

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707  
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DEMURRAGE LIABILITY  
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COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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**COMMENTS OF UNION PACIFIC RAILROAD COMPANY**

Union Pacific Railroad Company respectfully submits these comments in response to the Surface Transportation Board's Advance Notice of Proposed Rulemaking served December 6, 2010 ("ANPR"). In the ANPR, the Board requested information about the current commercial practices followed by rail carriers with respect to demurrage, how those practices provide notice to parties that are subject to demurrage liability, and whether warehousemen and similar third-party receivers of rail cars ("intermediaries") can reap financial gain if they can avoid liability for demurrage. These comments respond to that request. Union Pacific also endorses the comments submitted by the Association of American Railroads, which respond to the Board's request for comments on the legal principles that should apply to demurrage.

**I. INTRODUCTION**

Union Pacific appreciates the Board's effort to clarify when parties should be responsible for demurrage. Union Pacific agrees with the Board's statement that demurrage is "an important tool in ensuring the smooth functioning of the rail system." ANPR at 1. Our demurrage practices are designed to encourage shippers and receivers to avoid creating congestion at their loading and unloading facilities and at railroad terminals, which in turn allows us to maintain a fluid network. Demurrage also encourages efficient utilization of railcars and helps offset car hire that may accrue when cars are unduly detained by shippers and receivers for loading and

unloading freight. We have developed sophisticated systems so shippers and receivers can monitor movements of cars to their facilities and prevent issues from arising. In an ideal world, we would never need to assess demurrage, and we have established fair and reasonable rules designed to minimize disputes and provide parties with a transparent view of the facts that give rise to any demurrage liability.

Union Pacific's responses to the questions the Board posed in the ANPR will make more sense if we first briefly describe our demurrage practices and the terminology we use, because our demurrage program differs somewhat from more traditional practices.

Union Pacific uses a demurrage program called "Chargeable Events," or "CES."<sup>1</sup> Under CES, customers receive debits or credits upon the occurrence of certain events relating to the placement of cars at their facilities or in the "Serving Area" where their cars are held prior to placement at their facilities.<sup>2</sup> For example, CES assesses one debit per car per day, beginning after a loaded car arrives in the Serving Area or upon placement at the customer's facility, whichever is earlier.<sup>3</sup> CES also issues two credits for each loaded car that enters the Serving Area. Thus, if a car is placed, unloaded, and released within two days of its arrival in the Serving Area, the credits effectively offset the debits. At the end of the month, to the extent

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<sup>1</sup> See generally Tariff UP 6004-C, Section 9, available at <http://c02.my.uprr.com/wtp/pricedocs/UP6004BOOK.pdf>. A very small number of customers continue to operate under our more traditional demurrage program because we have not yet completed the process of gathering the facility-specific track-capacity information needed to implement the new program, but we are in the process of transitioning them to CES.

<sup>2</sup> For team track customers, the Chargeable Events program contains information regarding team track capacity, as well as information regarding a "Serving Area" for each team track.

<sup>3</sup> CES assesses one debit when a private car arrives in the Serving Area, but debits do not continue to accrue for private cars after placement at the customer's facility. (If a private car arrived in the Serving Area and was placed at the customer's facility on the same day, no debit would be assessed.)

debits exceed credits at a particular facility, demurrage is assessed (generally to the party identified as consignee on the bill of lading).

The Chargeable Events program also monitors the “Available Capacity” at each facility – *i.e.*, the maximum number of cars that can actually be placed at the facility minus the number of cars not released currently at the facility. As part of our operations planning process, Union Pacific has undertaken an extensive effort to determine the maximum number of cars that can be placed at each loading and unloading facility on our lines and developed systems that track car movements to and from the facilities, and we use that information to schedule cars for placement. For “Spot-on-Arrival” customers – *i.e.*, customers whose cars may be placed without the customer separately ordering them in – as cars arrive into the Serving Area, they are automatically scheduled for placement up to the maximum available capacity. For “Order-In” customers – *i.e.*, customers whose cars are not placed for unloading at their facility until the customer orders them in – our website shows when cars arrive in the Serving Area, so the customers can order them into their facility.

