

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 707

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DEMURRAGE LIABILITY

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REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Pursuant to the Board's Notice of Proposed Rulemaking served May 7, 2012 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its reply comments on the Board's proposal to provide an alternative legal basis for railroads to collect demurrage from any person who receives and detains rail cars.¹

In our Opening Comments, UP supported the Board's proposal and sought only minor clarifications to the demurrage tariff notification requirement and the agency status notification requirement. Comments were filed by 14 other parties, which consisted of individual railroads, the AAR, shipper associations, individual intermediaries, and intermediary associations.² Many parties commented or sought clarification on the various notification requirements in the

¹ UP supported the opening comments submitted by the Association of American Railroads ("AAR"), and UP supports the reply comments submitted by the AAR.

² The International Warehouse Logistics Association ("IWLA") raised many concerns about constructive placement and what constitutes proper notice of constructive placement in its comments. Comments of IWLA at 8-11. However, the Board stated in the NPRM that issues regarding constructive placement are outside the scope of this proceeding. NPRM at 6, n.16. Therefore, the Board should not address constructive placement in this proceeding, and UP opposes any modification or clarification relating to constructive placement in this proceeding.

proposed rules.³ While clarification regarding the notification requirements is necessary, UP believes that the Board can adequately address these concerns with modest clarifications as suggested in our Opening Comments.

Most of the comments filed on behalf of intermediaries oppose the Board's proposal because they claim intermediaries will be liable for demurrage they did not cause. Specifically, multiple intermediaries claim that railroads cause delays that result in demurrage. This claim, however, is inaccurate and fails to provide a sufficient reason for revising the Board's proposal. One intermediary also proposes to exclude privately-owned rail cars from the Board's proposal, but the Board should reject this proposal as contrary to Board precedent. Accordingly, the Board should adopt the proposed rules in the NPRM as modified by UP and the AAR.

I. Intermediaries incorrectly claim that demurrage accrues due to railroad actions and incorrectly claim that they have no control over rail cars.

Multiple parties gratuitously claim that railroads cause the delays that will result in demurrage charges issued against intermediaries under the proposed rules.⁴ With respect to UP, this claim is incorrect. In our earlier comments, UP described our demurrage program called Chargeable Events ("CES") in detail and explained how CES assigns debits and credits upon the occurrence of certain events relating to the placement of rail cars for our customers.⁵ We

³ See, e.g., UP Opening Comments at 5-9; Comments of the Association of American Railroads at 5-8; Comments of the American Short Line and Regional Railroad Association at 3-5; Comments of the Independent Fuel Terminal Operators Association ("IFTOA Comments") at 3-4; Comments of International Liquid Terminals Association ("ILTA Comments") at 2-3; Comments of National Industrial Transportation League ("NITL Comments") at 6-7.

⁴ See Comments of Continental Terminals Inc. at 1-2; IFTOA Comments at 1-2; ILTA Comments at 2; Initial Comments of Kinder Morgan Terminals on Notice of Proposed Rulemaking ("Kinder Morgan Comments") at 3.

⁵ Comments of Union Pacific Railroad Company, Ex Parte No. 707 (filed Mar. 7, 2011) ("UP ANPR Comments").

explained that CES uses a customer's Available Capacity to offset demurrage debits that accrue when a customer has capacity at its facility but is affected by events beyond its control.⁶ For example, if a Spot-on-Arrival customer has rail cars in the Serving Area but does not receive a switch, or does not receive a switch up to the customer's Available Capacity, CES issues two credits per rail car up to the maximum Available Capacity.⁷ Likewise, if an Order-In customer has Available Capacity and orders in a specific rail car but the car is not placed, CES issues two credits per rail car per occurrence.⁸ Therefore, claims that intermediaries accrue demurrage or will accrue demurrage under the proposed rules because UP failed to deliver rail cars that should have been delivered are incorrect.

Intermediaries also disavow responsibility for demurrage by claiming that they have no control over the movement of rail cars because shippers initiate the transportation and railroads control when the cars are delivered and picked up.⁹ Once again, this claim is not credible. *First*, intermediaries do not receive rail cars out of the blue – they enter into commercial relationships with shippers *before* receiving rail cars. Moreover, even though intermediaries allegedly lack control of rail cars to cause demurrage, multiple parties disclose that their contracts allocate responsibility for demurrage between shippers and intermediaries.¹⁰ It is entirely inconsistent for

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *See* Comments of Continental Terminals Inc. at 2-3; ILTA Comments at 2; Kinder Morgan Comments at 3.

