAL SERVICES / SERVICES OPTIONNELS
EXTENDED ASSET USE (STRAIGHT PLAN) / UTILISATION PROLONGÉE (RÉGIME DIRECT)

MM/DD/YY NUMBER
MM/JJ/AA NUMÉRO

⑮ ⑯ ③
Sep 29-05 / 2019 PVT EQUIP HELD ON CN TRACKS PRIOR TO UNLOADING EQP 'ALL' for CUSTOMER ⑤ at STATION / ST ⑦ 10/10/19
Sep 29-05 / 2019 DÉCHARG MAT PART RETENUS VOIES CN ÉQP 'ALL' pour à

PAY THIS AMOUNT/SOMME A PAYER: $ 3600.00 USD

① Init Marq	② Number Numéro	⑥ Consignee Destinataire	⑦ Origin Station Gare d'origine	④ Content Contenu	⑨ CP MM/DD HH Ms att MM/JJ HH	⑭ Order-In MM/DD HH Demande MM/JJ HH	⑧ Plcd MM/DD HH Ms place MM/JJ HH	⑩ Dwell (Day) (Jrs) Séj	⑪ Free (Day) (Jrs) S.fr	⑫ Allow (Day) (Jrs) Alloué	⑬ Net Chg Chg net
AAAA	######	CONSIGNEE	STATION / ST	CHEMLS	09/09 10	10/01 23	10/02 03	23	1	4	18
AAAA	######	CONSIGNEE	STATION / ST	CHEMLS	09/19 10	10/02 23	10/03 05	14	1	1	12
AAAA	######	CONSIGNEE	STATION / ST	GLYCOL	09/30 10	09/29 23	09/30 03	0	0	0	0
AAAA	######	CONSIGNEE	STATION / ST	WAXES	09/30 10	09/29 23	09/30 03	0	0	0	0
AAAA	######	CONSIGNEE	STATION / ST	ACIDS	10/05 10	10/04 23	10/05 08	0	0	0	0
AAAA	######	CONSIGNEE	STATION / ST	ACIDS	10/05 10	10/04 23	10/05 08	0	0	0	0
AAAA	######	CONSIGNEE	STATION / ST	GLYCOL	10/05 10	10/04 23	10/05 08	0	0	0	0
						TOTALS/TOTAUX		37	2	5	30

ATTACHMENT 2

SUPPLEMENTAL COMMENTS OF CN,

FILED JUNE 6, 2019 IN EX PARTE 754

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

SUPPLEMENTAL COMMENTS ON BEHALF OF CN

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Washington, DC 20004
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Kathryn.gainey@cn.ca

Dated: June 6, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

SUPPLEMENTAL COMMENTS ON BEHALF OF CN

The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter "CN") thank the Board for the opportunity to supplement CN's testimony regarding demurrage and optional services.

It is tempting to assess the efficacy of demurrage and accessorial charges by looking at the impact these may have on a specific customer (including terminals) in a specific service setting. But that narrow focus would ignore the greater good served by these charges. Demurrage policies are designed to increase capacity and improve service by creating the right incentives for customers to "turn the assets" as efficiently as possible. Railroads already have strong incentives to improve asset utilization, since assets that sit idle or occupy valuable track space directly impact a railroad's ability to provide efficient and fluid service to its other customers on the network. But customers do not have those natural incentives, since a customer's primary interest is in its own traffic—not the overall network. The solution cannot be to throw more assets at the problem, creating further inefficiencies and congestion, harming service, and increasing costs for all stakeholders. The solution

is to find a reasonable way to incentivize customers to move the assets efficiently. Demurrage is endorsed by Congress as an essential tool to create those incentives. While demurrage does not fully compensate railroads for the lost opportunity of a non-productive asset, it creates the necessary motivations to promote the public interest in a more efficient rail network.

While a casual observer of the May 22-23 hearing might conclude that the Board is being asked to decide a dispute between shippers and railroads over the proper role of demurrage and accessorial charges, the true divide is between the vast majority of customers who depend on reliable rail service and who manage their own operations efficiently and a minority of customers and their trade associations who seek to impose inefficiencies on others without consequence. Another divide is between the terminal operators who the Board has found are best positioned to reduce or eliminate delays for loading or unloading shipments they handle, and the terminal customers and other network users who the terminals prefer to bear the consequences of their inefficiencies.

If the Board were to impair railroads' statutory right to enforce reasonable demurrage policies, service to the entire rail network would suffer. Chairman Begeman is correct that "a continued focus on rail service is an overarching responsibility of the Board."[1] CN's witness Derek Taylor explained how important demurrage policies were to CN's overarching focus on moving traffic safely and

[1] *Oversight Hearing on Demurrage and Accessorial Charges*, STB Ex Parte No. 754, Day 1 Transcript at 9 (May 22, 2019) ("Day 1 Tr.").

efficiently and improving asset utilization so that we can provide the high level of service that our customers demand.

As the Board considers concepts like fairness and reciprocity, it should consider the overall interests of the supply chain in promoting network fluidity and maximizing asset utilization. Many stakeholders in the supply chain depend on the reliability and efficiency of CN's service. As CN testified, approximately 80% of CN's customers operate without receiving a single demurrage invoice.[2] For CN, this number confirms that its demurrage program is balanced and well-calibrated. It enables a substantial majority of customers to operate with no demurrage charges, while providing a continuing incentive for efficiency for the others.

Mindful of their role in the supply chain, most of CN's customers have structured their operations to make loading or unloading more efficient, have worked to better match railcar orders with the output of their facilities (*i.e.*, managing the pipeline from origin to destination for their moves), or have made staffing changes or capital investments at their facilities to build resilience in their own supply chain in the event of disruption. These efforts enhanced their ability to turn equipment efficiently, which benefits the whole interstate freight rail network. The Board should not disincentivize these efforts of the many or reward a minority

[2] *Oversight Hearing on Demurrage and Accessorial Charges*, STB Ex Parte No. 754, Day 2 Transcript at 835 (May 23, 2019) ("Day 2 Tr.") ("I would like to add the last 5 weeks, 80% of our customers did not receive a demurrage invoice."); *see also* attached Supplemental Testimony of Keith Courtoreille.

who, at times, fail to operate efficiently and, as a consequence, are externalizing their inefficiencies onto other participants in the supply chain.

The Board should also not forget that railroad demurrage practices are already regulated in two ways. First, railroads must comply with the detailed framework that the Board already has in place to ensure that demurrage policies are reasonable and fair. The regulatory background requires fair notice and protects against the collection of demurrage for delays caused by the railroad's conduct. Second, railroads are regulated and disciplined by the market, as Congress intended. CN's customers expect and demand that we deliver exceptional service with high velocity and efficient transit times. CN wants to help its customers compete in their markets. If we fail to meet those expectations, we risk losing business in the highly competitive transportation markets that govern the vast majority of our traffic.

CN's supplemental comments first address some of the basic statutory and regulatory principles governing demurrage. The Board's notice for the hearing asked parties to be prepared to address the application and effect of current demurrage policies.[3] But some of the questions from members at the hearing—and some of the incorrect assertions from other parties about the law in this area—suggest that a review of the legal principles that Congress and the Board have established would be helpful. Congress has given the Board clear instructions

[3] *Oversight Hearing on Demurrage and Accessorial Charges*, STB Ex Parte No. 754 (STB served April 8, 2019).

about the importance of demurrage and about the limitations of the Board's authority that the Board cannot ignore—as much as some commenters may wish it to. Moreover, the Board has established guidelines for addressing the reasonableness of demurrage charges in both its case-by-case adjudications and its recent Ex Parte No. 707 rulemaking. Suggestions that the Board ought to return to a pre-Staggers regime of regulation are inconsistent with current governing principles and should be rejected out of hand.

Second, CN responds to some discrete issues raised at the hearing where supplemental testimony might be useful. For example, CN is addressing some of the recurring questions at the hearing, such as the theoretical scenario of a shipper who is unable to comply with a railroad's demurrage policy; questions about how "zero free time" policies work; and the suitability of a cost-benefit analysis for individual demurrage adjudications. CN also responds to some of the incorrect accusations lodged at the hearing.

Third, CN describes some of its takeaways from the hearing and some of the commitments that it is making to respond to concerns raised by the Board and stakeholders. CN understands that some shippers believe that they may need an avenue for a cost effective forum to resolve demurrage disputes; CN therefore is committing to join the STB's arbitration program for demurrage disputes under $200,000. CN also commits that it will develop mechanisms to collect broader feedback from its customers on its demurrage policies.

