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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

**Docket No. EP 707
DEMURRAGE LIABILITY**

**COMMENTS OF
THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) respectfully submits its Comments concerning the Notice of Proposed Rulemaking: Demurrage Liability. These comments are submitted in response to the May 7, 2012 Notice by the Board soliciting public comment on its proposed rules.

ASLRRA represents 464 Class II and Class III railroads in the United States, Canada and Mexico as well as numerous suppliers and contractors to the short line and regional railroad industry. On behalf of its members, ASLRRA thanks the Board for the opportunity to comment on its proposed rulemaking concerning revised rules for demurrage liability.

It is difficult to make definitive comments about how the Board’s proposed new demurrage rule will affect small railroads because Class III carriers in

particular are both numerous and diverse. With that important caveat ASLRRA supports *in general* the concept of making the party who actually receives the cars responsible for the payment of any demurrage charges arising under the railroad's demurrage tariff. The standard the Board would adopt is simple and clear in its initial application and appears to resolve the split in the circuits which arose in the *Groves*¹ and *Novolog*² Circuit Court decisions. It does not resolve other demurrage issues which arise in the context of small railroad operations which have been raised by individual small railroads in this and other proceedings, but in fairness it does not purport to address them as far as ASLRRA can ascertain.

While ASLRRA supports the new principle of receiver liability, the conditions and limitations the Board attaches are problematic for small carriers. The first condition for the imposition of receiver liability for demurrage charges is *actual* notice to the receiver of the railroad's demurrage tariff. Simple enough in theory, it assumes that railroads can send notice electronically virtually automatically. While Class I carriers may do so, small railroads, particularly those who are acting as handling lines, may not even know who the receiver is. Even when they do know the shipper's identity, they often communicate with shippers by telephone. The Board expects, however, that when electronic communications are not in use, the railroads will provide actual notice in writing. This requirement places a new burden on the small carrier who would not otherwise communicate with the shipper 'in writing'. If the communication method of choice is telephone, then that is the simplest way for a small carrier to give actual notice to the receiver of the car what its demurrage terms are. This is not a burden under the current system because publication of the demurrage tariff has long been accepted and understood by the shipping community and requires no transaction-by-transaction

¹ *Norfolk S. Ry. v. Groves* (Groves), 586 F.3d 1273, 1278 (11th Cir. 2009), cert. denied, 131 S.Ct. 993 (2011).

² *CSX Transp. Co. v. Novolog Bucks Cnty.* (Novolog), 502 F.3d 247 (3d Cir. 2007)

affirmative action by the small railroad. It is hard to imagine a receiver of rail cars who is unaware of demurrage tariffs and has no clue how to ascertain their terms. Thus, ASLRRA questions the necessity of imposing this burden on small and sometimes less electronically sophisticated Class III carriers.

Beyond the additional burden to give actual *written* notice when automated electronic notice is not available, this new condition of *actual notice* takes away much of the advantage of the new rule, which is the certainty of who will be liable for demurrage charges. When this requirement is in effect a receiver can simply claim it did not receive actual notice, and the burden falls to the railroad to prove that the receiver did in fact have actual notice of the demurrage tariff. The very difficulty in proving that another party received actual notice becomes a tool for the unscrupulous receiver to delay, to defer, and ultimately to avoid payment of legitimate demurrage charges. For the small railroad the cost of fighting this gamesmanship will often be more than the charges it is trying to collect, making allegations that actual notice was not given more likely.

To remedy this problem, ASLRRA suggests that the Board either drop the actual notice requirement for cars delivered to receivers by Class III railroad so long as the carrier's demurrage tariff is duly published on the Class III carrier's public web site, or in the alternative adopt a rebuttable presumption that the receiver was given actual notice or could have obtained actual notice for itself by accessing the applicable demurrage tariff on the Class III railroad's publicly available website.

The other condition to the Board's general principle that receivers shall be liable for demurrage charges is that a receiver acting as an agent for another party shall not be liable for demurrage if that person has provided the rail carrier with

actual notice of the agency status and identity of the principal. This release puts small railroads back in the position that has vexed them for decades. Small carriers can go from pillar to post trying to collect legitimate accrued demurrage charges from consignees, consignors, warehousemen, other third party agents and principals who deny responsibility and point the finger at someone else who should be liable. While the basic rules underlying liability for the demurrage charges may be simple and clear, if the parties refuse to pay - no matter how feeble their excuse - small railroads typically cannot afford to play the collection game, and demurrage charges go unpaid. ASLRRA suggests that the Board only absolve a receiver or other agent from responsibility for demurrage charges when the principal for whom the agent purports to act steps forward and accepts responsibility *for itself* as principal for all demurrage liability. The railroad should not bear the burden of accepting the word of the agent that someone else is responsible when that may or may not be true; such an assertion is reliable only when a party accepts responsibility for payment, and the railroad can assess the reliability of the party. It should be between an agent who accepts that role voluntarily for compensation and its principal to work out the terms of the relationship between them. The railroad should be able to rely on the exquisite clarity of the simple rule that the receiver shall be responsible unless someone else steps forward to accept that liability for itself.

Respectfully submitted,

American Short Line and Regional Railroad Association



By: Keith T. Borman

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