¹⁰ *See* ILTA Comments at 2 (“If a terminal is the actual cause of a delay that triggers demurrage charges to be paid by the shipper, then the shipper has a straightforward, contractual ability to recover those costs from the terminal.”); Kinder Morgan Comments at 3 (noting that Kinder Morgan may contractually agree to reimburse a shipper for demurrage charges that resulted from (continued...))

intermediaries to claim that they have no control over rail cars when they must first agree to handle those cars in a contract and they contractually agree to allocate responsibility for demurrage. *Second*, intermediaries have access to transparent information about the flow of rail cars to their facilities,¹¹ and they “will know – at least as definitely as the railroad knows – when a rail car is being sent to it and when the car is expected to arrive.” NPRM at 13. Intermediaries control the movement of rail cars by using this information to manage their operations and to manage their commercial relationships with the shippers if they lack capacity. *Third*, intermediaries control the movement of rail cars by ordering in cars to their facilities or by releasing cars back to the railroad. Intermediaries’ generalized claims that they have no control over the movement of cars to and from their facilities are inaccurate.

II. The Board should reject Kinder Morgan’s proposal to exclude privately-owned rail cars held on railroad property from the definition of demurrage as contrary to Board precedent.

Kinder Morgan asks the Board to clarify that the definition of demurrage in the proposed rules applies to railroad-owned rail cars but does not apply to privately-owned rail cars. Kinder Morgan Comments at 16. The Board should reject Kinder Morgan’s proposal because the proposed clarification is contrary to Board precedent and would overturn established practice. In *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102 (STB served July 20, 2010), the Board determined, on referral, whether certain demurrage practices of the Missouri & Northern Arkansas Railroad Company (“MNA”) were unreasonable. In determining the reasonableness of

Kinder Morgan’s negligence or willful misconduct); Comments of The Fertilizer Institute at 1 (noting that most of its members address the issue of demurrage charges through contracts).

¹¹ See, e.g. UP ANPR Comments at 3-5; 7-8.

MNA's demurrage practices, the Board explained that the principle of demurrage also applies when a shipper's privately-owned cars are idled on railroad tracks because the shipper deprives the railroad of the use of that track. *Id.* at 4. "A railroad has a right to set a reasonable time [...] for a shipper to finish using rail *assets* and return them to the railroad. If a shipper keeps an *asset* for too long (beyond the allocated free time), it should compensate the railroad for the extended use of its *asset* (rail cars or *track*) – in other words, for demurrage." *Id.* (emphasis added).¹² Accordingly, a railroad may collect demurrage on privately-owned rail cars held on railroad property.

Kinder Morgan's proposal disregards Board precedent and fails to recognize that rail assets are in fact consumed when privately-owned rail cars sit idly on railroad property. Furthermore, Kinder Morgan offers no justification why the Board's proposal should not apply to privately-owned rail cars that are detained beyond the authorized free time. The only authority that Kinder Morgan cites to support removing privately-owned rail cars from scope of the Board's proposal is the fact that *some* railroads distinguish demurrage from storage in their tariffs. Kinder Morgan Comments at 16, n.36. However, the fact that some railroads apply only storage charges on privately-owned rail cars held on railroad property does not preclude another railroad from applying demurrage charges on privately-owned rail cars held on railroad property. Therefore, the Board should reject Kinder Morgan's proposal and confirm that demurrage *may* apply on privately-owned rail cars held on railroad property if an individual railroad's tariff defines demurrage in that manner.

¹² See also *N. Am. Freight Car Ass'n v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007), *aff'd sub nom. N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008) (upholding as reasonable a BNSF tariff that imposed demurrage on empty private covered hopper cars).

III. Conclusion

UP supports the Board's proposal to provide an alternative legal basis for railroads to collect demurrage from any person who receives and detains rail cars. The Board should reject any attempt by intermediaries to forestall the Board's proposal by claiming that railroads cause demurrage, and the Board should reject Kinder Morgan's proposal as contrary to Board precedent. The Board should clarify the demurrage tariff and agency status notification requirements as suggested by UP, and the Board should adopt its proposal as modified by the AAR.

Respectfully submitted,



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