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SERVICE DATE – MAY 7, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 707

DEMURRAGE LIABILITY

Digest:¹ Demurrage is a charge incurred when rail cars are detained by the party receiving delivery of the cars beyond a specified period of time for loading or unloading. The Board is announcing a proposed rule providing that any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond a specified period of time may be held liable for demurrage if that person has actual notice of the terms of the demurrage tariff providing for such liability prior to the carrier's placement of the rail cars. The Board also clarifies that it intends to construe the provisions of 49 U.S.C. § 10743 governing liability for payment of rates as applying to carriers' line-haul rates, but not to carriers' charges for demurrage.

Decided: May 3, 2012

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Through this Notice of Proposed Rulemaking (NPR), the Board is proposing a rule establishing that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the "free time" provided in the carrier's governing tariff will generally be responsible for paying demurrage, if that person has actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. The Board also clarifies that it intends to construe the provisions of 49 U.S.C. § 10743, titled "Liability for payment of rates," as applying to carriers' line-haul rates, but not to carriers' charges for demurrage.

DATES: Comments are due by June 25, 2012. Reply comments are due by July 23, 2012.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 707, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Craig Keats at (202) 245-0260. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Demurrage is a charge for detaining railroad-owned rail freight cars for loading or unloading beyond a specified amount of time (called "free time"). Demurrage has compensatory and penalty functions. It compensates rail carriers for the use of railroad equipment, and by penalizing those who detain rail cars for too long, it encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system. See 49 U.S.C. § 10746.

Historical Regulation of Demurrage. Since the earliest days of railroad regulation, parties have had disputes about who, if anyone, should have to pay demurrage. Certain principles for allocating the liability of intermediaries for holding carrier equipment became established over time and were reflected in agency and court decisions.² After reviewing recent court decisions, however, we believe that it is appropriate to revisit the matter and to consider whether the Board's policies should be revised.

Demurrage collection cases may only be brought in court, and thus much of the law governing the imposition of demurrage liability has been established judicially. However, the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), also provides that demurrage is subject to Board regulation. Specifically, 49 U.S.C. § 10702 requires railroads to establish reasonable rates and transportation-related rules and practices, and 49 U.S.C. § 10746 requires railroads to compute demurrage and to establish demurrage-related rules "in a way that fulfills the national needs related to" freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed on the "consignor" (the shipper of the goods) for delays in

² See Responsibility for Payment of Detention Charges, E. Cent. States (Eastern Central), 335 I.C.C. 537, 541 (1969) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), aff'd, Middle Atl. Conference v. United States (Middle Atlantic), 353 F. Supp. 1109, 1114-15 (D.D.C. 1972) (3-judge court sitting under the then-effective provisions of 28 U.S.C. § 2321 et seq.).

loading cars at origin and on the “consignee” (the receiver of the goods) for delays in unloading cars and returning them to the carrier at destination.³

This agency has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.⁴ The disputes between railroads and parties that originate or terminate rail cars can involve relatively straightforward application of the carrier’s tariffs to the circumstances of the case. Complications can arise, however, in cases involving warehousemen or other “third-party intermediaries” who handle the goods but have no property interest in them. A consignee that owned the property being shipped had common-law liability (for both freight charges and demurrage) when it accepted cars for delivery,⁵ but warehousemen typically are not owners of the property being shipped (even though, by accepting the cars, they are in a position to facilitate or impede car supply). Under the legal principles that developed, in order for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability beyond the mere fact of handling the goods shipped.⁶

What became the most important factor under judicial and agency precedent was whether the warehouseman was named the consignee on the bill of lading.⁷ Thus, our predecessor, the

³ While the Interstate Commerce Act does not define “consignor” or “consignee,” the Federal Bills of Lading Act uses the term “consignor” to refer to “the person named in a bill of lading as the person from whom the goods have been received for shipment,” 49 U.S.C. § 80101(2), and the term “consignee” to refer to “the person named in a bill of lading as the person to whom the goods are to be delivered,” 49 U.S.C. § 80101(1).

⁴ E.g., Eastern Central; Springfield Terminal Ry.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42108 (STB served June 16, 2010); Capitol Materials Inc. —Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry., NOR 42068 (STB served Apr. 12, 2004); R. Franklin Unger, Trustee of Ind. Hi-Rail Corp.—Pet. for Declaratory Order—Assessment & Collection of Demurrage & Switching Charges, NOR 42030 (STB served June 14, 2000); South-Tec Dev. Warehouse, Inc.—Pet. for Declaratory Order—Ill. Cent. R.R., NOR 42050 (STB served Nov. 15, 2000); Ametek, Inc.—Pet. for Declaratory Order, NOR 40663, et al. (ICC served Jan. 29, 1993), aff’d, Union Pac. R.R. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997).

⁵ Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577, 581 (1919); Norfolk S. Ry. v. Groves (Groves), 586 F.3d 1273, 1278 (11th Cir. 2009), cert. denied, 131 S.Ct. 993 (2011).

⁶ See, e.g., Smokeless Fuel Co. v. Norfolk & W. Ry., 85 I.C.C. 395, 401 (1923).

