

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707
DEMURRAGE LIABILITY

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REPLY COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation
League
1700 North Moore Street
Arlington, VA 22209

By its attorneys:

Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Dated: September 21, 2012

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The National Industrial Transportation League (“League” or “NITL”) submits these Reply Comments in response to the Notice of Proposed Rulemaking that the Surface Transportation Board (“Board” or “STB”) issued on May 7, 2012, (“Notice”) in which the Board requested comments on a proposed rule concerning demurrage liability. The proposed rule establishes the conditions under which a person who receives and detains railcars beyond the designated free time period is responsible for demurrage.¹

I. INTRODUCTION

On August 24, 2012, the League submitted its comments in this proceeding (“League Comments”). In those comments, the League expressed its support for assigning responsibility for demurrage to the party that receives and delays the release of railcars.² However, the League also expressed its concerns with certain aspects of the rule and asked the Board to clarify the rule. First, the League noted that it was very concerned with the provision that gives third-party receivers of railcars unchecked authority to shift their demurrage liability to shippers or other parties by claiming the existence of agency status in a notice to the railroad, but without a notice

¹ *Demurrage Liability*, STB Docket No. EP 707, slip op. (STB served Dec. 6, 2010) (75 Fed. Reg. 76,496 (Dec. 10, 2010)).

² League Comments 3.

to the shipper.³ Second, the League requested that the Board clarify that a blanket notice could satisfy actual notice under the rule to reduce the administrative burden,⁴ and that carriers must provide actual notice of their demurrage tariffs to parties identified as principals by third-party receivers of railcars.⁵ Additionally, the League sought clarification that the rule would operate to only hold responsible for demurrage the party that detains railcars and not another party that does not detain the cars but may have a contractual relationship with the railroad.⁶

Many of the comments that were submitted in response to the Notice echoed the League's comments. 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.⁷ Accordingly, the League and railroad commenters generally supported the adoption of a conduct-based rule for demurrage liability.⁸ While many of the intermediary commenters expressed concerns over the conduct-based approach, their concerns were generally limited to an assumption that the rule would increase their exposure for demurrage.⁹ Also, most commenters called for clarification of the rule, especially the actual notice requirement.¹⁰

Further, the railroads generally opposed the rule's agency exception, which allows agents to avoid demurrage liability by providing to the carrier actual notice of its status as an agent and

³ *Id.* at 4.

⁴ *Id.* at 6.

⁵ *Id.* at 7.

⁶ *Id.* at 8.

⁷ League Comments 8; AAR Comments 2, 3; CP Comments 4; CSXT Comments 1; NS Comments 4; UP Comments 2, 4.

⁸ League Comments 3; AAR Comments 4; ASLRRRA Comments 3; BNSF Comments 2; CP Comments 5; NS Comments 6-7; UP Comments 2.

⁹ IFTOA Comments 1; ILTA Comments 1-2; Kinder Morgan Comments 9.

¹⁰ League Comments 6-9; AAR Comments 2; BNSF Comments 3; CP Comments 1; CSXT Comments 12-14; IFTOA Comments 3; ILTA Comments 2-3; IWLA Comments 2; Kinder Morgan Comments 13; NS Comments 4; UP Comments 3.

the identity of the principal.¹¹ Railroads viewed the exception as inconsistent with the Board’s interpretation of 49 U.S.C. § 10743 and principles of agency law, a potential loophole for avoiding liability, and unnecessary in light of the ability of principals and agents to use commercial mechanisms to address how they will allocate demurrage liability amongst themselves.¹² Although no intermediary commenter expressly called for the abandonment of the agency exception, the intermediary commenters generally opined that current market practices and contracts between principals and agents adequately address the allocation of demurrage liability.¹³

II. THE BOARD’S PROPOSED RULE IS APPROPRIATE FOR DETERMINING DEMURRAGE LIABILITY

A. There Is Broad Support for the Conduct-Based Principle Underlying the Board’s Rule.

There is strong support by the League and other commenters for the principle that demurrage liability should be based on conduct.¹⁴ As many of the railroads note, a purpose of demurrage is to incentivize conduct—*i.e.*, incentivize the return of railcars without unnecessary delay.¹⁵ This allows the rail system to be more efficient and better serve the public, which is consistent with the statutory goals of fulfilling 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

¹¹ AAR Comments 2; CP Comments 1; CSXT Comments 13; NS Comments 14; UP Comments 7.