CN has also attached supplemental testimony from Keith Courtoreille, which provides some additional information to the Board about some of the topics discussed at the hearing.

I. THE BOARD SHOULD NOT ACCEPT THE INVITATION OF SOME SHIPPERS TO FAVOR THEIR OWN INTERESTS TO THE DETRIMENT OF OTHERS WHO DEPEND UPON THE INTERCONNECTED RAIL NETWORK.

Some witnesses seem to want to use the Board's oversight hearing to upend the structure of demurrage charges and have the Board impose sweeping legal and policy changes to serve narrow parochial interests. For example, multiple logistics providers asked the Board to discard the 49 C.F.R. Part 1333 rules adopted just five years ago and return to a regime where terminals could never be held accountable for the delays they cause.[4] Other shippers asked the Board to make systematic changes like instituting nationwide demurrage rules, making rail carriers liable for demurrage, banning demurrage charges for private cars, or prohibiting demurrage charges for cars in constructive placement when dwelling in rail yards.[5]

These parties' requests fail to recognize the statutory and regulatory foundations governing demurrage and the regulatory structure that is already in place to ensure that receivers have the ability to seek relief from unreasonable demurrage charges. The Board is not writing on a blank slate, and it should not

[4] See, *e.g.*, Day 2 Tr. at 771-76 (asking STB to reverse rule allowing demurrage to be billed to terminals).

[5] See, *e.g.*, Day 1 Tr. at 91-92 (suggesting that railroads should be charged demurrage for private cars); Day 1 Tr. at 242-245 (advocating for nationwide demurrage rule proposals).

lose sight of Congress's express guidance or lightly abandon the demurrage policies that the Board has carefully developed in recent rulemakings and adjudications. Nor should it ignore the changes that have occurred in the regulatory framework over the past four decades. The Board's current precedent and governing rules have long since left behind concepts deployed in the pre-Staggers era, and this oversight hearing is no place to consider reviving them.

Four legal principles should guide the Board in any action it takes in relation to demurrage:

1) Congress explicitly authorized demurrage and recognized its important purpose in promoting efficient asset utilization and fluidity on the interconnected rail network.

2) The Board's regulatory role is circumscribed, and the Board's regulatory authority and mission are far different now than they were before the Staggers Act.

3) Railroads cannot collect demurrage for delays caused by the railroad's conduct.

4) Railcar receivers are liable for demurrage if they are on notice of the demurrage tariff, because they are best positioned to reduce delays.

A. Principle 1: Congress explicitly authorized demurrage and recognized its important purpose.

The first source for any question about the Board's legal authority on a subject is the statute. For demurrage, Congress provided clear instructions in 49 U.S.C. § 10746:

> 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.

Three points about the statute are of particular importance. First, Section 10746's very existence is noteworthy. Demurrage was specifically endorsed and encouraged in the Interstate Commerce Act—a clear signal that Congress has long recognized the importance of demurrage to the functioning and efficiency of the rail network. Second, the statute does not merely say that railroads "may" compute demurrage charges and establish rules for those charges—it rather says that railroads "shall" compute those charges. "Shall" is generally recognized to reflect the mandatory language of command.[6] This mandatory language is again noteworthy; Congress did not say that railroads can establish demurrage programs—it said they must establish those programs.[7] Third, Congress framed the purposes of demurrage not in terms of cost recovery or a penalty for poor performance, but rather in terms of incentives. In Congress's view, the purpose of demurrage is to incentivize behavior that serves the national needs for freight car use, distribution, and supply by encouraging loading and unloading to be done efficiently so railcars can be placed at the next origin.

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[6] *See, e.g., Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily the 'language of command'") *citing Escoe v. Zerbst*, 295 U.S. 490, 493 (1935).

[7] The suggestion at the hearing that Congress's mandate to "compute" demurrage charges might not entail a mandate to "collect" these charges would frustrate Congress's plain legislative intent. The mere computation of charges without actual collection could hardly create a meaningful incentive to fulfill the national needs for freight car distribution and promote network fluidity.

Both the Board and courts have acknowledged Congress's clear statutory endorsement of demurrage "as an important tool in ensuring the smooth functioning of the rail system." *Demurrage Liability*, STB Ex Parte No. 707, at 2 (STB served April 11, 2014).

B. Principle 2: The Board's Role Is Limited, In Accordance With Congress's Deregulatory Purpose.

A second critical statutory principle is that Congress has sharply circumscribed the Board's regulatory role to review railroads' demurrage practices from what it once was. At the time that many older demurrage cases were decided, the ICC was a top-down regulator that imposed detailed, uniform rules on how demurrage had to be documented and collected and that regularly reviewed nationwide agreements setting demurrage rates for the industry.[8]

Now, however, Congress has made clear that railroads need to be given the freedom to set their own demurrage policies and that the Board's primary role is to resolve individual complaints alleging that aspects of a carrier's particular demurrage policy are unreasonable. The Board's limited jurisdiction means that its role is not to define what demurrage policies are the "best"—it is rather to provide a forum for shippers to challenge aspects of a carrier's demurrage policies or applications that shippers believe are unreasonable. Put differently, the Board is

[8] *See, e.g., Car Demurrage Rules Nationwide*, 350 I.C.C. 777 (1975); *see also Railroads Per Diem, Mileage, Demurrage, and Storage Agreement*, 1 I.C.C.2d 924, 934 (1985) (rejecting prior policy of nationwide decisionmaking because "a free market approach to such charges will more effectively foster the goals of the national rail transportation policy").

not charged with developing and imposing the most reasonable demurrage policy—it is instead charged with setting the boundaries of what is unreasonable. That charge is one that the Board is to carry out as a case-by-case adjudicator—not as a command-and-control regulator.

Nevertheless, the Board's role is not insignificant. On the contrary, it is vitally important and consistent with its mandate that the Board continue to provide a forum for resolving disputes (in addition to individual disputes that are resolved in courts or in arbitration), and the Board's case-by-case precedents provide important guidance on what policies are unreasonable. But except in limited circumstances,[9] the Board is not a roving investigator charged with reviewing and redefining railroad demurrage policies or imposing nationwide uniform demurrage standards. It is rather an adjudicator available to resolve demurrage complaints that are brought before it.[10]

The Board has been rightly reluctant to use its rulemaking authority to set nationwide demurrage policy, given the unique circumstances that can affect whether a particular demurrage charge is unreasonable in an individual case. In the aftermath of Staggers, the ICC specifically abandoned a prior nationwide

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[9] The Board now has limited authority to initiate investigations into potential violations of the Interstate Commerce Act that are of national or regional significance.

[10] *Cf. NAFCA v. BNSF Ry. Co.*, STB Docket No. 42060 (Sub-No. 1), at 13 n.46 (STB served Jan. 26, 2007) ("The fact that a shipper might suffer hardship from a service failure at a particular location or particular locations does not warrant overturning the railroad's entire storage or demurrage program, as there are other remedies available for that situation.").

demurrage regime in 1985, finding that "the need for uniform demurrage and storage charges has been overstated, that such charges clearly can be established on a unilateral basis, and that a free market approach to such charges will more effectively foster the goals of the national rail transportation policy." *Railroad Per Diem, Mileage, Demurrage – Agreement*, 1 I.C.C.2d 924, 934 (1985).

The only recent exception has been Ex Parte 707, where the Board needed to resolve a significant legal controversy over what type of notice of a demurrage tariff is required for demurrage charges to be invoiced to railcar receivers like warehousemen and terminal operators. *See Demurrage Liability*, Ex Parte No. 707. In that rulemaking, the Board specifically declined to issue rules of general applicability about fact-specific issues like bunching and actual placement, holding that such issues were "best addressed in the context of individual disputes." *Id.* at 23-24.

Finally, the Board's authority is particularly circumscribed when addressing allegations about the level of a rate or how rates are calculated. The D.C. Circuit Court of Appeals has held that the Board's governing statute requires challenges to the level of a rate to be brought under the Board's rate jurisdiction, not under its practices jurisdiction. *Union Pacific R.R. Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989). In the same vein, the Board's investigative authority does not permit it to initiate investigations concerning the level of a rate. *See Rules Relating to Board-Initiated Investigations*, STB Ex Parte No. 731, at 11 (Dec. 7, 2016) ("In addition, there is no need to expressly exclude rate disputes in these rules—such disputes are

not subject to Board-Initiated Investigation under the statute (whether or not they are of national or regional significance).").