⁷ A bill of lading is the transportation contract between the shipper and the carrier for moving goods between two points. Its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

Interstate Commerce Commission (ICC), held that a tariff⁸ may not lawfully impose such demurrage charges on a warehouseman who is not the owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation.⁹

Recently, a new question arose: who should bear liability when an intermediary that accepts rail cars and detains them too long *is* named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee? On that issue, the courts of appeals have split.¹⁰ The legal debate and resulting conflicting opinions prompted the Board to reexamine its existing policy and to assist in providing clarification for the industry.

Conflict Among the Circuits. In Groves, the United States Court of Appeals for the Eleventh Circuit looked to contract principles and concluded that a party shown as a consignee in the bill of lading is not in fact a consignee, and hence is not liable for demurrage charges, unless it expressly agrees to the terms of the bill of lading describing it as a consignee, “or at the least, [is] given notice that it is being named as a consignee in order that it might object or act accordingly.”¹¹ On virtually identical facts, the United States Court of Appeals for the Third Circuit held in Novolog that “recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. § 10743(a)(1).”¹² The statutory notice provision of

⁸ Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called “filed rate doctrine.” See Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICCTA. Nevertheless, although tariffs are no longer filed with the agency, rail carriers may still use them to establish and announce the terms of the services they hold out.

⁹ Eastern Central, 335 I.C.C. at 541.

¹⁰ Compare Groves, *supra*, with CSX Transp. Co. v. Novolog Bucks Cnty. (Novolog), 502 F.3d 247 (3d Cir. 2007).

¹¹ 586 F.3d at 1282. Relying in part on Illinois Central Railroad v. South Tec Development Warehouse, Inc. (South Tec), 337 F.3d 813 (7th Cir. 2003), which did not directly decide the issue but which indicated a predilection toward such a result, the court in Groves found the warehouseman not to be a consignee and thus not liable for demurrage even though the warehouse accepted the freight cars as part of its business and held them beyond the period of free time.

¹² 502 F.3d at 254. The court in Novolog cited Middle Atlantic, the Uniform Commercial Code, and the Federal Bills of Lading Act to find that a warehouseman (or, in that

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§ 10743(a)(1), which is also referred to in Groves, states, among other things, that a person receiving property as an agent for the shipper or consignee will not be liable for “additional rates” that may be found due beyond those billed at the time of delivery, if the receiver notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.¹³

After reviewing these recent court decisions, the Board determined that it needed to revisit its demurrage precedent to consider whether the agency’s policies accounted for current statutory provisions and commercial practices. Thus, on December 6, 2010, the Board published an Advance Notice of Proposed Rulemaking (ANPR)¹⁴ that raised a series of specific questions about how the demurrage process works and sought public input on whether the Board should issue a new rule that does not follow the reasoning of Novolog or Groves, but that instead would provide that demurrage charges may apply when cars are accepted by a party with notice of the carrier’s demurrage charges. Shortly thereafter, the United States Supreme Court denied a request that it review the split in the circuits. Norfolk S. Ry. v. Groves, 131 S.Ct. 993 (2011) (mem.).

(. . . continued)

case, a transloader) could be a “legal consignee,” even if it was not the “ultimate consignee.” 502 F.3d at 258-59. The court found that a contrary result, such as the one suggested in South Tec, would frustrate what it viewed as the plain intent of § 10743: “to facilitate the effective assessment of charges by establishing clear rules for liability” by permitting railroads to rely on bills of lading and “avoid wasteful attempts to recover [charges] from the wrong parties.” Id. The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. Id. at 259.

¹³ 49 U.S.C. § 10743(a)(1) states in full:

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—(A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

¹⁴ Demurrage Liability, EP 707 (STB served Dec. 6, 2010), 75 Fed. Reg. 76,496 (Dec. 10, 2010).

Comments Received in Response to ANPR. In response to the ANPR, the Board received comments from: the International Warehouse Logistics Association (IWLA); the International Association of Refrigerated Warehouses (IARW); two warehouse operators, Freeport Logistics, Inc. (Freeport) and Savannah Re-Load; the Association of American Railroads (AAR); and several individual railroads.¹⁵ We will summarize the comments before we explain our conclusions.

Warehouse Interests. IWLA argues that, because demurrage is a contractual liability, railroads should not be able to impose demurrage charges unilaterally onto non-consenting third-party warehousemen. For that reason, IWLA asserts, bills of lading should not show a warehouseman as a consignee unless the warehouseman has agreed to such status.¹⁶ With respect to the § 10743(a) agency issue, IWLA asserts that 49 U.S.C. § 10743 should not be applicable to demurrage charges.

IARW asserts that additional regulations regarding demurrage are unnecessary because the interested parties generally resolve those matters contractually. It also suggests that railroads should be required to seek demurrage recovery directly from shippers, as shippers are able to allocate their liability *vis à vis* warehousemen through contract. Because IARW concludes that demurrage is a transportation cost, it argues that 49 U.S.C. § 10743 should apply to demurrage charges.