¹² AAR Comments 8-11; CP Comments 9; NS Comments 14.

¹³ IFTOA Comments 2-3; IWLA Comments 3 (noting that contracts can play an important role in avoiding demurrage liability); Kinder Morgan Comments 12.

¹⁴ AAR Comments 4 (“The idea that the entity that has control of rail cars should be liable for demurrage is appropriate.”); ASLRRRA Comments 3 (supporting the adopted principle of receiver liability); BNSF Comments 2 (“BNSF . . . believes that a rule that ‘tie[s] demurrage liability to the conduct of the parties directly involved with handling the rail cars’ is appropriate.”); CP Comments 5 (“[D]emurrage liability should be ‘tie[d] . . . to the conduct of the parties directly involved with the handling of the railcars.”) (emphasis in original); NS Comments 6 (agreeing with the Board’s policy rationale); UP Comments 2 (“[C]ommend[ing] the Board for proposing rules that place the responsibility for detaining rail assets on the party in the best position to expedite the movement of rail cars.”).

¹⁵ AAR Comments 4; CP Comments 2; UP Comments 5.

transportation of property.¹⁶ The League supports the use of demurrage as long as both the free time periods and demurrage rates are reasonable, and not used as a profit center by the railroads.

The proposed rule recognizes that the party in possession of the railcars is better suited to ensure the timely return of railcars, but it may not be the party in direct contractual privity with the railroad. While the actions of railroads may affect the amount of railcars that are delivered to a receiver, and should also be accounted for as addressed below, the receiver knows best whether it has the capacity to handle the cars that it receives and has control over acceptance and return of the railcars. Thus, in the context of demurrage, the conduct of the receiver will directly impact freight car use and availability, which justifies the approach underlying the Board's proposal.

B. The Rule Should Apply to All Parties, Not Just Intermediaries.

As noted, the conduct-based principle underlying the rule is widely supported by the League and other commenters. The League believes that the Board should apply the general conduct-based principle of the rule more broadly and not only in the narrow context of a receiver that operates as a warehousemen or intermediary. The rational policies and principles discussed above apply equally to traditional consignors and consignees that receive railcars, and not only to intermediaries. Accordingly, the Board's conduct-based demurrage rule should apply to all parties involved in rail transportation.¹⁷

The railroad commenters widely support the general purpose of the conduct-based rule but then advocate for a narrow application of the rule to serve their own interests.¹⁸ Their

¹⁶ 49 U.S.C. § 10746.

¹⁷ The League notes that the parties to a contract entered into under 49 U.S.C. § 10709 would have the freedom to agree to alternative demurrage terms.

¹⁸ *E.g.*, compare AAR Comments 4 (“The idea that the entity that has control of rail cars should be liable for demurrage is appropriate.”), BNSF Comments 2 (“BNSF . . . believes that a rule that ‘tie[s] demurrage liability to the conduct of the parties directly involved with handling the rail cars’ is appropriate.”), CP Comments 5 (“[D]emurrage liability should be ‘tie[d] . . . to the conduct of the parties directly involved with the handling of the railcars.”) (emphasis in original), NS Comments 6 (agreeing with the Board's policy rationale), and UP Comments 2 (“[C]ommend[ing] the Board for proposing rules that place the

objective appears designed to allow them to “have their cake and eat it too” by having the dual right to enforce demurrage charges against a third-party receiver of railcars, as well as against another party named in the bill of lading, even when such named party may not have detained the railcars beyond the free time period. Thus, the railroads would like to ensure that they can always look to the contracting shipper to recover demurrage as a backstop, even when the shipper did not detain the railcars beyond the allocated free time. However, existing bases of demurrage liability, which are contract-based, do not have the same influence on the timely return of railcars because they do not place liability for demurrage on the person who ultimately has control over the return of the railcars. Furthermore, when the contracting party is not aware that a receiver held a car too long, it is in poor position to determine the validity of demurrage charges.¹⁹ Accordingly, the proposed rule is most aligned with the goals of demurrage listed at 49 U.S.C. § 10746.