While several questions were asked about how railroads set demurrage rates or the components of rates, these are not appropriate topics for a public hearing. In the first place, asking railroads to publicly comment on considerations in setting rates or charges in a forum alongside other railroads could cause serious competitive harm. Moreover, questions suggesting that railroads are required to separately calculate specific "cost" and "penalty" components of demurrage charges stem from an antiquated line of cases that have long since lost their relevance. It is true that in the 1970s the ICC held in several decisions that, if the shipper affirmatively demonstrated "due diligence" in avoiding demurrage charges, a railroad could only collect a "per diem" charge for demurrage (as compensation for prescribed car hire expenses) and not any additional penalty component.[11] This due diligence standard was exacting: it required "evidence that [the customer] made special efforts to avoid or abate the accrual of demurrage." *See Prince Mfg. Co. v. Norfolk & W. Ry. Co.*, 356 I.C.C. 702, 707 (1978). Moreover, any such waiver of the full demurrage tariff charge required special dispensation from the ICC, which might not be granted even if the railroad and the customer agreed.[12]

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[11] *See, e.g.*, *Ormet Corp. v. Illinois Cent. R.R. Co.*, 341 I.C.C 647, 651 (1972).

[12] *See Prince Mfg.*, 356 I.C.C. at 707 ("The parties are not at liberty to decide between themselves that a particular charge was just and reasonable. Thus, in numerous informal cases involving an allegation that demurrage charges were unjust or unreasonable, we have denied special-docket applications (where carrier-defendants admitted allegations of unreasonableness) and later denied reparations on the same matter." (footnote omitted)).

These concepts have been left far behind. No one would suggest in 2019 that a railroad and customer could not agree between themselves that a particular demurrage charge should be waived or refunded. The filed rate doctrine is no longer controlling, and there has not been a special docket or waiver proceeding involving demurrage at the agency in more than thirty years.[13] Car hire rates have been deprescribed and are now determined bilaterally and confidentially by rail carriers, eliminating the basis for a fixed "compensation" component of a railroad's demurrage charge. Indeed, the idea that demurrage must be separated into identified compensation and penalty components has been cited in only one agency decision since the early 1980s,[14] and customers today receive relief from the entire demurrage charge in appropriate circumstances, not just a "penalty" component. Coupled with the fact that shippers are no longer required to prove their "due diligence" to avoid demurrage, the development of demurrage jurisprudence since the 1970s has in many ways been *favorable* for customers. Prior concepts of a mathematical division of demurrage charges into identifiable components are no longer relevant to how the Board adjudicates demurrage disputes.[15]

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[13] *See The Atchison, T. & S.F. Ry. Co. and Ulysses Irrigation Pipe Co. -- Exempt. To Waive Demurrage Charges*, ICC Docket No. 40129, 1987 WL 98283 (1987).

[14] *See R. Franklin Unger – Pet. for Decl. Order – Assessment and Collection of Demurrage and Switching Charges*, STB Docket No. 42030, 2000 STB LEXIS 333 (2000).

[15]In any event, CN does not think of demurrage as being made up of a certain percentage of cost recovery and a certain percentage of a "penalty." CN views demurrage as an incentive for efficiency, not a cost recovery mechanism. That said, CN expects that in most situations the demurrage charge it receives is far outweighed by the costs it incurs from dwelling railcars (which include both operational costs, harms to fluidity, and opportunity costs for the railroad and other

C. Principle 3: A railroad cannot collect demurrage if it is at fault.

Third, the Board has made clear that a railroad may not collect demurrage if it is at fault. As the Board recognized in *Capitol Materials*, "[a] shipper should not be required to compensate a railroad for delay in returning the asset if the reason for the delay is not the shipper's, but the railroad's fault." *Capitol Materials, Inc.—Pet. for Declaratory Order*, 7 S.T.B. 576, 577 (2004). Federal courts agree that current law requires "that a shipper be allowed to demonstrate before the [agency] that erratic service is the fault of the railroad and that a shipper should therefore not be assessed a charge for idle track time caused thereby." *NAFCA v. STB*, 529 F.3d 1166, 1178 (D.C. Cir. 2008).

The law is clear, however, that "the question of fault is fact-specific," and that "the burden is on a complaining shipper to show that demurrage fees are excessive in a particular instance because of some fault on the railroad's part." *Id.* at 1173. As the D.C. Circuit has observed, the fact that shippers have the burden of proving railroad fault flows directly from the general principle that shippers have the burden of proving that a railroad practice is unreasonable. *Id.* at 1173 n.6.

D. Principle 4: The Board appropriately placed demurrage responsibility on the receiver, if the receiver has actual notice of a railroad's demurrage tariff.

Finally, the Board made clear in its recent *Demurrage Liability* rules that demurrage can properly be charged against any person receiving railcars from a rail

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customers whose service is deteriorated and who are not able to get a car at origin as quickly when cars are dwelling).

carrier for loading or unloading, so long as that person has actual notice of the terms of the demurrage tariff prior to the carrier's placement of the railcars. *See Demurrage Liability*, STB Ex Parte No. 707, at 9-15 & App. A; 49 C.F.R. §§ 1333.1 - 1333.3. The Board's rules were the result of a three-and-a-half-year rulemaking proceeding in which it received comments from multiple parties and resolved a significant divide among courts about the circumstances in which demurrage could be charged to railcar receivers who were responsible for loading and unloading, but who were often not named on the bill of lading. Indeed, in urging the Supreme Court to deny certiorari on a petition seeking to resolve the circuit split, the Solicitor General's amicus brief urged the Court to "allow the Board to apply its expertise to resolve the issue of demurrage liability for warehousemen, as well as other related demurrage issues, through its pending rulemaking proceeding."[16] The Board concluded that the 1969 ICC precedent that led to this confusion was inconsistent with the purpose of 49 U.S.C. § 10746 and with good policy.

Instead, the Board recognized as a policy matter that "responsibility for demurrage should be placed upon the party in the best position to expedite the loading or unloading of rail cars at origin or destination." *Demurrage Liability*, STB Ex Parte No. 707, at 8. And it found that terminals and warehousemen were in the best position to minimize demurrage liability for the shipments they receive—despite their protests to the contrary. *See id.* at 8-9. While many of the same

[16] Brief of United States as Amicus Curiae at 9-10, *Norfolk Southern Ry. Co. v. Groves*, No. 09-1212 (filed Dec. 10, 2010).

parties who participated in Ex Parte 707 returned to this hearing to make the same arguments they made before in an attempt to escape future liability for demurrage charges, there is no cause for the Board to revisit its Ex Parte 707 conclusion.

II. RESPONSES TO OTHER QUESTIONS AND ISSUES.

A. CN Actively Works With Customers To Encourage Prompt Loading and Unloading of Equipment and Address Unique Issues.

Much of the discussion at the hearing focused on what to do about a customer who alleges that it cannot comply with a demurrage tariff and has no choice but to incur charges. While the Board's concern about this hypothetical scenario is understandable, it does not reflect CN's experience with the vast majority of railcar receivers.

CN cannot speak to the circumstances faced by individual customers of other railroads, but CN can say that its general experience is that customers have multiple options to minimize or avoid demurrage charges. Those options might be operational fixes to improve the efficiency of loading or unloading. They might be supply chain improvement and better pipeline management to ensure that the flow of cars into a facility matches that facility's ability to load or unload the cars. Or they might be storage options, such as contracting with railroads or other parties to use storage tracks or investing in internal storage capacity. While every customer is different, most customers have viable options to substantially reduce or eliminate demurrage.

CN works with its customers on an individualized basis to help them reduce demurrage liability and increase efficiency through better pipeline management,

more economical storage, or other options. Mr. Courtoreille's supplemental testimony describes some of the eBusiness tools that CN provides to give customers, including terminals, visibility into the railcars moving in their supply chains. CN also maintains an internal fleet capacity planning group which leverages the same tools and techniques that CN uses for its system cars for large private car customers. This group assists customers in right-sizing their private car fleets to improve network fluidity and help avoid demurrage charges. And where a customer lacks sufficient storage options, CN works to help customers identify economical alternatives.

In short, the hypothetical example of a customer who has no ability to avoid demurrage charges remains, in CN's experience, just a hypothetical. We work with our customers to address their unique situations, and in our view customers have multiple options to minimize or avoid demurrage charges.