Savannah Re-Load, the defendant in Groves, points out that demurrage can be attributable to multiple causes other than fault of the warehouseman: the volume of freight shipped to a warehouse; the pace at which the carrier delivers cars to the warehouseman; the

¹⁵ Specifically, the following entities filed pleadings in response to the ANPR: AAR; BNSF Railway Company (BNSF); Canadian Pacific Railway Company (CP); CSX Transportation, Inc. (CSXT); Freeport; Indiana Harbor Belt Railroad Company (IHBR); IARW; IWLA; Norfolk Southern Railway Company (NSR); Savannah Re-Load; and Union Pacific Railroad Company (UP).

¹⁶ IWLA also discusses the concept of “constructive placement,” under which a carrier may start the demurrage clock on rail cars that the carrier is ready to deliver but the receiver is unable to receive. IWLA argues that third-party warehousemen’s liability to their customers should only be based on actual placement of rail cars on the tracks, because claims based on constructive placement are nearly impossible for third-party warehousemen to confirm or deny “based on the railroad’s systems and documentation.” IWLA Comments 6. That issue is beyond the scope of this proceeding. We note, however, that carriers do routinely provide information to customers about car location and status, and, while there may be occasional disputes or discrepancies, as a general matter warehousemen know when constructive placement is made and have the opportunity to reject rail cars that have been improperly sent to them.

carrier's willingness to make switches; and the rate at which the warehouseman unloads the freight. Savannah Re-Load argues that "[f]ocusing on the warehouseman's agency places an absurd emphasis on whether the warehouseman complies with technical notice requirements – notice of agency – that will have no bearing on the delivery or accrual of demurrage. . . . The way to truly incentivize each party to the transportation network to work in the most efficient manner is to hold the party which causes the demurrage responsible for it."¹⁷

Freeport Logistics, Inc., states that it has no trouble avoiding detention charges when it accepts traffic from trucking companies, because it refuses delivery if bills of lading listing it as the consignee are not amended to show it as a "care of" party. With railroads, however, Freeport states that it never actually sees the bill of lading or the waybill, that it is often unaware of the identity of the shipper of origin, and that it cannot regulate the volume of cars sent to it.

Small Rail Carrier Interests. IHBR was the only non-Class I rail carrier to file comments. IHBR, which identifies itself as the Nation's largest switching and terminal railroad, states that each industry located on its 266 miles of sidings and yard track is responsible for all demurrage and storage charges associated with any cars delivered or pulled at that industry's facility. IHBR informs us that it is not a party to contracts between warehousemen and their customers and thus holds no assurance that the outside party is willing to assume responsibility for demurrage. In its view, the intermediaries (i.e., the warehousemen) are the only parties involved with the shipping transaction that can control efforts to receive freight, unload cars, and release empty cars back to the railroad. Indeed, it states that the switching carrier often does not have the information to identify the party responsible for the product being shipped, nor does it have information regarding the agency status of receivers. IHBR argues that it should not be saddled with the responsibility of determining those matters.

Large Rail Carrier Interests. Although it agrees with many of the points made in the ANPR, AAR would not abandon the conventional, bill-of-lading-based approach to demurrage. Rather, it argues generally that the Board should adopt the rule in Novolog, and not the rule in Groves, in addressing demurrage liability for third-party warehouseman. In order to reconcile Novolog with Groves, however, AAR suggests that the Groves notice requirement pertaining to demurrage liability should be satisfied if the "railroad, the shipper, or some other party has provided the receiver with an opportunity to ascertain its status 'before delivery of the property . . .'"¹⁸ In AAR's view, because shippers and warehousemen have their own commercial relationships, railroads should be able to establish demurrage liability through actions within their control, and without having to prove the actions of shippers or receivers. Finally, AAR argues that 49 U.S.C. § 10743(a) does apply to demurrage: "the term 'transportation charges' as

¹⁷ Savannah Re-Load Comments 3.

¹⁸ AAR Comments 24.

used in the predecessor sections to 10743(a)(1) has long been construed by the agency and the courts as embracing demurrage.”¹⁹

Supporting a rule that generally renders a warehouseman liable for demurrage unless that party has provided notice to the serving carrier of its agency status with respect to the shipment received, the individual railroads argue that, because shippers create the bills of lading, carriers should not have to go behind those documents to determine the state of mind of each of the shippers’ warehouseman customers. Additionally, the railroads state that the record-keeping component to shipping has shifted from a twentieth century paper-driven process, centered around the bill of lading, to a twenty-first century electronic process that provides parties to the shipping process with easy access to information on shipments, carriers, rail cars, destinations, tariffs, and other relevant matters. They note that, under Electronic Data Interchange (EDI), parties can register for EDI and then view information about shipments and review from the data information that is specific and useful to them.

CSXT, for example, summarizes its electronic site as follows:

ShipCSX allows any affected party (consignor/shipper, “in care of” party, consignee, warehouseman/intermediary, etc.) to (1) view the real-time location of a shipment; (2) receive enroute reports that allow the user to determine bill of lading status for inbound/outbound shipments; (3) receive enroute reports that update the user as to whether any number of pre-selected events have occurred (including actual placement and constructive placement); and (4) receive a summary demurrage report that details demurrage liability.²⁰

UP also describes its electronic recordkeeping system, under which shippers and receivers can monitor movements of cars to their facilities, so that they can avoid demurrage issues. That system includes tracking demurrage through a program called Chargeable Events, which also monitors available capacity at each facility.²¹ UP informs us that it no longer provides its customers with traditional active notice of actual or constructive placement, but instead, through its Chargeable Events program, provides notice by continuously making movement and status information available. Therefore, UP opposes an affirmative requirement on railroads to make intermediaries aware that they are liable for demurrage or to notify receivers affirmatively of actual or constructive placement.

