

August 24, 2012

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VIA ELECTRONIC FILING

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Surface Transportation Board
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ENTERED
Office of Proceedings
August 24, 2012
Part of
Public Record

Re: STB Ex Parte No. 707

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket are the Comments of Norfolk Southern Railway Company in Response to Notice of Proposed Rulemaking.

Thank you for your assistance.

Sincerely,



David L. Meyer

Attachment

cc (with attachment): John M. Scheib, Esq.
Greg E. Summy, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 707

DEMURRAGE LIABILITY

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY
IN RESPONSE TO NOTICE OF PROPOSED
RULEMAKING**

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Dated: August 24, 2012

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Norfolk Southern Railway Company (“NS”) offers the following Comments in Response to the Notice of Proposed Rulemaking served May 7, 2012.

INTRODUCTION

Norfolk Southern commends the Board for promulgating a proposed rule that will mark a major step forward in harmonizing the Nation’s system of railcar demurrage with Congress’s intentions. By making clear that all receivers of railcars are part of an integrated network of railcar handling, and are responsible for compliance with the serving railroad’s reasonable demurrage tariffs, the thrust of the Board’s rule will further Congress’s goal of having demurrage provide incentives for the efficient usage of railroad freight cars. *See* 49 U.S.C. § 10746. NS limits its comments herein to a discussion of three respects in which the Board’s proposed rule should be revised to tailor the rule more closely to the Board’s – and Congress’s – demurrage policies.

First, NS recommends that the Board clarify that, although the scope of the rule encompasses all receivers of railcars, the rule is not intended to override other established

bases for establishing demurrage liability, such as against consignees under the bill of lading. Such a clarification would avoid unproductive confusion in courts accustomed to establishing liability on such bases. *See* Section II, *infra*.

Second, NS urges the Board to eliminate the requirement that the serving carrier provide the receiver with “actual notice” of its potential liability under the carrier’s demurrage tariffs. Any requirement of proving actual notice is at best unnecessary and in most cases would be highly inefficient. NS fears that some receivers will seize on the “actual notice” obligation as a way of generating disputes as to whether they received proper notice so as to increase collection costs and seek to avoid liability. In fact, receivers of railcars are voluntary and knowing participants in the rail network. This is no less true of intermediaries. Operators of rail-served warehouses do not go into business and solicit deliveries by rail without learning what it means to accept a railcar. Thus, when such receivers take physical possession of railcars, they are well aware of the concept of demurrage and their potential liability. Accordingly, the Board should dispense with any notice requirement beyond the receiver’s knowing acceptance of a railcar delivery at its facility. *See* Section III, *infra*.

If the Board nonetheless opts to retain an “actual notice” requirement, NS recommends that it at minimum revise its rule to create practical safe harbors ensuring that carriers know what notice will suffice and can meet the requirement in a simple and straightforward way.

Third, NS urges the Board to strike from its proposed rule the exception from demurrage responsibility for receivers who assert that they are agents. This exception is inconsistent with the Board’s recognition that *all persons* who handle railcars should

have incentives to handle them efficiently. As NS demonstrated in its previous comments in this proceeding, the carrier often has no relationship with the third party (or multiple third parties) on whose behalf receivers claim to be acting and no realistic ability to test whether the principal-agent relationship is real. In many cases the supposed principals will be overseas or otherwise outside the carrier's reach in asserting demurrage claims, yet carriers have no practical ability to decline to deliver the cars despite having no realistic expectation of being able to collect demurrage charges. No principle of agency law supports, much less requires, allowing a receiver whose business involves the handling of railcars to refuse to pay valid demurrage bills tendered by the railroad supplying those railcars. The fact that a third party principal may ultimately be responsible for reimbursing the receiver should have no effect on the receiver's responsibility to the serving carrier, any more than the receiver's possible agency status should allow it to refuse to pay its electric bill. *See* Section IV, *infra*.