B. Customers Do Not Need Extra Free Time To Avoid Demurrage.

Some testimony at the hearing suggested that so-called "zero free time" policies would "invariably" cause receivers to incur demurrage charges even when they "perform perfectly."[17] This is not accurate and is not borne out by CN's experience. As CN has testified, it does not issue credits for the storage of private cars. But "no storage time" for private cars at CN does not in fact mean "zero time," rather, it means no extra free time will be provided if a customer does not ask that cars be delivered in the first available service window. The fact that only 20% of

[17] Day 1 Tr. at 28.

CN's customers pay any demurrage is powerful evidence that its policies on private car storage do not equal automatic demurrage.

When CN provides no additional storage time (as it does for private car unloading), it does not mean that a customer immediately incurs demurrage. It means that a customer is not given an extra day to order a car in for delivery. As Mr. Courtoreille explains in his attached supplemental testimony, no demurrage is charged if a customer orders cars in for the first available service after being notified that the car is ready for delivery. The cut-off times for these orders are specific to a customer's service plan. Thus, if a customer is only served on Mondays and Thursdays, and a car arrives for delivery on a Friday, the customer will not be charged demurrage so long as the customer asks that the car be delivered on the following Monday. The cut-off time for requesting that Monday delivery will be 4 hours before the customer's scheduled time of service.

CN's eBusiness tools make it even easier for customers to avoid demurrage, by providing detailed tracking that allows customers to know in advance when cars arrive and will be available for loading. Mr. Courtoreille's supplemental testimony includes a sample First Mile/Last Mile dashboard that shows the kind of visibility that is available to customers, including terminals,to understand their pipeline. Indeed, a customer does not need to wait for a notice of constructive placement to order a car in for delivery. If the customer sees that a car is en route, it can order it in before the car is actually constructively placed.

For all of these reasons, CN's customers using private cars are able to manage their pipelines without incurring demurrage charges, and most of them do.

C. CN's Demurrage Tariff Easily Passes a Proper Cost-Benefit Analysis.

CN generally supports the Board's use of cost-benefit analyses in carrying out its regulatory role. But suggestions at the hearing that the Board might use a cost-benefit analysis to resolve individual demurrage complaints are impractical. Any cost-benefit analysis has to consider the effect of demurrage incentives on all stakeholders. The Board cannot simply look at costs and benefits for the railroad and the complaining customer; it must also look at other stakeholders who benefit from a more efficient network and the costs to those stakeholders and costs to network fluidity if a particular customer does not efficiently load or unload railcars and cars are dwelling in CN's serving yard.

CN is confident that such an analysis would show that the benefits of its demurrage program far outweigh the costs. Indeed, Congress has already decided that the benefits of demurrage outweigh the costs, when it legislated that railroads "shall compute" demurrage charges and "statutorily recognized [demurrage] as an important tool in ensuring the smooth functioning of the rail system."[18] But it is not practical for the Board to perform a full cost-benefit analysis in an individual adjudication, because the benefits of demurrage are spread so widely among users of the rail network and others who depend upon efficient rail operations.

[18] *Demurrage Liability*, STB Ex Parte 707, at 2.

D. Kinder Morgan's Allegations About CN Are Meritless.

CN is in federal court litigation against Kinder Morgan ("KM") over its failure to pay for the demurrage it incurs for cars that back up in CN's Chicago-area Glenn Yard while awaiting KM's instructions to deliver them to its Argo terminal. The litigation did not arise from disputes about service problems or allegations of unfair tariff changes. It stems from the fact that KM has refused to pay a single demurrage invoice to CN in nearly four years, because of an apparent decision by KM that the Board's 2014 *Demurrage Liability* rules are not lawful. Indeed, KM has pressed an affirmative defense asserting that the Board's final rule holding that terminals like KM are liable for demurrage is legally invalid (despite KM's failure to appeal that final rule).[19] KM is right that the amount at dispute in that litigation now exceeds $8 million, but that is a function of the massive congestion that KM has been causing in the Chicago terminal over the past several years and its refusal to pay one penny of demurrage. While KM claimed to the Board that "we will be responsible for the liabilities that we create," its behavior to date has not matched that claim in CN's experience. (Tr. at 57).

Given the ongoing litigation, CN will not respond to each of the claims KM makes. KM's allegations that CN imposes "strict liability" for demurrage, that it does not recognize "fault-based defenses," and that it fails to provide effective

[19] *See* Mem. in Support of Motion for Partial Summary Judgment, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. filed May 21, 2019) (Doc. 106); Answer to Amended Complaint at 19, *Illinois Cent. R.R. Co. v. Kinder Morgan Liquids Terminals LLC*, 1:16-cv-08044 (N.D. Ill. Filed May 23, 2017) (Doc. 35).

invoice review or dispute resolution are not supported, and are not consistent with any of the other testimony that the Board has heard regarding CN's demurrage policies. But two points require a specific response.

First, KM's claims of retaliation are nonsense. It first claims that it was "retaliation" for CN to increase the public tariff rate for ethanol shipments to Argo by $300 in January 2019. That claim makes little sense, since KM does not pay that line-haul rate; its customers do. KM further asserts that it is "discriminatory" for CN's tariff to charge higher demurrage fees in Chicago than it charges elsewhere on its system in the United States. But as the Board well knows, congestion in Chicago has an outsized impact on the fluidity of all rail networks, and CN has good cause to incentivize efficient behavior in that vital area. (CN similarly sets demurrage charges at a higher level in Vancouver and a higher charge that applies during winter months across CN's network.) There is nothing discriminatory about a tariff that applies generally to Chicago carload receivers subject to CN 9000.[20]

Second, KM alleged that CN "absolutely refused" to be part of three-party agreements among KM and its customers for demurrage liability during the settlement discussions KM and CN conducted under the Court's guidance

[20] At the hearing, KM was asked a question asserting that CN "raised the demurrage charge to $300" and that "the demurrage charge is 1 and [a half] times higher for you than for anybody else in the Chicago area." But the premise of this question about demurrage referred not to CN's demurrage charge from CN 9000 for receivers in Chicago; instead it referred to KM's testimony about the increase in CN's rate for ethanol shipments to Argo. KM's witness did not correct the misunderstanding of its testimony and instead replied "We believe that was retaliatory." Day 1 Tr. at 106.

(settlement discussions that were confidential until KM unilaterally decided to air them in a public hearing). Day 1 Tr. at 94. KM's allegation is inaccurate. While CN will limit its public response out of respect for the confidentiality of settlement discussions, CN notes that litigation was stayed for 18 months in which CN negotiated in good faith with KM seeking a potential resolution. Those negotiations included discussions about agreements involving KM's customers, but those discussions were not successful.

III. CN'S COMMITMENTS TO THE BOARD AND ITS CUSTOMERS.

At the close of the hearing, Chairman Begeman asked railroads to think seriously about the comments at the hearing and to consider whether any changes might be warranted. CN took that advice to heart, and it will continue to think about better ways to communicate with our customers. CN believes that our demurrage program and policies are already responsive to many of the Board's concerns and already embody best practices. In this regard, we were encouraged by the general lack of comments from shippers regarding CN's policies and practices.[21]

While it is fair to say that CN was not a focus of concerns expressed at the hearing, we listened to stakeholders and the Board, and we have reexamined our program in light of the Chairman's request that carriers consider taking actions in response to the hearing. CN is prepared to make the following commitments at this time:

[21] Kinder Morgan, of course, is an exception, since it is opposed to paying any demurrage under any circumstances and disagrees with the Board's final rule adopted in Ex Parte No. 707.

- In the interest of ensuring that customers have another forum to resolve disputes over demurrage, CN will file a notice in the STB Ex Parte 699 docket of its intent to consent to participate in the Board's arbitration program under 49 C.F.R. § 1108 subject to certain conditions. This will provide another method of alternative dispute resolution to resolve certain disputes over demurrage, in addition to informal resolution of disputes such as the Board's informal mediation process.

- CN is also evaluating mechanisms to regularly gather feedback from customers regarding service and optional services.

- CN will continue to offer technology to assist customers and railcar receivers with supply chain management, including the tools described in Mr. Courtoreille's attached supplemental testimony

Respectfully submitted,

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Dated: June 6, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

SUPPLEMENTAL TESTIMONY OF KEITH COURTOREILLE

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

SUPPLEMENTAL TESTIMONY OF KEITH COURTOREILLE

Following the Board's May 21-22 hearing regarding demurrage, CN is submitting this supplemental testimony to provide the Board with additional information relevant to some of the issues that arose at the hearing. While most of the testimony was not directed at CN, there were some areas where some additional information regarding demurrage practices might be helpful to the Board. The following supplemental testimony is intended to clarify and expand upon some of the topics raised at the hearing to complete the record.