¹⁹ AAR Comments 20.

²⁰ CSXT Comments 4.

²¹ UP Comments 3-4.

CP advocates using the 49 U.S.C. § 80101(1) definition of “consignee” – the person named in the bill of lading as the person to whom goods are delivered – as the lynchpin of demurrage liability. CP asserts that, “when an intermediary chooses to accept the potential revenue opportunity from handling a railcar, it also accepts the potential cost of demurrage liability for an unreasonable delay in handling that railcar.”²² CP would rely on 49 U.S.C. § 10743(a)(1) to establish whether there is an agency relationship that would protect the warehouseman from demurrage liability.

BNSF points out that the issue of party responsibility is rarely an issue: the party loading a rail car receives electronic notice of the tender/placement of the rail car for loading and is billed for origin demurrage, and the party unloading a rail car similarly receives electronic notice of tender/placement for unloading and is billed for destination demurrage. Those parties have an opportunity to accept or decline responsibility for demurrage by notifying BNSF if they do not accept financial responsibility for origin or destination demurrage and informing BNSF of the responsible party.

NSR, the plaintiff in Groves, points out that warehousemen often play a central role in handling freight cars at destination, but that their own business incentives may cause them to take actions that undercut the prompt unloading and return of cars. Yet the existing decisions focusing on the bill of lading, along with those applying the agency principles incorporated into § 10743, impede NSR’s ability to collect demurrage, even when it is clear which party is the cause of the delay. In a pleading largely supporting the ANPR, NSR argues that “demurrage based incentives must apply to all parties whose conduct with respect to the physical handling of rail cars might undermine the ‘efficient use and distribution’ of those cars.”²³ To do that, NSR advocates that the Board issue a policy statement that would guide the courts hearing demurrage collection cases by stating that intermediaries, regardless of their designation in the bill of lading, “should be responsible for paying appropriate demurrage charges for their delays attributable to their handling of the cars.”²⁴ Pointing to the difficulties it has had collecting from origin shippers for demurrage that is the fault of the destination receiver, NSR further argues that the Board should state that, when intermediaries are able to escape liability, consignors should be responsible for demurrage attributable to the conduct of the receiver to whom they instruct the carrier to deliver rail cars.²⁵

Regarding the applicability of 49 U.S.C. § 10743, the railroads generally expressed the opinion, based largely on precedent, that demurrage is a transportation charge subject to

²² CP Reply Comments 9.

²³ NSR Comments 5.

²⁴ Id.

²⁵ NSR Comments 5, 8.

49 U.S.C. § 10743. NSR, however, argues that agency principles should be irrelevant to demurrage liability, which should turn on the receiver's operational role with respect to the efficient use of the freight car, rather than whether the receiver is acting as an agent for a particular shipment. In its view, the potential inapplicability of 49 U.S.C. § 10743 to demurrage would “underscore that legal responsibility to pay demurrage is properly linked to the *handling of railcars* rather than being exclusively driven by the contract governing the movement of the *freight* (i.e. the bill of lading)[.]”²⁶

The Proposed Rule. Having reviewed the comments, we propose a rule governing assessment of demurrage. The operative paragraph of the rule reads as follows:

Any person receiving rail cars from a rail carrier for loading or unloading who detains the rail cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if that person has actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. However, if that person is acting as an agent for another party, that person is not liable for demurrage if the rail carrier has actual notice of the agency status and the identity of the principal.

In offering this proposed rule, we keep in mind IWLA's statement that it, like AAR, believes that the existing system for handling demurrage liability works well, except for the narrow conflict between Novolog and Groves. Our proposal to modify our historical way of viewing demurrage is intended to mitigate that conflict, and we believe it can do so with little or no disruption to railroads or warehousemen.

Under our proposal, any shipper or receiver of rail cars, whether designated as a consignor, consignee, or otherwise, may be subject to demurrage liability in accordance with the terms of the carrier's demurrage tariff if it does not reject tendered rail cars. There are, however, conditions that protect the warehouseman. First, liability does not begin unless a car is placed at the warehouseman's facility or proper notice of constructive placement is provided to the entity upon which liability is to be imposed.²⁷ Second, the provisions for imposition of warehouseman liability must be set forth in the carrier's publicly available demurrage tariffs. Third, the party subject to demurrage must have received *actual* notice of the carrier's demurrage tariffs prior to placement of the rail cars. And fourth, the carrier may not assess demurrage on the warehouseman if it receives actual notice that the warehouseman is acting as an agent for another party. While our rules would permit parties to alter their relationship by contract, having this regulation as the guiding principle would enable carriers to adopt tariffs that place responsibility

²⁶ NSR Reply Comments 16-17 (emphasis in original).