I. THE NPR PROPERLY RECOGNIZES THAT DEMURRAGE IS APPROPRIATELY APPLIED TO ALL RECEIVERS OF RAILCARS

NS agrees with the Board's policy rationale and the essence of the Board's proposed rule, which recognizes that Congress's goals for demurrage are best served by a demurrage system that makes *all receivers of railcars*, including intermediaries, responsible for demurrage in accordance with a rail carrier's tariffs. *See* NPR at 11. NS likewise agrees that the bill of lading – or other contractual documents addressing the movement of *freight* – should not be the sole basis for establishing a receiver's liability for demurrage. *See* NPR at 11.

These core conclusions of the Board's May 7 Notice mark a major step forward in aligning the demurrage system with Congress's policy intentions. As NS explained in its

previous comments in this proceeding, Congress has directed that carriers establish a system of railcar demurrage aimed at serving the “national needs” relating both to the “adequate supply of freight cars and the efficient use and distribution of those cars.” NS Opening Comments at 9; 49 U.S.C. § 10746. Such a system cannot function effectively unless it encompasses all parties who handle railcars, including warehousemen and other intermediaries. NS Opening Comments at 11-15.

Some aspects of the proposed rule, however, may inadvertently undermine these core policy objectives. As we explain below, the Board should clarify that the rule does not override well established legal bases for recovering demurrage and it should close two significant loopholes created by Proposed Rule 1333.3 that would stand in the way of achieving the basic policies on which the Board’s Notice is predicated. By exempting from demurrage receivers who claim not to have received “actual notice” or who assert that they are merely “agents,” the Board’s proposed rules may inadvertently provide unwarranted loopholes for receivers who seek to avoid their responsibilities relating to efficient railcar handling.¹ NS recommends closing both of those loopholes.

II. THE BOARD SHOULD CLARIFY THAT ITS PROPOSED RULE DOES NOT OVERRIDE PRE-ESTABLISHED BASES FOR IMPOSING DEMURRAGE LIABILITY

The Board’s proposed rule applies broadly to “any person receiving rail cars from a rail carrier for loading or unloading.” Proposed Rule, § 1333.3. For the reasons noted above, this scope is appropriate and indeed important. But as a result of this breadth, the

¹ NS commends the Board for steering clear in this proceeding of issues relating to the reasonableness of demurrage charges in particular contexts, such as the “constructive placement” issues raised by IWLA. As the Board observed, such issues are “beyond the scope of this proceeding.” NPR at 6; *see also* NS Reply Comments at 11 n.6; NS Opening Comments at 13 n.10 & 16 n.14.

Board's rule applies not merely to the "warehousemen or other 'third-party intermediaries'" who were the focus of this proceeding (*e.g.*, NPR at 3), but equally to shippers and receivers who, among other things, have formal status as consignor and consignee with respect to the bill of lading.

To avoid any potential confusion, 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. The Board plainly had no disagreement with the longstanding conclusions of courts that, for example, consignors who are signatories to the bill of lading are appropriately held liable, whether or not one might conclude those shippers had "actual notice" of demurrage tariffs. The Board accordingly should revise proposed Section 1333.3 to begin with the phrase: "In addition to any other valid legal basis for imposing liability for demurrage charges, ..."

This clarification is consistent with the goal of this proceeding, which was to address (and ultimately close) a loophole that has allowed intermediaries to avoid demurrage despite their role in the physical handling of railcars. The Board's rule should facilitate holding such intermediaries responsible for demurrage – by aiding in the imposition of liability and collection of reasonable charges – without undermining the traditional means by which railroads have successfully established liability and collected demurrage charges under well-established existing law and practice.

III. THE BOARD SHOULD ELIMINATE THE CARRIER'S REQUIREMENT TO PROVE THAT THE RECEIVER HAD "ACTUAL NOTICE"

NS urges the Board to eliminate the proposed requirement that the serving carrier provide the receiver with "actual notice of the demurrage tariff providing for such liability prior to the placement of railcars." Proposed Rule, § 1333.3. NS believes that

this requirement is unnecessary and likely will lead to disputes by receivers seeking to avoid responsibility for valid demurrage charges.