A. Demurrage Promotes Asset Velocity and Network Fluidity.

As CN explained at the hearing, we do not treat demurrage as a revenue stream. Instead, demurrage serves as an incentivizing device that encourages customers to turn assets promptly, thereby improving network fluidity.

Imagine a customer who finds it more convenient to leave a rail car in a CN yard for several days rather than ordering it immediately. From the narrow perspective of the customer's business needs, that decision might make economic sense. But because the interconnected rail network in North American involves the

use of shared assets, that customer's individual choice to dwell cars in a CN yard can result in the deterioration of fluidity within that yard. The impacts of that customer's decision can flow throughout the system, impacting both local service for other customers and through service for other traffic moving through the yard. In such instances, demurrage ensures that the customer cannot impose costs to the network and the overall supply chain through its choice to dwell cars in CN's yard without the customer paying a price for those costs. This incentivizes receivers of rail cars to load or unload equipment as quickly as possible.

The impacts of dwelling cars in a yard cannot be overstated. In one instance, CN found that shaving one day of dwell from a pool of 11,000 CN centre beam cars translated into 400 additional loads at origin. As this example illustrates, asset velocity is dependent upon capacity. Dwelling cars in a serving yard reduces the capacity to move cars through the yard, which flows through the whole network.

B. 80% of CN Customers Incur No Demurrage Charges.

As I testified at the hearing, the vast majority of CN's carload customers in the United States incur no demurrage charges. 80% of CN customers incurred no demurrage charges in the sample period we examined of five weeks from the Week of Feb 24- March 24, 2019. *See* Table 1, below. This data is consistent with CN's approach to demurrage as an incentivizing tool to encourage its customers to order/call their calls in from our serving yards, and to load and unload product as quickly as possible and return equipment to the network to promote efficient asset utilization. By ordering in and loading and unloading cars more quickly, the cars or

yard space can be released to CN and be used by the next customer. This in turn reduces the number of cars on the network needed to meet customer demand and increases fluidity of the tracks and yards, which benefits all participants in the supply chain.

Table 1: Customer Demurrage Invoices from February 24-March 24, 2019

Sample Week	Invoiced Demurrage	Not Invoiced Demurrage
2019-02-24	20%	80%
2019-03-03	21%	79%
2019-03-10	19%	81%
2019-03-17	19%	81%
2019-03-24	19%	81%
Average %	**20%**	**80%**

The high percentage of CN customers who never incur a single demurrage bill is compelling proof that customers can and do manage their business so as to avoid demurrage, thereby improving asset velocity for the greater good of the network. While other customers make business choices that mean they occasionally incur demurrage charges, rhetoric at the hearing that customers are unable to avoid demurrage charges is plainly overstated.

C. Service Windows Provide for Extra Time for Private Cars.

"Zero free time" was a recurring topic of discussion at the hearing, and some more information on that topic might be helpful. As I explained in my initial comments, CN does not issue credits for dwelling private cars in CN's yards or on CN's lines. CN heard the Board's concern about the concept of "zero free time" at the hearing. However, the concept of "no storage time" for private cars at CN does

not in fact mean "zero time." Rather, it means "no extra time after a customer chooses not to order/call in cars for its first available service." At CN, a customer does not begin to be charged demurrage for a constructively placed car until the customer fails to order the car in the next available service delivery window—delivery windows that are based on each customer's individualized service schedule. CN aligns its "order in" cutoff times to a customer's individual service schedule, and generally sets each customer's cutoff time at four hours before its next scheduled time of service. This ensures that customers who do not receive service on weekends, for example, are not penalized if a car arrives in the serving yard during a time when the customer's facility is closed. All they have to do to avoid demurrage is to ask for delivery before the cutoff time for their next scheduled service. If a customer fails to ask for delivery at its scheduled service date, and instead leaves the car in a CN serving yard while it awaits delivery instructions, then the demurrage clock will start. That policy is entirely consistent with the purposes of demurrage because it ensures that private equipment will not clog railway yards and prevent smooth operations for the handling of all traffic. It creates an appropriate incentive for efficiency while affording customers time to plan.

A few examples illustrate how CN's practices in this area give customers adequate time to order in the cars to avoid demurrage.

Example A: Customer has service two days per week: Tuesday and Thursday, 10:00AM to 6:00PM, and has a closed gate facility. A car arrives Sunday at 9:00PM. Customer orders the car on Monday at 4:00PM.

In this example, a car arrives at CN's serving yard when the customer's facility is closed. The customer is a "closed gate" facility, which means that CN cannot directly deliver cars when they arrive, and instead must notify the customer that cars are ready for delivery and wait for delivery instructions. Thus, upon delivery the car is constructively placed in the local CN serving yard, and the customer is notified of the constructive placement.

The customer's next service window is Tuesday at 10:00AM. The customer has until Tuesday at 6:00AM to order the car. The customer orders the car on Monday at 4:00PM for delivery on Tuesday. Because the customer orders the car in advance of the Tuesday service cut-off, the customer incurs no demurrage charges, even though the car occupied space in CN's serving yard from Sunday through Tuesday, for a total period of 37 hours.

Changing the example to an "open gate" facility means that cars will be directly delivered to the customer facility without the customer needing to call/order the cars in. Using the above example, the car, upon arriving at 9PM, would be placed on the first available service, which in this case is Tuesday. The customer would not incur any demurrage.

As these examples illustrate, CN's program provides ample free time to its customers whether they are closed gate or open gate.

Example B: Customer's closed gate facility has service three times per week: Monday, Wednesday, Friday, 10:00AM to 6:00PM. A car arrives on Saturday at 6:00PM Customer orders the car at 9:00AM on Tuesday.

In this example, a car arrives on a Saturday at 6:00PM. The customer's next service window is Monday at 10:00AM. The customer has until 6:00 AM on Monday to order in the car to avoid demurrage. If the car is not ordered in time to meet the Monday service cut off, demurrage charges would begin at 00:01 on Tuesday. Demurrage stops when the customer requests delivery and the car is placed. Here, because the customer did not order the car until 9:00AM on Tuesday morning, the car would be delivered on Wednesday, the next available service date for that facility. The customer would therefore be responsible for two days of demurrage by not ordering in their car for the Monday service, and ordering it and having it placed on the Wednesday service. The customer would <u>not</u> pay demurrage for Saturday through Monday (even though the car was placed in the CN serving yard on Saturday evening) because the clock does not start until the customer misses a delivery window. In this example, the customer was not charged demurrage for a total of 36 hours of dwell in a CN yard. Even in circumstances where a customer ultimately pays demurrage, that customer does enjoy more than "zero" free time.

Example C: Customer has seven-day-a-week service at a busy facility, with service scheduled between 1:00AM and 10:00AM. Customer receives a list of cars that are ready for delivery each day at 11:00AM, and has until 9:00PM to order in cars for delivery for the next day.