²⁷ Although warehousemen are not explicitly notified when actual placement (as opposed to constructive placement) is made, they should be aware when a car has been placed on their own property. Moreover, actual placement is duly noted in the carriers' demurrage records, which generally reflect current information, and which are readily available to customers.

for delaying the return of rail cars on the party in the best position to expedite the movement of those cars.

This approach would depart from the historical focus on the bill of lading as the main document used to determine demurrage liability.²⁸ But warehousemen and the shippers that send them rail cars do not always communicate as to the warehouseman's status as consignee, and sometimes the reason for the designation assigned to the warehouseman in the bill of lading is unclear. Thus, some courts, while relying on the bill of lading to determine demurrage liability, will find that even warehousemen that *are* named in the bill of lading may nevertheless be excused from paying demurrage based on a lack of notice. We understand the logic of a finding that a party should not be bound by the terms of a bill of lading imposing demurrage liability unless that party knows and has accepted, at least implicitly, such liability. Court decisions holding that a rail car receiver may be charged demurrage only if it has actual notice that it is named consignee in the bill of lading, however, are themselves moving away from looking solely to the wording of the bill of lading as the dispositive factor. Moreover, a finding that a party that receives rail cars and detains them for too long can avoid demurrage simply by saying that it does not know about (or that it chooses not to consent to) the consignee status assigned by the shipper from whom it receives the cars undercuts the demurrage provisions of our underlying statute.

Section 10746 states that demurrage regulation should facilitate freight car use and distribution and an adequate car supply. Permitting a warehouseman that handles rail cars as part of its business to avoid demurrage by declining to accept, or claiming ignorance of, the "consignee" status assigned to it in the bill of lading would not advance those statutory goals. Moreover, such an approach could require the delivering carrier – which, IHBR tells us, may not even know the identity of the shippers at origin – to make "wasteful attempts to recover [demurrage charges] from the wrong parties." Novolog, 502 F.2d at 258-59.

AAR argues that because electronic shipment information is readily available to parties that make an effort to find it, we can satisfy the Groves notice-and-acceptance requirement by presuming that warehousemen do indeed know (or at least should know) whether particular bills of lading give them consignee status. Then, we could find that acceptance of rail cars by warehousemen amounts to acceptance of their obligation to pay demurrage when they hold cars too long. We agree that warehousemen should pay attention to such electronic information when they are trying to determine the location of particular cars; yet, for the information about liability in general, because a receiver ought to have actual notice before being bound by the rail carrier's

²⁸ Indeed, in Middle Atlantic, the court found reliance on the bill of lading appropriate in spite of commentary indicating that the warehouseman – regardless of its status in the bill of lading – may be "the only person who can eliminate the undue detention." Middle Atlantic, 353 F. Supp. at 1111 (quoting one of the parties to the case).

tariff, we find AAR's suggested approach inappropriate. Cf. Disclosure, Pub. & Not. Of Change of Rates—Rail Carriage, 1 S.T.B. 153, 159 (1996) (Rate Disclosure) (carriers must make “active, or positive, response or notification” of rate information on request of shipper, rather than using “electronic billboards or other ‘passive’ forms of notification”). Moreover, we are concerned that the courts might find such an approach incompatible with contract law principles, because it would force a non-party to a shipping contract (the warehouseman) to take affirmative steps to determine the role assigned to it by the direct parties to the contract (the shipper and the carrier).

Because warehousemen and other third-party receivers are often not signatories to the bill of lading, we do not believe that the bill of lading should be the contract that establishes demurrage liability. As NSR points out, the bill of lading is the contract of carriage for the goods themselves.²⁹ Under that contract, the origin carrier and all connecting carriers agree with the shipper to move certain goods from point A to point B. But as the Groves outcome highlights, it is a fiction to say that warehouseman demurrage liability is really part of that process. Demurrage, instead, concerns the railroad equipment in which those goods are moved. To the extent that demurrage can be viewed as a product of contract, the substance of that contract would be embodied in the carriers' demurrage tariffs, which provide the terms under which each carrier holds out to provide cars to move the commodity being shipped. Regardless of the terms of the bill of lading, the parties involved with the separate demurrage tariff are generally the carrier and the person to whom it turns over the rail cars. Even if a warehouseman is not a party to the bill of lading, it is certainly not a stranger to the carrier delivering it the cars. Therefore, when the warehouseman accepts rail cars, there is no reason why it should not also accept responsibility for demurrage if it is made aware of its liability under the carrier's demurrage tariffs.

Under our proposal, a delivering carrier may make a person receiving rail cars after a rail journey liable for demurrage even if that person is not named a consignee in the bill of lading. Regardless of its status in the bill of lading, a party that accepts rail cars from a rail carrier with *actual* notice of the carrier's demurrage tariffs would in fact be deemed to have agreed to be subject to the terms of the carrier's demurrage tariffs. We believe that our new approach would best achieve the goals of § 10746.