NS does not take issue with the Board's desire that receivers of railcars be put on notice of their potential demurrage-related obligations. But NS believes receivers are in fact on notice today, and the Board's action in this docket will only confirm such receivers' knowledge of their potential responsibilities. In NS's experience, businesses that receive railcars are conscious participants in the rail network. Those businesses are, by definition, physically connected to the rail network and routinely take possession of railcars as part of their commercial operations. Warehousemen like Brampton/Savannah Reload (the entity whose litigation over demurrage charges in the case docketed as *Groves v. Norfolk Southern* led to this proceeding) and others affirmatively seek to have shippers send loaded railcars to them so that they can make money warehousing and transshipping the goods, and thereby benefit from the use of loaded and empty railcars. Those businesses know, *or certainly should know*, that their decision to operate a business that is connected to the rail network entails certain responsibilities, one of which is compliance with the serving railroad's demurrage tariffs. If they do not, the Board's order in this docket will remove any uncertainty in that regard.

Railcars do not show up on the sidings of these businesses uninvited; railcars are not like envelopes or parcels that can be dropped in the mail for delivery to any unwitting recipient who happens to have a mailbox. As the Board's decision observed, receivers are "certainly not a stranger to the carrier delivering it the cars" (NPR at 12), and such receivers should not be able to "claim [] ignorance" of its role and responsibilities in the

handling of railcars. NPR at 11.² The Board's decision in this proceeding takes a further step toward ensuring that all receivers are fully aware of their potential liabilities in that regard. Accordingly, the actual notice requirement is unnecessary.

The Board's Notice comments that, "[h]istorically, regardless of whether they had actual knowledge, parties were deemed to have constructive knowledge of tariffs and to be bound by their terms," but opines that today, because tariffs are no longer filed with the agency, they "do not constitute legal notice, as they did in the past." NPR at 13. It is of no consequence that the law may no longer deem receivers to be on notice of every detail in every railroad's shipping tariffs, because the law certainly will deem them to be on notice of their status as entities who are bound by the reasonable terms of the serving carrier's demurrage tariff. The governing statute and the Board's issuance of its Final Rule herein will put receivers on notice of the fact that demurrage tariffs may appropriately apply to them regardless of their status with respect to a particular shipment of goods.

It remains a deeply engrained principle of our Nation's legal system that "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse." *Shevlin-Carpenter Co. v. State of Minnesota* 218 U.S. 57 (1910). And were any notice required, "[d]ue process cases have long recognized that publication in the Federal Register" – as will occur with respect to the Board's Final Rule herein – "constitutes an adequate means of informing the public of agency action."

² Indeed, as the Board is aware, the demurrage dispute that gave rise to this proceeding (that between NS and Groves) involved a receiver who knew full well that the carrier asserted that the receiver was responsible for paying demurrage charges under the carrier's tariff, but who did not to acknowledge the carrier's *legal right to collect such charges*.

Howmet Corp. v. Environmental Protection Agency, 614 F.3d 544 (2010) (quoting *Perales v. Reno*, 48 F.3d 1305, 1316 (2d Cir. 1995)). Thus, all intermediaries are now legally on notice that they are subject to a rail carrier's reasonable demurrage rules.