The Chargeable Events program uses Available Capacity information to offset demurrage debits that accrue when customers have capacity at their facilities but are affected by events beyond their control. For example, if a Spot-on-Arrival customer has cars in the Serving Area but does not receive a switch, or does not receive a switch up to the Available Capacity, CES issues two credits per car up to the maximum Available Capacity. Similarly, if an Order-In customer has Available Capacity and orders in a specific car but the car is not placed, CES issues two credits per car per occurrence.

Union Pacific’s customers have access to the data in the Chargeable Events program via our website, so they can monitor the location of cars and readily understand when and why

demurrage debits and credits are assessed. They can monitor the number of cars in the Serving Area, the number of cars on spot at their facility, and their Available Capacity. They can determine when a car arrived in the Serving Area, when it was ordered into and/or placed at their facility, and when it was released back to Union Pacific. And, even before a car enters the Serving Area, they can determine whether we consider them to be liable for demurrage charges associated with a car, as we will discuss in more detail below.

## **II. NOTICE OF LIABILITY FOR DEMURRAGE PROVIDED BY THE PAPERWORK ATTENDING A SHIPMENT**

The Board requested comments on how the paperwork attending a shipment of property by rail is processed, how the paperwork gives affected parties notice of the status they are assigned in the bill of lading, and whether proper identification of each party's *de facto* status should be required before railroads may assess demurrage. *See ANPR at 7.*

From Union Pacific's perspective, the short answer is that our customers submit bills of lading to us, and we are dependent on them to identify status of parties named in a bill of lading, including the "consignee" – *i.e.*, the party liable for demurrage on loaded cars. Our customers' failure to identify properly each party's *de facto* status should not preclude us from assessing demurrage. Receivers on our lines, including intermediaries, can ascertain via our website whether the bill of lading identifies them as the consignee and notify us of any issues before they incur any demurrage liability. They should not be allowed to assert after the fact that we cannot recover demurrage from them.<sup>4</sup>

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<sup>4</sup> Union Pacific relies on the information submitted by a shipper in a bill of lading. Any claims by the named consignee that it should not be liable for demurrage should be resolved between the shipper and the named consignee. A rail carrier has no control over the decisions that determine the nature of the legal relationship between the shipper and the named consignee and would not normally be privy to facts regarding the relationship between the shipper and the (continued...)

Union Pacific does not create bills of lading. Bills of lading are created by our customers. A customer that wants to ship a loaded car from a facility that we serve must submit a bill of lading to Union Pacific. Virtually all of Union Pacific's customers submit bills of lading using "Electronic Data Interchange," or "EDI." Our larger customers typically transmit bills of lading using mainframe-to-mainframe computer links; our smaller customers typically use our website. The information is transmitted using a standardized format established by the American National Standards Institute ("ANSI"). To begin shipping on Union Pacific, a customer must complete a set-up process, through which it acquires the ability to submit bills of lading and access our web-based systems.

For Union Pacific's systems to accept a bill of lading, and to meet the standards established by ANSI so that a railcar can move through the rail transportation system, the electronic transmittal must provide certain basic information. Among other things, it must identify the customer submitting the bill of lading; the railcar being shipped; the origin city and state; the destination city and state; the route; the commodity; the shipper's name; and, most important for purposes of this proceeding, the consignee's name.

If the bill of lading contains no information that identifies a receiver other than the consignee, Union Pacific's systems understand that the consignee and receiver are one and the same. Under ANSI standards, however, the customer submitting the bill of lading can distinguish between the physical receiver of the car and the consignee of the property. The customer does this by identifying a "Care of" party in the bill of lading. When the bill of lading identifies a "Care of" party in addition to a consignee, Union Pacific's systems understand that

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named consignee, including whether the named consignee has taken responsibility for physically receiving the freight.

the car should be delivered to the “Care of” party, but that the receiver is not the consignee for demurrage purposes.