As a matter of course, each rail carrier informs its customers of its various shipping policies, including its demurrage policies. Our rule would ensure that receivers are given actual notice of the carriers' demurrage tariffs. And once a warehouseman or other third-party receiver knows the ground rules, it should be responsible for managing its demurrage. The warehouseman will know the general terms under which demurrage will apply. Although the carriers' tracking systems are not always perfect, the warehouseman will be able to track, through the carriers' electronic information systems, every car that it is to receive. The

²⁹ NSR Reply Comments 16-17.

comments we have received have convinced us that, under current practices, the warehouseman will know – at least as definitively as the railroad knows – when a rail car is being sent to it and when the car is expected to arrive. The warehouseman will also be informed when particular rail cars are placed (either in actual or in constructive placement), and will have the opportunity to reject cars that should not have been shipped to it. Our proposed rule, therefore, takes into account current industry practices.³⁰

Our proposed rule would also tie demurrage liability to the conduct of the parties directly involved with handling the rail cars and would advance the goals of § 10746 by permitting the carrier to impose charges on the party best able to get the cars back to the carrier. Further, it would relieve the carrier of the burden of searching for a responsible party when the warehouseman denies responsibility on the ground that it did not know about its status in the bill of lading. See *Novolog*, 502 F.2d at 258-59. This approach would make it easier for parties on both sides of the transaction to know their status.

We have considered what type of notice the carriers must provide to trigger demurrage liability on the part of the parties receiving rail cars. The carriers argue that, because their electronic information systems are so widely available, all parties to rail transactions should be deemed to have notice of them, and acceptance of rail cars alone ought to constitute acceptance of the railroad's terms. We agree that a warehouseman can readily learn about a carrier's demurrage tariffs (through, for example, the carrier's website). But tariffs play a different role today than they did when they were filed at the agency. Historically, regardless of whether they had actual knowledge, parties were deemed to have constructive knowledge of tariffs and to be bound by their terms. Today, however, tariffs are no longer filed with the agency, and they do not constitute legal notice, as they did in the past. A rule holding that warehousemen are bound by rail carrier tariffs because they could learn about them if they tried to do so is not acceptable.

Therefore, our proposal is that a shipper or receiver of rail cars to whom the rail carrier has given *actual* notice of its own demurrage tariff will be deemed to have accepted the rail carrier's demurrage terms whenever it accepts the cars. This approach would best advance the intent of 49 U.S.C. § 10746 (promoting the supply and efficient use of freight cars).

The next question is what notice will be sufficient to constitute actual notice. We see no reason why we should depart from our directive when we addressed the form of carrier communications responding to shipper requests for rates. As we said there, carriers are to use "electronic responses and notices when both parties have the requisite capabilities. Otherwise,

³⁰ Other than IHBR, no smaller rail carriers participated in the proceeding. Nevertheless, as we understand it, small carriers are able to offer communication tools similar to those offered by the Class I railroads.

the response should be written.”³¹ We believe that carriers will have no trouble ensuring that actual notice is part of their regular business practices and customer communications.

Finally, our ANPR suggested that, notwithstanding the ICC’s summary finding in Eastern Central in 1969, the provisions of 49 U.S.C. § 10743 should not be interpreted to apply to demurrage. We noted that, on its face, the language of § 10743 focuses on shipping charges, i.e., “rates for transportation of a shipment of property,” and not on accessorial charges such as demurrage. Moreover, as explained in cases like Hub City Terminals and Hall Lumber Sales,³² the statutory provision was adopted to address issues other than demurrage. The first part of § 10743, providing that carriers may not deliver freight until the charges are paid, was enacted in the Transportation Act of 1920 as an antidiscrimination provision. The amendments to what is now § 10743(a) (formerly 49 U.S.C. § 3(2)), along with what is now § 10743(b) (formerly 49 U.S.C. § 3(3)), were adopted in 1927 and 1940 to address liability of property owners and their agents for charges for hauling freight, including charges for reconsigned shipments. There is nothing in the statute or legislative history to suggest that these provisions were adopted to address demurrage.

AAR, along with some of the warehouse interests, disputes this interpretation. Citing the various court cases applying § 10743 to demurrage, AAR argues that, because rail cars are encompassed within the term “transportation,” as defined in 49 U.S.C. § 10102(9), demurrage charges for holding those rail cars are transportation charges to which § 10743(a) applies. AAR seems to concede that § 10743(a) was not directed at demurrage, but it argues that the statutory language can be extended to include demurrage, and it points out that it has indeed been applied that way in court cases. AAR notes that one of the statutory amendments discussed in Hall Lumber Sales was designed to address charges for refrigeration, which is an accessorial, rather than a line-haul, charge. Therefore, AAR argues, the statute was intended to apply, if not primarily, then at least secondarily, to other sorts of charges, such as demurrage, that are not related to line-haul.³³

We continue to believe that § 10743 – which is directed to payment of rates for the movement of the property by the party with ownership of the property – should not be deemed to apply to demurrage. Eastern Central summarily concluded that the provision embraces demurrage, but earlier agency and court cases found to the contrary. See, e.g., Great N. Ry. v. United States, 312 F.2d 906, 910 (Ct. Cl. 1963), citing Krauss Bros. Lumber Co. v. Director

³¹ Rate Disclosure, 1 S.T.B. at 159.