The railroad support for narrowing the rule also runs counter to their desire to eliminate loopholes and establish a clear basis for liability. A key theme of the railroad comments and intermediary comments is that loopholes for avoiding liability and uncertainty in the liability rules should be eliminated. This rule addresses these concerns by clearly identifying the person who receives and detains railcars as the person who will be liable for demurrage, and the League supports that approach as long as the delayed release of the railcars was not contributed to by the conduct of the railroads, as addressed below.

responsibility for detaining rail assets on the party in the best position to expedite the movement of rail cars.”), with AAR Comments 12 (“[T]he Board should clarify that this proposed rule does not remove any existing legal basis for liability.”), BNSF Comments 3 (“BNSF believes the Board’s intention was . . . to supplement existing law.”), CP Comments 11 (“The Board should clarify that Part 1333 supplements existing bases for demurrage liability and does not create new or different obligations for demurrage imposed on shippers and consignees.”), NS Comments 8 (“NS recommends that the Board clarify that proposed Section 1333 does not purport to embody the *sole basis* for establishing the liability of a party to pay demurrage charges.”) (emphasis in original), and UP Comments 2 (“UP believes that Part 1333 is intended to provide an alternative legal basis for collecting demurrage . . .”).

¹⁹ League Comments 4-5.

Broad application of the proposed rule will not result in a greater notice burden than that which would exist under a narrow rule. Under a broad application, a rail carrier would have to give notice to receivers with whom the carrier has an existing relationship. Already, carriers communicate with these receivers, in many cases via email. These pre-existing lines of communication eliminate the hurdles to fulfilling the actual notice requirement.

Thus, the League recommends that demurrage liability be based on the simple, clear rule that the Board has proposed—not a hodgepodge of rules and bases for liability.

C. The Rule Should Include an Exception to Liability Where a Railroad’s Conduct Causes or Contributes to Delay.

Many intermediary commenters expressed concern over the assumption that receivers of railcars are in the best position to avoid liability.²⁰ They noted that delays in the unloading and release of railcars are influenced by factors outside their control, primarily because they lack operational control over the movement and delivery of the railcars to their facilities. This concern also applies to consignors and consignees who are not intermediaries.

The League agrees that receivers of railcars do not always have complete control over the timing and number of railcars received and that certain rail carrier practices may frustrate attempts by receivers to avoid demurrage. The comments of several intermediaries identify the practice of railcar bunching as the culprit for many railcar unloading delays.²¹ Kinder Morgan Terminals (“Kinder Morgan”) also commented that the pickup and delivery of railcars is not within its control.²² As the Independent Fuel Terminal Operators Association (“IFTOA”) noted, many third-party receivers cannot address these practices through commercial mechanisms

²⁰ IFTOA Comments 1; ILTA Comments 1-2; Kinder Morgan Comments 9.

²¹ IFTOA Comments 2; ILTA Comments 3.

²² Kinder Morgan Comments 10.

because terminals do not have enough leverage with rail carriers to address these issues.²³ The League submits that traditional consignors and consignees likewise are unable to negotiate favorable demurrage terms against the market power of the rail industry. Thus, the League suggests that the Board address these legitimate concerns by creating an exception or defense to a receiver's demurrage liability to the extent it was caused by a rail carrier. This can be accomplished by amending the rule as follows:

Except to the extent that detention of railcars beyond the applicable free time period is caused by a rail carrier, 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. . . .

III. THE BOARD SHOULD ELIMINATE THE AGENCY EXCEPTION TO LIABILITY

Although the Board clarified in its Notice that demurrage payments are not governed by 49 U.S.C. § 10743, its proposed rule includes an agency exception that appears to be derived from this statutory provision.²⁴ Under the rule's agency exception, a receiver of rail cars that

²³ IFTOA Comments 2.

²⁴ Under 49 U.S.C. § 10743(a)(1), a consignee that is an agent and does not have beneficial title to the property delivered to it is not liable for rates found due after delivery if, before the delivery of the property, the consignee gives written notice to the delivering carrier of the (1) agency and absence of beneficial title; and (2) 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 bill of lading.