Moreover, even if the Board thought it necessary that the receivers were aware of the particular terms of each railroad's demurrage tariff, constructive knowledge of those terms would nonetheless be appropriate. Demurrage tariffs, unlike detailed freight tariffs applicable on a shipment-by-shipment basis, remain widely and publicly available. In light of every receiver's cognizance of the fact that they must (and desire to, for their own commercial benefit) interact with their serving railroad with respect to the delivery of railcars, it is not asking too much for those receivers to visit the internet, where Norfolk Southern's generally-applicable demurrage tariff is prominently posted.³ None of the intermediaries that have participated in this proceeding have suggested that they were unaware of the serving carrier's demurrage terms. NS believes that intermediaries are sophisticated businesses that know the rules before they choose to accept railcars. Therefore, imputing constructive knowledge remains entirely appropriate, and will be all the more so when the Board issues its final rule herein.⁴

The actual notice requirement is also counterproductive. The Board's proposed "actual notice" rule may encourage some receivers – despite their awareness that their

³ An index to NS's tariff publications (<http://www.nscorp.com/nscportal/nscorp/Customers/Publications/>), including a link to its demurrage tariff (Tariff 6004-B), shows up as the first link, and an explanation of NS's demurrage tariff (http://www.nscorp.com/nscorphtml/pdf/demurrage_faq.pdf) shows up as the second link in response to a Google search for "Norfolk Southern demurrage tariff."

⁴ See, e.g., *West Point Relocation, Inc. & Eli Cohen — Petition for Declaratory Order*, Finance Docket No. 35290 (served Oct. 29, 2010) at 6 (freight forwarder "is expected to review and understand the terms of the *publicly available tariff* and is responsible for all reasonable terms of service and the charges it incurs thereunder") (emphasis added).

serving railroad has demurrage policies that apply to their handling of railcars – to dispute the adequacy of the carrier’s “notice” of those policies as a way of avoiding responsibility for valid demurrage charges. Such disputes could relate to such issues as the general form and timing of the notice, whether the notice was sent to the right address, whether the notice named the proper legal entity carrying on business at the rail-served facility in question,⁵ and whether it specifically addressed each individual railcar delivered by the carrier. These issues are magnified by the fact that intermediaries are generally not responsible for the freight charges; they often have no incentive to develop a commercial relationship with the serving railroad of the sort that would lead them to take steps to ensure that the railroad had up-to-date information about the receiver’s proper legal name and other particulars that could bear on the adequacy of “actual notice.” Uncertainty created by the notice requirement would undermine the efficiency of the demurrage system. The simple and appropriate solution for these problems is to dispense with the “actual notice” requirement altogether. The Board should deem all receivers on constructive notice of their potential obligation to pay demurrage charges under the serving carrier’s tariff when they accept loaded or empty railcars from the serving carrier.

⁵ This concern is based on NS’s own hard experience. In the lawsuit that gave rise to this proceeding, the warehouseman from which NS unsuccessfully sought to collect demurrage charges asserted that bills of lading that listed “Savannah Re-Load LLC” or “some other imperfect variation of this Defendant’s name did not suffice to identify the defendant, “Brampton Enterprises, LLC,” which Brampton acknowledged did business under the trade name “Savannah Re-Load.” See *Norfolk Southern Ry. v. Brampton Enterprises, LLC d/b/a Savannah Re-Load*, No. CV407-155, Brief in Support of Defendants Motion for Partial Summary Judgment (S.D. Ga., filed May 30, 2008) at 6. It is not hard to imagine innumerable variations on this sort of liability-avoidance scheme.

If the Board nonetheless concludes that it should retain a notice requirement, NS recommends that the Board revise its proposed rule to create clear and practical safe harbors that would ensure that carriers know what notice will suffice and can meet that requirement in a simple and straightforward way. NS specifically recommends that a carrier be deemed to have provided adequate notice for purposes of establishing a receiver's potential liability for demurrage as to a particular railcar so long as the carrier has, at some point prior to the delivery of any railcars as to which demurrage charges could be incurred, either:

- (a) provided notification that the railroad's demurrage tariff is available on its website via whatever form of notice (hard-copy or electronic) the railroad customarily sends to receivers to inform them that railcars are available for delivery (which notice is designed to elicit from the receiver instructions for the car to be delivered) or via whatever form of notice it sends to its customers and tariff subscribers generally; or
- (b) mailed a copy of its current demurrage tariff to the street address of the rail-served facility in question.