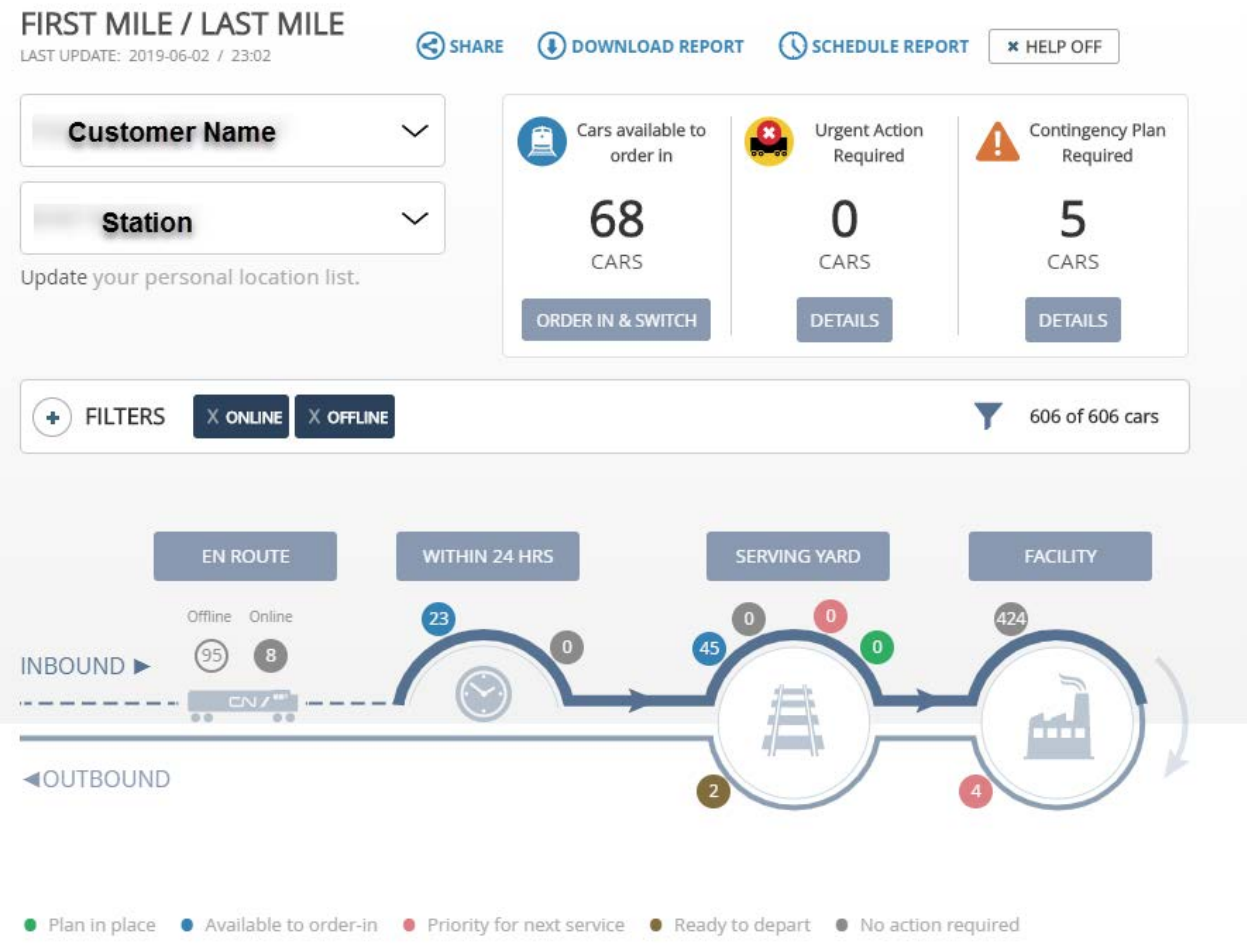
In this example, Customer has the ability every day to avoid demurrage by ordering cars for delivery before the cut off for the next morning's window. Indeed, Customer does not have to wait for the 11:00AM notification of constructive placement if it uses CN's eBusiness tools to track car movement and to identify cars that are en-route to the serving yard and will arrive within 24 hours. CN's customer service tools allow customers to track car movements and order cars in before constructive placement occurs.

Example D: Customer has two-day-a-week service, on Tuesdays and Thursdays between 6:00AM and 4:00PM. Customer orders 5 cars for the Tuesday service, as they have 5 more arriving in 24 hours behind them. In this case, a CN service issue affected the ordinary delivery schedule (a crew ran out of time and had to return to the serving yard), and the Tuesday service was missed. The cars are returned to the serving yard, and CN's systems automatically apply system credits to those 5 cars to offset the failure. Wednesday evening the other 5 cars arrive. The customer is unable to accept all of the cars during its Thursday delivery window. In this case, CN would work with the customer to develop a recovery plan, which might include recovery service outside of the typical window if agreed, or an alternate delivery plan over a longer horizon. Regardless of what recovery plan was used, the customer would not be charged for any demurrage. CN would apply manual credits to the cars left in the yard as result of the service failure.

D. CN Focuses on First Mile/Last Mile Service and Provides Customers With Effective Tools to Monitor First Mile/Last Mile Performance.

During the hearing, CN heard a number of comments from shippers regarding first and last mile service. Shippers complained generally that some carriers do not give customers sufficient visibility into car movements during the first and last mile. While CN cannot address other carriers' efforts in this area, CN has invested in eBusiness tools that provide notifications and alerts in the First/Last Mile to assist customers in making choices that limit demurrage. I visited over 30 customers in the United States in 2014 to introduce these tools and showcase their potential. Figure 1 is an example of the kind of visibility afforded to customers using the First Mile/Last Mile tool. This same tool is available to railcar receivers like terminal operators.

Figure 1: First Mile/Last Mile eBusiness Tool



In the example in Figure 1, the customer has 68 cars available to order in. Of those 68, 45 are already in the CN serving yard, and 23 are slated to arrive in the serving yard within 24 hours. CN provides information in its Alerts Dashboard, which helps the customer plan: the five cars listed in this example exceed their normal transit time, requiring a contingency plan. This customer has 103 cars inbound to the serving yard – eight of those cars on CN's system, 95 of them offline (*i.e.*, on another railroad). In outbound service, the customer can see that CN has

acknowledged four cars are slated to be pulled from the customer facility at the next service and two cars are ready to depart the CN serving yard.

The electronic version of this tool is interactive, such that it allows customers car-level detail views of their shipments. For example, if the customer clicked on the blue "45" bubble indicating the number of cars in the serving yard available to order in, it would receive car-level details, including, for example, commodity type and shipment origin.

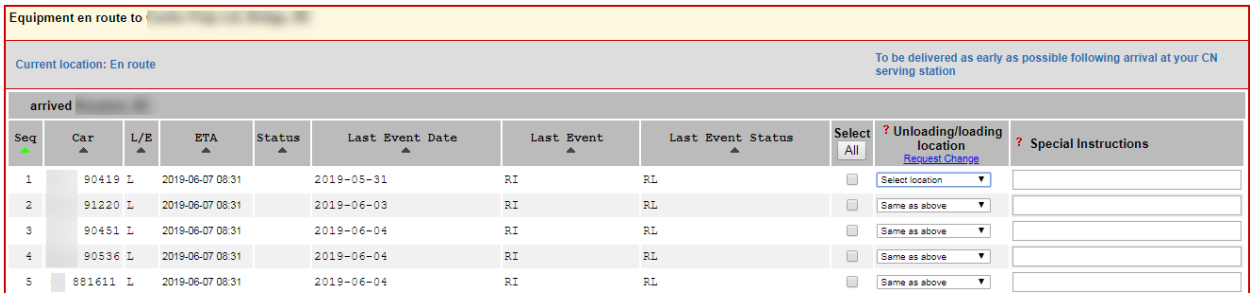
The details available in CN's first mile/last mile eBusiness tool give our customers transparent visibility into the pipeline of railcars inbound into their facility, the cars currently at their facility, and those that are outbound. This allows customers (and receivers) to plan in advance for rail service at their facility, thereby minimizing demurrage charges.

In addition to the First Mile/Last Mile eBusiness tool, CN offers customers tools specifically designed to help them reduce railcar dwell time, so as to minimize demurrage fees, including the following:

- **Order in Railcars:** This tool offers customers the capability to view railcars en route to them and to order railcars in before they arrive. *See* Figure 2, below. The customers can also view cars still in transit, within the next 48 hours, and order them in while they are still on the train. This functionality was developed to help customers avoid delays and demurrage charges for their cars dwelling at the local serving yard, especially for cars arriving

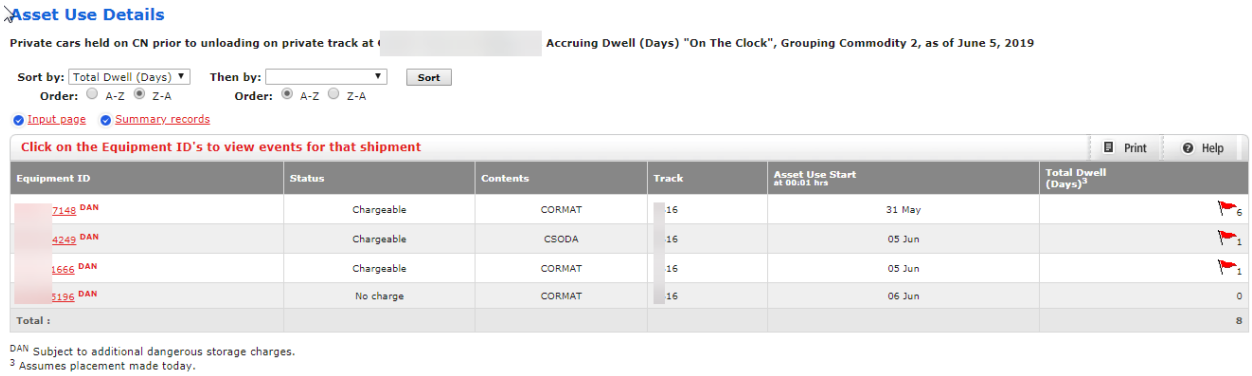
during the weekend or at times when the customer facility is closed. This tool facilitates a customer's ability to easily order cars before the cut off for its next scheduled service.