When Union Pacific receives a valid electronic bill of lading, we use the information in the bill of lading to generate an electronic waybill. The waybill contains all of the information in the electronic bill of lading, including information identifying the designated consignee and any “Care of” party, as well as a waybill number. Once we create the waybill, we acknowledge our receipt of the bill of lading and provide the corresponding waybill number. The waybill data are then used to schedule the car for movement to the destination.

Union Pacific has no control over whether the customer submitting the bill of lading notifies the receiver that a car is on the way, much less whether it designated the receiver as the consignee or a “Care of” party. However, Union Pacific has systems in place that allow receivers on our lines, including intermediaries, to determine whether they are liable for demurrage on cars destined to their facilities. If receivers determine that they are incorrectly designated in the bill of lading, they can notify us before they incur demurrage liability.

Union Pacific provides information to receivers on our lines, including intermediaries, that explains how they can request notifications and generate reports to manage the flow of railcars to their facilities. Using Union Pacific’s website, which is available 24 hours a day, seven days a week, a receiver can monitor the location and number of cars enroute to its facilities, the estimated arrival date for each car, the number of cars at its facilities, and the number of cars in its Serving Areas. Moreover, via the website every receiver can review bill of lading information for the cars enroute to its facilities to determine whether it is subject to liability for demurrage. Accordingly, if a receiver is concerned that a shipper may have improperly identified it as the consignee (rather than a “Care of” party) for a car, it can review

the bill of lading information, and if necessary, notify Union Pacific of any issues before it incurs demurrage liability.<sup>5</sup>

In sum, Union Pacific must rely on its customers to submit bills of lading that accurately reflect the *de facto* status of each party involved with the transaction. However, we provide receivers with the tools to identify any issues associated with the cars moving to their facilities. We therefore believe it is both fair and appropriate to hold intermediaries liable for demurrage when they are identified as the consignee in the bill of lading and they have not taken steps to inform us of errors in the bills of lading.

### **III. PROVIDING FOR NOTICE OF LIABILITY FOR DEMURRAGE BY OTHER MEANS, INCLUDING ACTUAL PLACEMENT OR CONSTRUCTIVE PLACEMENT**

The Board also requested comments on how intermediaries can best be made aware of their liability for demurrage. *See* ANPR at 7. In addition, the Board asked whether actual placement or constructive placement of a rail car constitutes adequate notification to a shipper, consignee, or agent that a demurrage liability is being incurred. *See id.*

Union Pacific believes that railroads should not be required to take any particular steps to make intermediaries aware when they are liable for demurrage. Intermediaries should recognize that they will be liable for demurrage if they are named as consignees on a bill of lading and have not properly notified the delivering carrier of any issue. As discussed above, Union Pacific's systems allow any receiver to determine its status on the bill of lading. If other

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<sup>5</sup> Moreover, intermediaries can also use the information we provide proactively to adjust their relationships with shippers. Intermediaries presumably have contractual relationships with the shippers that use their services, and if a shipper is repeatedly sending too many cars to the facility, or providing insufficient notice, or providing the railroad with incorrect information on bills of lading, the parties should be able to adjust the terms of their relationship so the shipper bears the resulting costs.

railroads' systems do not include this capability, intermediaries can still protect themselves by entering into agreements under which shippers indemnify them for erroneous designations in bills of lading.

With regard to the Board's question about notification provided by actual or constructive placement, we believe that either event could constitute adequate notice that demurrage liability may be accruing, if the bill of lading identifies the receiver as the consignee and the receiver has not notified the railroad of any issue. However, we do not believe there should be a separate requirement that a railroad affirmatively notify the receiver of actual or constructive placement as a condition to imposing liability for demurrage. Rather, if a railroad actually or constructively delivers a car to a receiver that is identified as the consignee in the bill of lading and has not notified the carrier of an issue, the receiver should be held liable for demurrage, at least *vis a vis* the railroad.<sup>6</sup>

