



ASSOCIATION OF
AMERICAN RAILROADS

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Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served on May 7, 2012, attached please find the Reply Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking (“NPR”) served on May 7, 2012, in this proceeding, the Association of American Railroads (“AAR”), on behalf of its freight railroad members, hereby submits its reply comments.

In the NPR, the Surface Transportation Board (“Board”) proposed to adopt a new rule related to demurrage. The proposed rule would state that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond “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 proposed rule would excuse such a party from liability for demurrage charges where it is acting as agent for the owner of the freight and supplies the railroad with actual notice of that status. The Board also clarified that it intends to construe the provisions of 49 U.S.C. § 10743, *Liability for Payment of Rates*, as applying to carriers’ line-haul rates, but not to carriers’ charges for demurrage.

The Association of American Railroads (“AAR”) filed opening comments on August 24, 2012. In its comments, the AAR generally supported the essence of the proposed rules as

consistent with both the requirements of 49 U.S.C. § 10746, *Demurrage Charges*, and the traditional goals of demurrage. However, the AAR noted that the proposal is unclear in several important respects and asked the Board to clarify and modify three issues in the final rule. First, the AAR asked the Board to reconsider requiring “actual notice,” or, at a minimum, clarify what would constitute actual notice under its proposed rule. Second, the AAR argued that the proposed agency exception is unnecessary in light of the Board’s interpretation of Section 10743 as not applying to demurrage charges. Third, the AAR asked the Board to clarify the scope of the proposed rule to state that the proposed rule does not remove any existing basis for demurrage liability.

Opening comments were filed by AAR members BNSF Railway, Canadian Pacific Railway (“CP”), CSX Transportation, Norfolk Southern Railway (“NS”), and Union Pacific Railroad. Opening comments were also filed by the American Short Line and Regional Railroad Association, Minnesota Commercial Railway, Continental Terminals, Fertilizer Institute, National Industrial Transportation League (“NITL”), International Warehouse Logistics Association (“IWLA”), International Liquid Terminals Association (“ILTA”), Independent Fuel Terminal Operators Association (“IFTOA”), and Kinder Morgan Terminals.

In the discussion below, the AAR responds to the opening comments filed in this proceeding.¹ Specifically, the AAR first disagrees with the claim that the proposed rule exceeds the Board’s statutory authority. The AAR then shows that the opening comments filed in this proceeding illustrates three things. First, there is a need for a clarifying rule that states that a

¹ The Board’s NPR stated that issues related to constructive placement of rail cars for loading or unloading are “beyond the scope of this proceeding.” NPR at 6 & n.16. The AAR will therefore not respond to comments regarding such issues. *See, e.g.*, IWLA Opening Comments at 8-11. Similarly, the AAR will not respond to comments regarding “bunching” of rail cars or other factual questions related to demurrage charges better suited to resolution in individual disputes. *See, e.g.*, IFTOA Opening Comments at 1-2.

receiver of rail cars that detains those cars beyond free time may be held liable for demurrage regardless of its status on the bill of lading. Second, the record shows that no agency exception is warranted for the proposed rule. Third, there is no evidence that third-party intermediaries are unaware that demurrage liability exists or that they are not already on notice of rail carriers' demurrage tariffs. Finally, the AAR asks the Board to state affirmatively that, when railroads categorize private cars held on railroad tracks as demurrage, the proposed rule would apply.

Discussion

I. The Proposed Rule is Within the Statutory Authority of the Board

Despite argument to the contrary, the Board has the statutory authority to promulgate the proposed rule.² Kinder Morgan Terminals argues that the proposed rule exceeds the Board's statutory jurisdiction. Kinder Morgan Terminals Opening Comments at 5. Specifically, Kinder Morgan Terminals asserts that Congress gave "rail carriers, not the Board, the authority to compute demurrage charges and create rules on demurrage that 'fulfill the national needs.'" *Id.* at 7.

Kinder Morgan Terminals is correct in noting that 49 U.S.C. § 10746 requires rail carriers to calculate demurrage 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." The statutory scheme recognizes rail carriers' rights and duties in the first instance to establish rules and practices related to demurrage. Yet rail carriers' rules promulgated pursuant to section 10746 are subject to STB jurisdiction. The Board has exclusive jurisdiction over "transportation by rail carrier" and "remedies with respect to rates, classification, rules (including car service, interchange, and other operating rules), practices,

² In making this statement, the AAR assumes that the Board's proposed rule does not intend to remove any existing legal basis for liability, as set forth in AAR's Opening Comments.

routes, services, and facilities by such carriers.” 49 U.S.C. § 10501(a) and (b). The Board is charged with determining if a party has been injured by a violation of the Interstate Commerce Act, as amended (“ICA”), by a rail carrier, 49 U.S.C. § 11704(a), and whether railroad practices are reasonable. 49 U.S.C. § 10702 . The Board has express authority to “prescribe regulations in carrying out” the ICA. 49 U.S.C. § 721(a).