“act[s] as an agent for another party 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.”²⁵

In its initial comments, the League expressed concern that the exception fails to include any safeguards to prevent a third party from improperly alleging the existence of an agency relationship in order to avoid demurrage charges.²⁶ This is because the exception does not require the intermediary to establish actual existence of the relationship that requires the alleged principal to assume demurrage liability.

Nearly all of the railroad commenters and at least one intermediary commenter also expressed concern that this exception could be used nefariously in an attempt to avoid demurrage liability.²⁷ The comments of the International Liquid Terminals Association echo this point:

[T]he opportunity afforded terminals to provide notice of their agency status will, in most cases, ensure that no improvement will occur in the rail carriers’ ability to determine demurrage responsibility and collect demurrage. Terminals would uniformly exercise their right to waive demurrage liability by providing the notice.²⁸

Simply put, a third party receiver has nothing to lose by declaring agency status, since it could potentially avoid demurrage charges for which it ought to be responsible, or at least delay its potential liability by creating a dispute over its agency status.

²⁵ Notice 17.

²⁶ League Comments 4.

²⁷ AAR Comments 11; CP Comments 9; CSXT Comments 13; ILTA Comments 3; NS Comments 15; UP Comments 8.

²⁸ ILTA Comments 3.

A uniform exercise of the agent exception by third party receivers will only ensure a plethora of demurrage disputes which will require all parties—shippers, carriers, and intermediaries—to expend resources to determine demurrage liability. As CSX Transportation, Inc., (“CSXT”) noted, carriers would have to make wasteful attempts to recover demurrage due to false declarations of agency status.²⁹ Shippers would be in a similar position.

Moreover, determining agency status involves a fact-specific analysis which can be time consuming and expensive to litigate. As railroad commenters point out, a third-party receiver may be an agent for the purposes of receiving goods, but not for the handling of the railcars used to transport the goods.³⁰ Furthermore, it is possible that a warehouseman could be acting as agent with regard to some deliveries for a particular shipper but not for other deliveries. Demurrage liability should not turn on such fine distinctions, which will lead to complicated fact-intensive demurrage disputes.

The agent exception is also unnecessary in light of the ability of shippers and intermediaries to allocate demurrage liability among themselves by contract. As noted by the terminals themselves, the commercial mechanisms that are currently in place suffice for allocating demurrage liability between shippers and third party receivers.³¹ Thus, eliminating the agency exception would clarify and simplify application of the rule, would reduce demurrage disputes, and would permit third party receivers and shippers to continue the practice of allocating demurrage responsibility in their commercial arrangements.

²⁹ CSXT Comments 13.

³⁰ AAR Comments 9; NS Comments 16.

³¹ AAR Comments 10; CP Comments 10; IFTOA Comments 2-3; IWLA Comments 3 (noting that contracts can play an important role in avoiding demurrage liability); Kinder Morgan Comments 12.

IV. THE BOARD SHOULD CLARIFY THE ACTUAL NOTICE REQUIREMENT

A. The Criteria for Actual Notice Should Be Clear.

Most commenters asked the Board to clarify the actual notice requirement by establishing clear criteria that would constitute actual notice under the proposed rule. Under the rule, actual notice triggers liability. As the Association of American Railroads (“AAR”) and International Liquid Terminals Association (“ILTA”) noted,³² any ambiguity concerning the criteria for actual notice will invite litigation to establish its contours and create uncertainty concerning the application of the proposed rule. This runs counter to one of the core purposes of the rule—to eliminate the legal ambiguities that stand as an obstacle to the assessment of demurrage liability.

Moreover, the criteria for actual notice should not be overly burdensome. The League’s initial comments sought to address the potential administrative burden associated with the provision of actual notice with every rail shipment by suggesting that a blanket notice be permitted.³³ Railroad and intermediary commenters expressed the same concern and also provided suggestions for avoiding an unnecessarily burdensome notice requirement.³⁴

B. Constructive Notice of a Demurrage Tariff Should Be Insufficient.

The AAR, Canadian Pacific Railway Company (“CP”), and Norfolk Southern Railway Company (“NS”) requested that the Board deem all receivers of railcars to have notice of the railroads’ demurrage tariffs by virtue of their participation in the rail transportation system and the publication of the rule in the *Federal Register*.³⁵ The League disagrees and believes that permitting constructive notice of tariffs would impede the Board’s objectives of ensuring

³² AAR Comments 7; ILTA Comments 3.