Either of these forms of notice would certainly be ample to place a receiver on notice that the rail carrier serving its facility regards the receiver as responsible for complying with the railroad's demurrage tariff. The safe harbors NS has proposed would also be effective in avoiding disputes about whether the receiver was the "legal entity" to which the notice was addressed, since NS envisions that these safe harbors would be satisfied by correspondence addressed "to whom it may concern" (or to a predecessor of the current receiver) at the facility to which the railcars would be delivered.

No purpose would be served by requiring any more burdensome form of notice, such as an obligation to establish a formal account with the receiver or to announce the carrier's demurrage policies each and every time a railcar was delivered to the receiver.⁶ This form of notice is also consistent with the statutory requirement applicable to railroad rate and service terms set forth in 49 USC § 11101(c); *see also* NPR at 13. NS envisions that, to fall within this safe harbor, a carrier would send updates or provide an updated electronic link when it revised its demurrage tariff.

IV. THE BOARD SHOULD NOT PROVIDE AN EXCEPTION FOR "AGENTS"

NS urges the Board to remove from its proposed rule the last sentence of proposed Section 1333.3, which provides that a person "acting as an agent for another party ... is not liable for demurrage" so long as it merely provides the carrier "with actual notice of the agency status and the identity of the principal." Proposed Rule, § 1333.3.

This exception is squarely inconsistent with the central rationale of the Board's Notice: "permitting a warehouseman that handles rail cars as part of its business to avoid demurrage by declining to accept, or claiming ignorance ... would not advance [Section 10746's] statutory goals." NPR at 11. Demurrage cannot "facilitate freight car use and distribution and an adequate car supply" if receivers who handle freight cars can claim to be agents and thereby absolve themselves of responsibility for demurrage.

⁶ As noted above, receivers that are intermediaries often do not have a customer relationship with NS because they generally do not pay freight bills. Customers are invited to subscribe to our tariff publications, which means that the subscribers receive notice of changes and information about how to access tariffs on NS's website. A receiver that is not a customer, and whose sole interaction with NS is to receive railcars (for which it could be liable for demurrage), has little or no incentive to reach out to NS to provide exact information for purpose of NS's providing them with notice of a potential charge.

The proposed exception for “agents” is also inconsistent with the Board’s analysis of Section 10743. As the Board (correctly) reasoned, the statute focuses on and thus delineates the responsibilities of agents with respect to *freight charges*, where “there is no separate role played by the intermediary that can affect the underlying rates.” NPR at 15. In the context of demurrage, by contrast, the “third-party consignee is often the party most directly able to mitigate demurrage.” *Id.* The Board’s rules should not re-establish an agency exception that the Board itself has concluded does not apply and would make no sense in the context of demurrage.

The proposed exception also will lead to counterproductive disputes and uncertainty, with intermediaries (and others) continuing to seek to avoid demurrage charges by denying their own responsibility and pointing the finger at other parties. Liability-avoidance behavior of this sort is exactly what led to this proceeding. Efficient collection of demurrage would grind to a halt if intermediaries merely needed to state that they were agents and identify a supposed “principal.” As NS demonstrated in its previous comments in this proceeding, the carrier often has no relationship with the third parties on whose behalf receivers might claim to be acting, and those third parties – like the overseas consignees to whom the freight was ultimately destined, as in the Brampton case – are outside the carrier’s reach in asserting demurrage claims. NS Opening Comments at 20-21. The carrier has no feasible means of verifying whether the claimed principal-agent relationship is a bona fide one, a problem exacerbated by the fact that warehousemen would typically claim to be acting on behalf of different principals with respect to each freight shipment (and perhaps multiple principals with respect to a single boxcar load).