Any of these statutory provisions would authorize the STB to issue the proposed rule that would affirmatively establish that rail carriers may charge demurrage to receivers of rail cars who hold rail cars beyond free time regardless of their status on the bill of lading. This would define reasonable railroad practices that meet the statutory goals of 49 U.S.C. § 10746 and allow for the compensation for use of railroad property and an incentive to release rail cars quickly to improve car utilization. Such a rule would be in the public interest as timely release of cars aids in network fluidity, ultimately benefiting all railroad customers. As such, the proposed rule falls squarely within the Board’s statutory jurisdiction.

II. The Record Establishes the Need for a Clear Rule that Allows Railroads to Charge Receivers of Rail Cars for Demurrage in Appropriate Circumstances

The opening comments filed by non-railroad parties in this proceeding illustrate the untenable position railroads can find themselves in when trying to collect demurrage in situations where cars are handled by third-party intermediaries. Intermediaries like ITFOA and ILTA state their view that shippers should always be held liable for demurrage and that third-party intermediaries are always acting as agents for shippers. ILTA Opening Comments at 1; IFTOA Opening Comments at 1. In contrast, NITL argues that liability should be based on the conduct of the parties handling the rail car and that third-party intermediaries should not be able to shift liability to shippers by merely providing notice to the rail carrier of purported agency status. NITL Opening Comments at 5, 8. Without the proposed rule, rail carriers are put in the middle

of parties that may seek to avoid liability without having access to information as to the business and legal relationships of those parties that may define the liability. It is therefore evident that the Board should establish a rule that clarifies that those who handle railcars are liable for demurrage. It is the position of the AAR, as demonstrated in its opening comments, that a rule that would allow demurrage to be charged to the receiver of rail cars, in addition to any existing legal basis for liability, would meet the requirements of 49 U.S.C. § 10746 and the traditional goals of demurrage. *See* AAR Opening Comments at 5.

III. The Record Establishes Why An Agency Exception is Not Appropriate for the Proposed Rule

Despite interpreting 49 U.S.C. § 10743 as not applying to demurrage charges, the proposed rule would create an exception to demurrage liability for a party providing actual notice to the rail carrier that they are acting as an agent for another party that would mirror the statutory exception in 10743. The opening comments filed in this proceeding illustrate the problems with the proposed agency exception detailed in the AAR Opening Comments: it is logically inconsistent with the basis for the proposed rule and would undermine the Board's stated goal to bring clarity to this area. *See* AAR Opening Comments at 8-11.

IFTOA claims that when a third-party intermediary handles merchandise but has no property interest in the cargo, then those intermediaries are acting as an agent of the shipper. IFTOA Comments at 1. ILTA states that terminals "would uniformly exercise their right to waive demurrage liability by providing notice [of agency]." ILTA Opening Comments at 3. Kinder Morgan Terminals acknowledges that such blanket characterizations is not consistent with traditional principles of agency. Kinder Morgan Terminals Opening Comments at 15. NITL points out that the proposed rule may provide incentives for third-party intermediaries to assert agency status without knowledge by the supposed principal. NITL Opening Comments at

4. The AAR, like NITL, supports a rule that “properly places accountability on the party that fails to efficiently handle the rail cars.” NITL Opening Comments at 4. But, as the AAR noted in its opening comments, the proposed agency exception undermines the effectiveness of the proposed rule in meeting this goal. Moreover, it is unlikely that handling freight cars would come within the scope of an agent-principal relationship unless expressly agreed to by the principal. If such an agreement is in place, the Board’s rule would allow such a “principal” to agree to indemnify the intermediary for its liability through a contract while facilitating the rail carrier’s ability to recover demurrage from the party who detained the cars. Indeed, the Board expressly proposed to allow the parties “to alter their relationship by contract.” NPR at 10. This would be a more workable and direct way to address the situation where a shipper/receiver has agreed to pay demurrage for cars handled by a third-party intermediary.

In contrast, allowing third parties to avoid demurrage liability by providing notice to the serving rail carrier would allow that third party to avoid liability caused by its own conduct without demonstrating that another party will assume that liability. Nor would the proposed rule necessarily allow railroads to charge demurrage to that named “principal” if that principal is not the named consignee in the bill of lading.³ Thus, there would be a new loophole that undermines the goal of Section 10746.