In fact, Union Pacific no longer provides customers with traditional active notice of actual or constructive placement. Our implementation of the Chargeable Events program has rendered the active notice process unnecessary. Notice is now effected by making railcar movement and status information available 24 hours a day. Historically, railroads notified their customers of actual placement or constructive placement so the customers could monitor their demurrage liability and maintain records to check our calculations. The Chargeable Events program represents a dramatic improvement to the traditional process by providing our customers an abundance of readily accessible information about when and why they are incurring demurrage liability. With CES, customers can use our website to obtain up-to-date

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<sup>6</sup> See note 4, *supra*.

reports on the number of cars in their Serving Area and at their facility. They can also review detailed records showing when their cars arrived in their Serving Area; when they were placed at, or ordered into, their facilities; when they released the cars back to the railroad; and the number of demurrage debits assessed for each car. Moreover, those customers that want regular active notifications can obtain customized reporting from the system, including electronic notifications whenever cars arrive in their Serving Area or are placed at their facilities.

We do not believe that any shipper or receiver on our lines can credibly claim to be unaware of our demurrage practices or its ability to track its demurrage liability using CES. Our demurrage rules appear in a publicly available tariff that is available on our website, and any entity in business as an intermediary is certainly sophisticated enough to obtain a copy of our rules. In addition, in moving our customers from a more traditional demurrage program to CES, we proactively discussed the new program and explained how they could use our systems to monitor and manage their demurrage liability. Furthermore, we routinely reach out to receivers that incur substantial demurrage to work out customized reporting from our system to help them manage their traffic. In sum, we do not believe there is any realistic possibility that intermediaries are unaware of the demurrage rules that apply to them.

#### **IV. BENEFITS TO INTERMEDIARIES OF AVOIDING LIABILITY FOR DEMURRAGE**

Finally, the Board requested comments on whether intermediaries could benefit by holding rail cars while avoiding liability for demurrage. *See* ANPR at 7.

Intermediaries would clearly benefit if they could avoid liability for demurrage. Obviously, intermediaries could avoid the costs of investing in their own facilities if they could obtain free use of railcars to store the goods they receive at their facilities until they are ready to unload the car. The free storage plainly would be a benefit to intermediaries.

Perhaps even more significant than free use of railcars, however, is the benefit intermediaries could obtain from free use of railroad yards and tracks to hold cars destined to their facilities. Intermediaries could increase their business without incurring the costs associated with expanding their facilities or improving their unloading processes if they could use our tracks to hold their loaded cars when their own receiving tracks are full. They would have no incentive to ensure that the volume of traffic to their facilities does not exceed the volume of traffic they can physically handle. Moreover, the intermediaries would not only be obtaining a benefit for themselves, they would also be imposing a cost on the railroads that are providing free storage. Indeed, the intermediaries would be imposing a cost not only on the railroads, but also on our other customers that use our yard and track facilities.

We understand that intermediaries sometimes claim they have no knowledge of, and no control over, the decisions of shippers to send cars to their facilities. However, such claims are not credible. *First*, as we explain above, all receivers on our lines can use our web-based systems to obtain detailed information about the flow of cars to their facilities. We have expended significant resources to make this information available, and there is no excuse for failing to use it. *Second*, intermediaries do not receive railcars out of the blue – they have existing relationships with shippers. If intermediaries need notice from shippers to ensure that they are not overwhelmed, they should include notice provisions in their contracts with those shippers.

Ultimately, Union Pacific's concern is not that intermediaries would be obtaining a free benefit if they could avoid demurrage liability. We do not regard demurrage as an opportunity to earn revenue. In fact, we would prefer that our customers never incur liability for demurrage. As we explained in the Introduction, our demurrage practices are designed to encourage shippers

and receivers to avoid creating congestion at their loading and unloading facilities and at our terminals. Our objectives are to maintain a fluid network for the benefit of all of our customers and to encourage efficient use of rail assets. We have expended significant resources to develop a fair and transparent demurrage system to advance those objectives.

We appreciate the Board's effort to gather information about current commercial practices to ensure that any rule or policy statement proposed as a result of this proceeding will be consistent with the important role that demurrage continues to play in ensuring the smooth functioning of the rail system.

Respectfully submitted,

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