³³ League Comments 6.

³⁴ AAR Comments 6-7; ASLRRRA Comments 3; CP Comments 8; NS Comments 13-14; UP Comments 6.

³⁵ AAR Comments 6, 8; CP Comments 7-8; NS Comments 9-11.

adequate knowledge of demurrage charges, free time periods, and other terms impacting liability. Ironically, constructive notice of demurrage tariffs would undermine the railroads' own interest in using demurrage to incentivize the timely return of railcars as well as the goals set forth at 49 U.S.C. § 10746.³⁶ Demurrage cannot incentivize the timely return of a railcar if the receiver is not aware of the nature of the incentive or that an incentive even exists.

Publication of a rule in the *Federal Register* only puts a party on notice of the rule, not the specifics of the commercial practices that give rise to it. The language of the cases that AAR, CP, and NS cite in support are clear—"publication in the Federal Register constitutes an adequate means of informing the public of agency action."³⁷ But the setting of tariff charges is not agency action, and furthermore, parties are not subject to constructive notice of railroad tariffs following elimination of the filed-rate doctrine.³⁸

Moreover, the provision of actual notice is consistent with the bedrock principle of contract law that parties cannot be bound without mutual assent.³⁹ This is an equitable principle that recognizes that it is unfair to hold a person accountable for an obligation that the person did not knowingly accept. Also, an actual notice requirement avoids forcing receivers to take affirmative steps to ascertain that demurrage charges apply and the extent to which they apply. In addition, the requirement is consistent with calls to eliminate uncertainty, by ensuring that

³⁶ AAR Comments 5 (identifying that a purpose of demurrage is to promote efficiency by providing a deterrent against detention); CP Comments 5 (noting that a key policy concern is "the need to create incentives for warehousemen, terminals and other third party receivers to return railcars promptly."); NS Comments 5-6 (noting that eliminating demurrage responsibility for agents will likewise eliminate their incentive to handle railcars efficiently).

³⁷ *Howmet Corp. v. EPA*, 614 F.3d 544 (2010) (cited by NS); *Perales v. Reno*, 48 F.3d 1305, 1316 (2d Cir. 1995) (cited by CP) (emphasis added). The AAR cited *Chip Steak Co. v. Hardin*, 332 F.Supp. 1084, 88 (N.D. Cal. 1971), which held that "the precise text of a proposed regulation [need not] be set forth in the published notice thereof so long as the published notice is sufficient to give affected parties notice of the substance of the proposed agency action."

³⁸ See Notice 4 n.8.

³⁹ Under contract law, an offer and acceptance must reference each other. Restatement (Second) of Contracts § 23 (1981).

receivers know, with certainty, the terms that apply to the loading, unloading, and handling of railcars.⁴⁰

C. Actual Notice Should Be Given to All Persons Who Receive Railcars

The AAR requested that the Board clarify to whom notice should be given.⁴¹ This request relates to the breadth of application of the rule, including whether the term *receiver* could be interpreted to exclude shippers who receive empty railcars for loading.⁴² For all of the same reasons why actual notice would benefit intermediaries' compliance with demurrage terms and incentivize the efficient handling of railcars, the League suggests that the Board clarify that actual notice of demurrage tariffs should be provided to all parties who receive either loaded or empty railcars, including shippers.

D. Actual Notice Should Be Satisfied by Electronic or Written Notice With a Link to the Carrier's Demurrage Tariff.

The AAR, CSXT, NS, and Union Pacific Railroad Company ("UP") suggested that electronic or written notice with a hyperlink to the carrier's demurrage tariff should constitute actual notice.⁴³ The AAR also suggested that the notice contain a summary of the tariff.⁴⁴ The League recognizes that a carrier may find that delivering a full copy of its demurrage tariff is burdensome and may require changes to its communication systems.⁴⁵ Moreover, the League believes that e-mail notification greatly reduces the burden of providing notice and managing the receipt of notice. Accordingly, the League agrees with AAR that electronic or written notice

⁴⁰ AAR Comments 5-6 (calling for the elimination of uncertainty concerning the establishment of liability); CP Comments 8 (expressing concern over increased disputes); 3 (stating that it is essential that there be clarity in the law governing demurrage); NS Comments 12 ("Uncertainty created by the notice requirement would undermine the efficiency of the demurrage system.").