³ The proposed rule seems to assume that if the receiver of rail cars is acting as an agent (and so notifies the rail carrier), then demurrage can be assessed against the principal, instead. But it is not entirely clear on what basis that liability would attach. It is not clear whether the Board intends the proposed rule to replace consignee liability or to supplement it. *See* AAR Opening comments at 11-12. The proposed rule only states that if the receiver of rail cars provides actual notice of agency it is not liable for demurrage. It does not affirmatively state that the principal named in that notice would be liable.

IV. The Record Establishes that Third-Party Intermediaries are Already on Notice Regarding Demurrage Liability

Notably absent from the opening comments was any suggestion by third-party intermediaries that they were unfamiliar with either the general contours of demurrage liability or the specifics of rail carriers' demurrage tariffs. As the AAR noted in its opening comments, receivers of rail cars are on notice today that demurrage may accrue. AAR Opening Comments at 6. Businesses that receive railcars do so as a voluntary part of their day-to-day business. It is unlikely that they do so without knowing that there are consequences for holding onto rail cars beyond free time. Third-party intermediaries are generally sophisticated entities engaged in national and international commerce. These parties are located along the facilities of the rail carrier from whom they receive cars and those carriers' demurrage tariffs are readily available. *See, e.g.*, CP Opening Comments at 7; NS Opening Comments at 11.

Therefore, the Board's proposed actual notice requirement is at best unnecessary, and at worst counterproductive, as it may lead to less clarity and more litigation. Parties seeking to avoid demurrage liability may seek to argue that sufficient actual notice had not been given in a particular case. Rather than narrow the problem of a named consignee claiming that it did not have notice of its designation or did not assent to such a designation, ambiguity regarding what constitutes "actual notice" could instead lead to more litigation not less. Such uncertainty would frustrate the Board's stated intent in promulgating the rule in the first place, and frustrate the intent of Section 10746.

V. The Board Should Clarify that the Proposed Rule Includes Private Cars Held on Railroad Tracks.

Kinder Morgan Terminals asks the Board to clarify that the definition of demurrage in the proposed rule would be limited to railroad-owned cars. Kinder Morgan Terminals Opening

Comments at 16. But such a clarification would be contrary to Board precedent. In *North America Freight Car Assoc. v. BNSF Ry. Co.*, NOR 42060 (Sub-No. 1) (STB served Jan. 24, 2007) (“NAFCA”), *aff’d sub nom., North America Freight Car Assoc. v. Surface Transportation Board*, 529 F.3d 1166 (D.C. Cir. 2008), the Board upheld as reasonable a BNSF tariff that applied storage and demurrage charges on empty private freight cars when held on railroad property beyond specified free time. There the Board noted that such charges meet the purposes of demurrage and are reasonable. “[T]hey compensate the railroad for use of its assets (i.e., the space on its track or at its yards), and they encourage more efficient use of freight cars on its system.” *NAFCA* at 9. *See also R.R. Salvage & Restoration, Inc.—Pet. for Decl. Order—Reasonableness of Demurrage Charges*, NOR 42102, *et al* (STB served July 20, 2010) at 4.

Kinder Morgan Terminals does not point to any precedent or suggest any policy reason why the Board would not apply the proposed rule to all demurrage claims. As the AAR has pointed out, the proposed rule is designed to apply to intermediaries. To the extent that intermediaries detain private railcars, the proposed rule should apply to demurrage charges related to private cars held on railroad track beyond free time consistent with carriers’ demurrage tariffs.

Conclusion

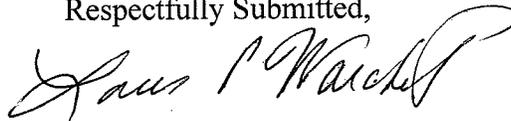
The AAR continues to support the intent of the Board’s proposal. As shown above, the proposed rule is within the Board’s statutory jurisdiction. The opening comments in this proceeding illustrate that there is a need for a clear rule to allow demurrage to be charged to receivers of rail cars that detain those cars beyond free time. However, there is no basis for the Board to conclude that it should include an agency exception to the proposed rule; and, moreover, the record shows that an actual notice requirement is unnecessary and may be counterproductive. The AAR respectfully asks the Board to clarify that the proposed rule:

(1) would not remove any existing legal basis for liability; and (2) would include demurrage charges that result from holding private cars on railroad track. The Board should clarify and modify the proposal as discussed herein and in the AAR Opening Comments and publish a final rule that states that a receiver of rail cars that holds them beyond the specified free time may be held liable for demurrage.

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