³² Blanchette v. Hub City Terminals, Inc., 683 F.2d 1008 (7th Cir. 1981); Union Pac. R.R. v. Hall Lumber Sales, Inc., 419 F.2d 1009 (7th Cir. 1969); see also N.W. Pac. R.R. v. Burchwell Co., 349 F.2d 497 (5th Cir. 1965).

³³ See AAR Comments 19-23.

General, 92 I.C.C. 450, 452 (1924) (“Demurrage charges are not part of the rate or through charges in effect at the time [of] shipment. . . . Although they may follow the shipment and be collected together with the transportation charges, they are for a distinct and separate service.”);³⁴ Getz Bros. v. Director General, 85 I.C.C. 673, 674 (1923).

The natural reading of the statutory language, along with the legislative history,³⁵ strongly suggests that the provision was meant to apply to charges for the movement of the goods, and not for the undue detention of carrier equipment. Subsection (a) states that, when property is bound to a consignee other than the original shipper, that consignee, if it is also an agent with no title to the property, is not liable for additional rates beyond those due at the time of delivery. Rather, as long as the agent-consignee discloses to the delivering carrier both its own agency status and the identity of the entity that owns the property, the shipper (or the beneficial owner in the case of a reconsigned shipment) must pay such extra charges. That provision makes sense when applied to rates and charges associated with the line-haul movement, where there is no separate role played by the intermediary that can affect the underlying rates paid for transporting the goods. Typically, the owner of property is the one liable for freight charges, and it is logical that a party with no ownership interest in the freight (the intermediary), who became involved in a shipment simply to facilitate delivery to the owner, should not have to pay more than the amount quoted when it was first engaged. Otherwise, the intermediary’s profits would be governed entirely by circumstances outside its control that develop after it made its deal with the shipper and carried out its part of the bargain.

In contrast to these added freight charges, demurrage charges that arise during the course of transit are not tied to ownership of the goods; demurrage occurs after delivery or placement (actual or constructive); and indeed, the third-party consignee is often the party most directly able to mitigate demurrage. Thus, the rationale behind § 10743(a) would not follow with respect to demurrage. AAR’s point that § 10743(a) was modified to apply to refrigeration services is not

³⁴ A later court case departed from Great Northern in finding that a request to recover charges for services at destination that were not related to line-haul must be brought in the same court action as a request to recover line-haul charges “arising out of the shipment (as evidenced by the bill of lading).” Container Transport Int’l v. United States, 468 F.2d 926, 930 (Ct. Cl. 1972). That decision, however, was based on a conclusion that the term “claim” should be deemed “to cover all the claimant’s rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” Id. at 929. It did not purport to set aside the conclusion that demurrage charges and line-haul charges are distinct.

³⁵ The three cases identified in footnote 32 discuss that legislative history at length. While they do not agree as to every aspect of that history, they do all agree that the provisions were intended to address the charges for moving the freight, and none of them mentions the term “demurrage.” See Burchwell, 349 F.2d at 499; Hall Lumber Sales, 419 F.2d at 1012; Hub City Terminals, 683 F.2d at 1011.

inconsistent with our reading of the statute: refrigeration is a service that is provided as part of the underlying conditions of transportation of the goods, see 49 U.S.C. § 10102(9)(B). Refrigeration is an integral part of the service arrangement between the shipper and the carrier; it has nothing to do with the warehouseman, and thus it should be treated the same as the line-haul charges or other auxiliary charges associated with the movement of the goods.

Nor does § 10743(b), by its express terms, apply to demurrage. That provision states that, when a party is shown in the bill of lading as both consignor and consignee, and then, during transit, the shipment is reconsigned to another, that new receiver (unless it discloses that it is taking the property as an agent for another named party) is required to pay both the original transportation charges and any extra charges due for the extra transportation provided. As with the comparable portion of § 10743(a), the point of § 10743(b) is to make a newly named consignee, which will presumably have an ownership interest in the property, the one responsible to pay all of the rates due, both for the original movement and for the extra movement to the reconsignee. Again, destination demurrage seems to have nothing to do with provisions such as § 10743(b), the focus of which is on the ownership of the goods. Moreover, as noted in the ANPR, there is no apparent reason why Congress would make § 10743(b) inapplicable to demurrage for a prepaid shipment, but applicable to other shipments, particularly given that, in either case, the conduct at issue – holding the cars too long – is the same.

AAR argues that, because § 10743(b) applies to such a narrow set of circumstances (where the same party is both consignor and consignee), it is irrelevant to our consideration here.³⁶ Although AAR provides no reason why Congress would have devised a different treatment for demurrage depending on whether a shipment is prepaid or not, AAR also argues that the prepayment provision is not anomalous, because when a shipment is prepaid, the ordinary rules of § 10743(a) would govern. However, because prepayment is unrelated to demurrage, there is no reason why one provision (subsection (b)) would apply for demurrage on prepaid shipments, while another (subsection (a)) would apply for demurrage on other shipments. Moreover, such a reading would be inconsistent with § 10743(a), which, by its terms, could not apply to a prepaid shipment where the same party is both consignor and consignee.

While our determination that the bill of lading does not establish demurrage liability may alter the way delivering carriers interact with warehousemen, the Board's conclusion that § 10743 does not apply to demurrage should not make any material difference in terms of commercial outcomes. Section 10743 incorporates basic agency principles into its provisions, and the rules we are proposing here adopt the generally applicable principal-agent standards.