Figure 2: Order in Railcars that are Enroute to Serving Yard



- **Asset Use:** This tool was designed to give customers insight into equipment that is at risk of being charged demurrage and highlights the action they need to take to so that charges are not incurred. It also provides visibility into equipment currently accruing demurrage, and what action is required to stop the demurrage charges (*e.g.*, provide delivery instructions to release a load). Figure 3 illustrates a sample report customers can generate through this eBusiness tool.

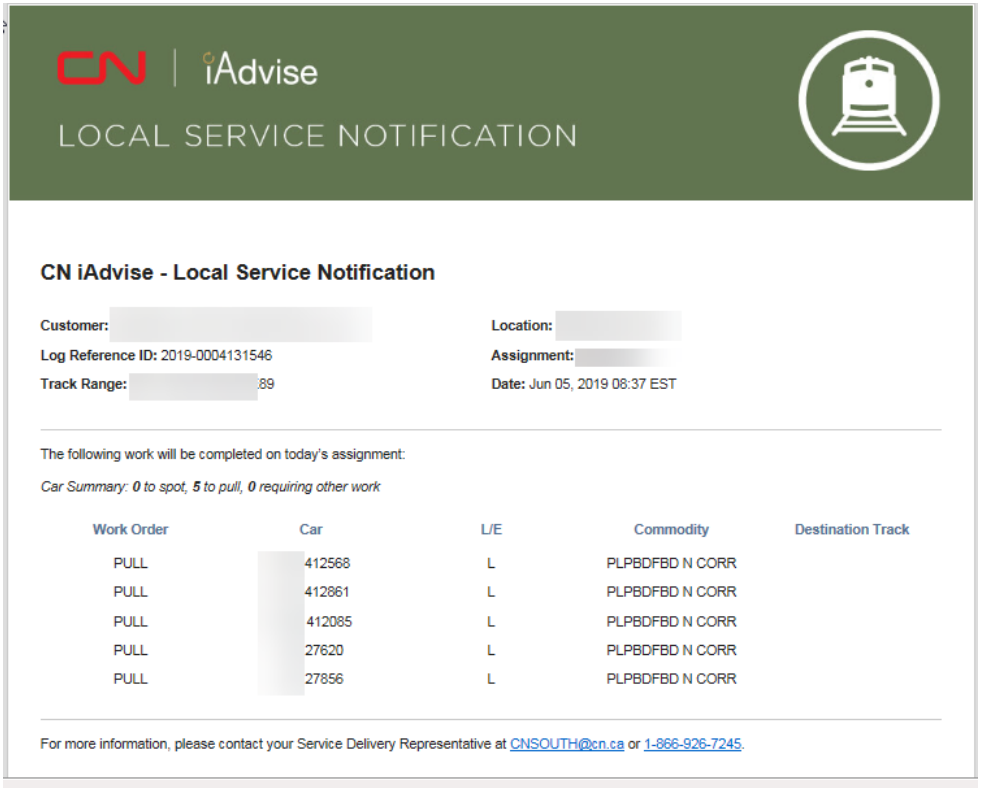
Figure 3: Asset Use Tool Sample Report



CN also offers customers the ability to subscribe to service notifications to improve planning at their facility, which in turn will result in better asset turn-around and reduced demurrage. Those notifications include:

- **Local Service Notifications:** Provide customers with the ability to receive an advanced notification of all work CN plans to perform during the customer's next scheduled assignment. These notifications are received before the service assignment starts and are intended to allow customers to complete planning / equipment/ crew setup for the day to safely increase the speed and efficiency when the crew arrives. *See* Figure 4.

Figure 4: Local Service Notification



CN | iAdvise

LOCAL SERVICE NOTIFICATION

CN iAdvise - Local Service Notification

Customer: [redacted] **Location:** [redacted]

Log Reference ID: 2019-0004131546 **Assignment:** [redacted]

Track Range: [redacted]89 **Date:** Jun 05, 2019 08:37 EST

The following work will be completed on today's assignment:

*Car Summary: **0** to spot, **5** to pull, **0** requiring other work*

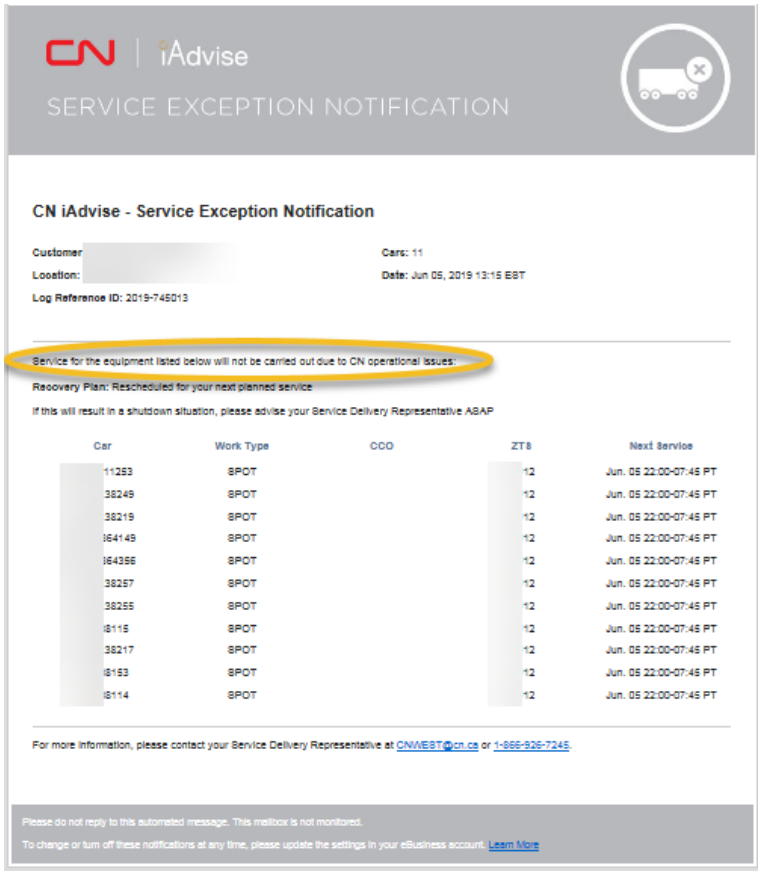
Work Order	Car	L/E	Commodity	Destination Track
PULL	[redacted]412568	L	PLPBDFBD N CORR	
PULL	[redacted]412861	L	PLPBDFBD N CORR	
PULL	[redacted]412085	L	PLPBDFBD N CORR	
PULL	[redacted]27620	L	PLPBDFBD N CORR	
PULL	[redacted]27856	L	PLPBDFBD N CORR	

For more information, please contact your Service Delivery Representative at CNSOUTH@cn.ca or 1-866-926-7245.

- **Service Exception Notifications:** Provide customers the ability to receive advanced warnings of exceptions if CN cannot execute all the work planned at a customer's facility during that day's scheduled assignment. Service Exceptions have two classifications: CN or Customer caused. CN caused are typically operational items like crews running out of time or mechanical breakdowns. Customer causes could include situations where the customer is not ready to receive cars or not available or where a customer's tracks are not safe to operate on. When CN is at fault, we will attempt to recover on the next service and will credit the customer for the service failure so it does not incur demurrage. (If other cars in the yard are impacted, they are also manually assessed and credited). I have a staff of 12 focused on detecting and crediting customers in these types of scenarios.

- If the failure is customer caused, CN will take the cars for that service back to the serving yard and the customer will need to call/order them in again. Demurrage will apply as if the cars had never left the yard. This policy demonstrate that CN is fair and reciprocal with its customers, as it issues credits when it fails and applies demurrage when a customer is responsible. *See* Figure 5 for CN Failure and Figure 6 for Customer Failure.