⁴¹ AAR Comments 7.

⁴² *Id.*

⁴³ AAR Comments 7; NS Comments 13; UP Comments 6.

⁴⁴ AAR Comments 7.

⁴⁵ *See* AAR Comments 7.

with a hyperlink to the carrier's demurrage tariff could qualify as actual notice, but only if it includes a conspicuous statement that would be obvious to the receiver and includes a summary of the demurrage tariff.

E. A Carrier Should Provide Actual Notice of Changes to Its Demurrage Tariff.

The comments of the AAR, CP, and UP addressed whether a rail carrier would need to provide actual notice of its tariff again, after it makes a change to its tariff.⁴⁶ CP suggests that additional notification should not be required after a change to a carrier's demurrage tariff.⁴⁷ The AAR suggests that actual notice should only be required for material changes to the demurrage tariff.⁴⁸ UP proposes that carriers provide actual notice of changes to their demurrage tariffs.⁴⁹

The League agrees with the suggestions of AAR and UP. That is, a carrier must provide actual notice of material changes to its demurrage tariff but should not be required to resubmit the entire tariff upon every modification. This could be accomplished by providing electronic or written notice with a hyperlink and summary. In this context, *material* should refer to substantive and not ministerial changes.

F. Proof of Delivery Should Be Adequate Proof of Notice.

CP seeks clarification of what constitutes proof of notice.⁵⁰ Specifically, CP is concerned that a receiver may claim that it did not receive actual notice because it did not read the notice from the carrier.⁵¹ Thus, CP suggest that delivery of written notice be sufficient to establish

⁴⁶ AAR Comments 8; CP Comments 8; UP Comments 6.

⁴⁷ CP Comments 8.

⁴⁸ AAR Comments 8.

⁴⁹ UP Comments 6.

⁵⁰ CP Comments 8-9.

⁵¹ CP Comments 9.

actual notice.⁵² The League suggests that proof of delivery should constitute proof of actual notice.

V. DEMURRAGE DISPUTES SHOULD BE SUBJECT TO ARBITRATION

In its comments, the International Warehouse Logistics Association (“IWLA”) encourages the Board to supplement the Notice by including a statement of agency support for the use of mediation and arbitration to resolve demurrage liability disputes.⁵³ In addition, IWLA suggested that the Board should encourage the use of the Board’s Rail Customer and Public Assistance Program to resolve demurrage liability disputes in a less formal and less costly manner.⁵⁴

The League joins the IWLA in support of the use of dispute resolution and the Board’s Rail Customer and Public Assistance Program to resolve demurrage liability disputes. As the League noted in its comments filed in the Board’s Ex Parte 699 proceeding, the League strongly favors private resolution of disputes and believes that mediation and arbitration are expeditious and cost-effective mechanisms for resolving a wide variety of transportation claims, including demurrage claims.⁵⁵

⁵² CP Comments 9.

⁵³ IWLA Comments 3.

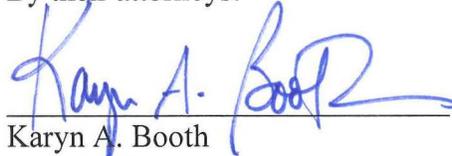
⁵⁴ *Id.*

⁵⁵ NITL Comments 2-3, STB Docket EP 699 (Oct. 25, 2010).

The League appreciates the opportunity to make its views known on this matter.

Respectfully submitted,
The National Industrial Transportation League
1700 North Moore Street
Arlington, VA 22209

By their attorneys:

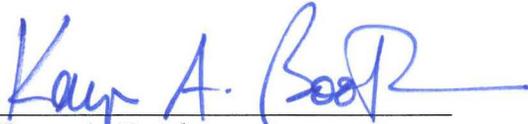


Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Dated: September 21, 2012

CERTIFICATE OF SERVICE

I certify that on this September 21, 2012 I caused a copy of the foregoing Reply Comments of The National Industrial Transportation Board to be served by first class mail upon all parties of record.



Karyn A. Booth