³⁶ AAR Comments 19 n.22.

Thus, a warehouseman will not be deemed liable for demurrage if the railroad has actual notice of the warehouseman's agency status and of the identity of the principal.³⁷

With those principles in mind, we propose the following rule:³⁸

a. Definition: "Demurrage" is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.

b. 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, but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

c. Who is Subject to Demurrage: 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 may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. However, if that person is acting as an agent for another party, that person is not liable for demurrage if that person has provided the rail carrier with actual notice of the agency status and the identity of the principal.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed

³⁷ We do not agree with NSR that agency principles should not apply to demurrage. Nor do we agree with NSR that the originating shipper should be automatically deemed to be liable for the actions of the warehouseman. In some cases, the warehouseman may not be an agent, and in such cases, it would be difficult to justify making the shipper liable for the actions of an independent party. Moreover, practically, it could be difficult in some cases for the shipper to influence how the warehouseman acts.

³⁸ The proposed rule would be codified in the Code of Federal Regulations. See Appendix A.

rule would not have a “significant impact on a substantial number of small entities,” § 605(b). The impact must be a direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

Although the regulations proposed here would affect railroads charging demurrage, they would not have a significant economic impact on a substantial number of small entities.³⁹ The proposed regulations would essentially do no more than impose a notice requirement on railroads. The regulations would require railroads to provide actual notice of demurrage liability and charges as a prerequisite to assessing demurrage. These types of notices are generally already provided, often electronically. Thus, the proposed regulations would not result in an increased burden on a substantial number of small entities. Accordingly, pursuant to 5 U.S.C. § 605(b), the Board certifies that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, D.C., 20416.

Paperwork Reduction Act. Under the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.3(c), a disclosure requirement, such as the notification requirements in the proposed rule, falls within the definition of a “collection of information,” which must be approved by the Office of Management and Budget (OMB). Pursuant to OMB regulations at 5 C.F.R. § 1320.8(d), the Board seeks comments regarding: (1) whether the proposed collection of information, which is further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board’s burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Additional information pertinent to these issues is included in Appendix B. This proposed collection will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

³⁹ The Small Business Administration’s (SBA) Office of Size Standards develops the numerical definition of a small business. See 13 C.F.R. § 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a short line railroad is considered small if its number of employees is 500 or less. Id. (subsector 482).

List of Subjects

49 C.F.R. part 1333

Railroads

Demurrage

It is ordered:

1. Comments are due by June 25, 2012, replies are due by July 23, 2012.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

APPENDIX A

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter D, of the Code of Federal Regulations by enacting Part 1333 as follows:

PART 1333 – Demurrage Liability

Sec.

- 1333.1 Demurrage Defined
- 1333.2 Who Can Charge Demurrage
- 1333.3 Who is Subject to Demurrage

Authority: 49 U.S.C. 721.

§ 1333.1 Demurrage Defined

“Demurrage” is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.

§ 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, but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

§ 1333.3 Who Is Subject to Demurrage

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 may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. However, if that person is acting as an agent for another party, that person is not liable for demurrage if that person has provided the rail carrier with actual notice of the agency status and the identity of the principal.

APPENDIX B

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

DESCRIPTION OF COLLECTION

Title: New Submissions Under the Board's Demurrage Liability Regulations.

OMB Control Number: 2140-XXXX.

STB Form Number: None.

Type of Review: New collection.

Respondents: Railroads that charge demurrage pursuant to a tariff, rather than a contract, and parties that receive rail cars as shipper agents and wish to avoid liability for demurrage under a tariff.

Number of Respondents: Approximately 650 railroads and approximately 75 receivers acting as shipper agents.

Estimated Time Per Response: No more than eight hours for each railroad; no more than one hour for each shipper agent.

Frequency: Railroads charging the demurrage under a tariff, rather than a contract, would have to provide notice to receivers of rail cars of the demurrage that may accrue with each delivery of cars. Similarly, persons receiving rail cars pursuant to a tariff, rather than a contract, would have to inform the servicing rail carrier whenever they acted solely in agency capacity in order to avoid potential demurrage on those cars.

Total Burden Hours (annually): No more than 2,208 (6625 hours averaged over three years, based on the assumption that it will take each of 650 railroads eight hours to provide initial notice to its customers (for a total of 5200 hours) and that it will take each of an estimated 75 warehouses that might consider asserting agency status one hour to provide notice to each customer, assuming an average of 19 customers (for a total of 1425 hours)). We anticipate that the notices required under the proposed rule will consist of electronic communications between parties that are already in communication regarding the transaction and that the burden will be minimal after the first year as the customer population for railroads tends to be rather stable and only new customers would have to be notified.

Total "Non-hour Burden" Costs: None identified.

Needs and Uses: The new information collection, which involves notification requirements, is necessary to ensure that parties to rail transactions provide and/or receive notice regarding any potential liability for demurrage charges.

Retention Period: Under the proposed rule, these records will not be collected or retained by the agency, nor does the proposed rule impose a retention requirement on the parties to the transaction.