Figure 5: Service Exception Notification – CN Failure



CN | iAdvise

SERVICE EXCEPTION NOTIFICATION

CN iAdvise - Service Exception Notification

Customer [redacted] **Cars:** 11

Location: [redacted] **Date:** Jun 05, 2019 13:15 EST

Log Reference ID: 2019-745013

Service for the equipment listed below will not be carried out due to CN operational issues:

Recovery Plan: Rescheduled for your next planned service

If this will result in a shutdown situation, please advise your Service Delivery Representative ASAP

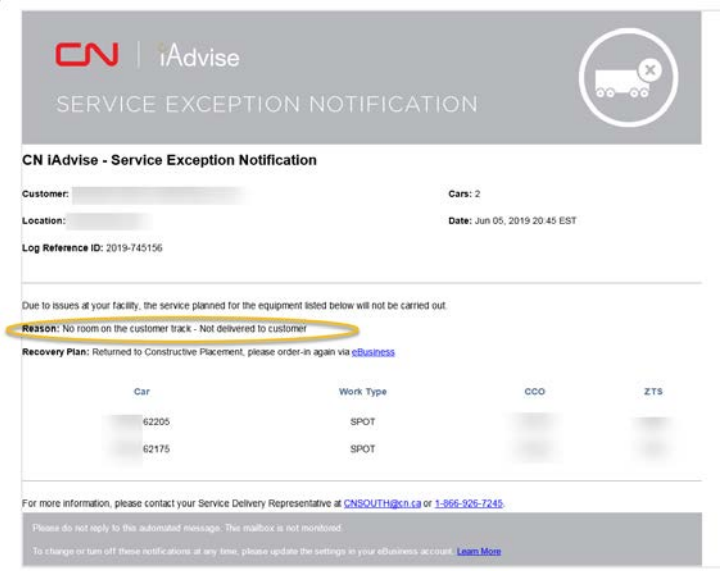
Car	Work Type	CCO	ZTS	Next Service
[redacted]11253	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]38249	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]38219	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]64149	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]64366	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]38257	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]38255	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]8115	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]38217	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]8153	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT
[redacted]8114	SPOT		[redacted]12	Jun. 05 22:00-07:45 PT

For more information, please contact your Service Delivery Representative at CNWEST@cn.ca or 1-866-926-7245.

Please do not reply to this automated message. This mailbox is not monitored.

To change or turn off these notifications at any time, please update the settings in your eBusiness account. Learn More

Figure 6: Service Exception Notification – Customer Failure



CN | iAdvise

SERVICE EXCEPTION NOTIFICATION

CN iAdvise - Service Exception Notification

Customer: [redacted] **Cars:** 2

Location: [redacted] **Date:** Jun 05, 2019 20:45 EST

Log Reference ID: 2019-745156

Due to issues at your facility, the service planned for the equipment listed below will not be carried out.

Reason: No room on the customer track - Not delivered to customer

Recovery Plan: Returned to Constructive Placement, please order-in again via eBusiness

Car	Work Type	CCO	ZTS
[redacted]62205	SPOT	[redacted]	[redacted]
[redacted]62175	SPOT	[redacted]	[redacted]

For more information, please contact your Service Delivery Representative at CNSOUTH@cn.ca or 1-866-926-7245.

Please do not reply to this automated message. This mailbox is not monitored.

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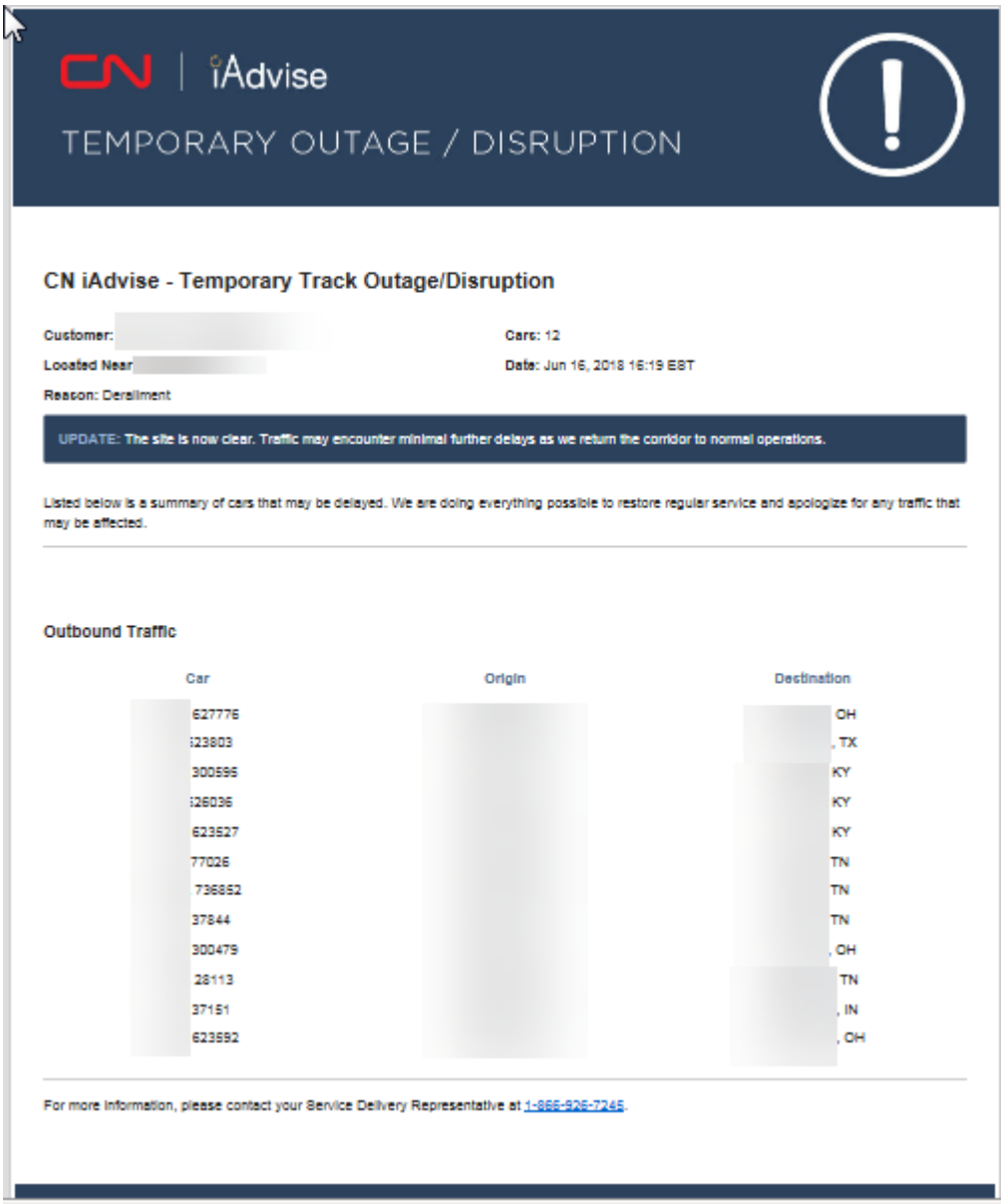
- **Temporary Outage/Disruption Notifications:** Provide customers with a notification of major track issues that could affect the traffic they are receiving or shipping, so that they can formulate contingency plans. *See* Figure 7.

Figure 7: Temporary Outage/Disruption Notification



E. CN Helps Customers with Fleet Optimization.

CN maintains an internal fleet capacity planning group which leverages the same tools and techniques that CN uses for its system cars for large private car customers who agree to partner with CN. This group helps those customers to right-size their fleets, which helps reduce congestion and promote network fluidity. CN does not charge customers for this service. The actions of this group with customers positively reinforce that the right-sized fleet is an integral part of managing the pipeline and ultimately reducing or even eliminating demurrage.

F. CN Provides Ample Advance Notification of Tariff Changes.

We aim to provide as much notice of our tariff renewals as possible to customers. For the past three years, CN has provided a minimum of 52 days' notice of the annual renewal of its CN 9000 Optional Services tariff. The following table identifies the amount of notice CN has recently provided:

Effective Date	Notification Date	Number of Days' Notice
February 1, 2017	December 1, 2016	62
January 1, 2018	November 10, 2017	52
January 1, 2019	November 2, 2018	60

G. CN Customers Have Options to Avoid Demurrage Charges.

All of the tools and options identified above provide CN customers with numerous means to meter the flow of their traffic, match their car orders to their

plant capacity, and plan their operations to avoid the accumulation of railcars. In CN's experience, these tools also assist customers in avoiding demurrage charges. The majority of CN customers do not pay demurrage and we are convinced that the tools we provide is the primary reason for this success rate.