Moreover, even if there might be some true principal-agent relationship, establishing an agency exception for receivers is particularly inappropriate in the demurrage context. First, the general principle of agency law that agents are not liable for the debts of their disclosed principals is founded upon the vendor's ability to decide whether to deal with the principal once its identify is disclosed. It is for this reason that agents for *undisclosed* principals themselves become obligated to third parties. Third parties, in dealing with unidentified principals, cannot make the many judgments required to assess the ability of the principal to perform the duties required by the contract. *See* Restatement (Third) Agency § 6.02, comment b (“Without notice of a principal’s identity, a third party will be unable to assess the principal’s reputation, assets, and other indicia of creditworthiness and ability to perform duties under the contract.”). In the demurrage context, of course, this concern applies equally to *disclosed principals*: the railroad has no realistic ability to refuse to deliver railcars despite its conclusion that the principal (perhaps located overseas) is not likely to honor any demurrage-related obligations that arise from the receiver’s handling of railcars.

Second, and more fundamentally, no principle of agency law supports, much less requires, allowing a receiver *whose own business* involves the loading and unloading of railcars to refuse to pay valid demurrage bills tendered by the railroad supplying those cars. To the contrary, under well-established agency-law principles, even if a receiver might be an agent for purposes of receiving and transshipping *freight* (and perhaps that a third-party principal may ultimately be responsible for reimbursing the receiver for its expenses), that status has no legal effect on the receiver’s responsibility for use and possession of the railcars it uses in its day-to-day business. Just as such a business could

not assert its agency status as a way of refusing to pay its electric bill, to make rental payments on the forklifts it uses, to pay for the pallets its uses, or to compensate other vendors for services they provide, agency law does not allow such a business to refuse demurrage liability occasioned by its own handling of railcars.

The use of railcars is one of the services that warehousemen and other intermediaries procure in order to carry on their own business. Those intermediaries routinely detain railcars after they have been emptied of the freight, such as for temporary storage of commodities being transshipped. There are no supposed “principals” who control these day-to-day activities. As a result, the fact that a receiver may be an agent as to the “freight” does not mean that it is an agent for purposes of the handling of railcars into which the freight might be loaded, or from which the freight might be unloaded.

It is a black letter principle of agency law that principal-agent relationships are not all-encompassing and specifically do not extend to activities an agent undertakes in running its business over which the principal does not exercise effective control. The Restatement (Third) of Agency illustrates the application of this principle with an example of a footwear company that licenses another company (the agent) to manufacture and sell footwear bearing the principal’s trade name. Although the principal may adequately control the quality of the footwear manufactured under the license to make the manufacturer an agent for that purpose, when the manufacturer enters into a contract to purchase rubber for the shoes “neither the footwear company nor the manufacturer is the “an agent of the other” as to that contract because the footwear company’s control does not extend to rubber purchases. Restatement (Third) of Agency, § 1.01 cmt. g, illustration 10; *see also, e.g., Simmons v. American Savings & Loan Ass’n*,

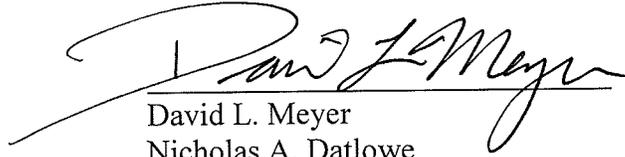
368 So.2d 1206, 1208 (La. Ct App. 1979) (where lot was staked by surveyor at request of and for benefit of plaintiff, “the actions of the surveyor in staking would be outside the scope of its agency relationship with defendant, if any such relationship in fact existed”). This analysis underscores that an intermediary who is the agent of another for purposes of receiving and transshipping particular freight generally should not be treated as an agent for purposes of the railcar handling activities of that intermediary. Accordingly, NS believes the Board should remove the exception allowing avoidance of demurrage liability based on the assertion of an agency relationship.⁷

CONCLUSION

NS believes that the foundation underlying the Board’s proposed rule is sound and will further the demurrage-related goals established by Congress. NS urges the Board to modify its proposed rule to ensure that the proposed limitation to receivers who have received “actual notice” and the proposed exception for “agents” do not interfere with achieving those goals.

⁷ If the Board nonetheless concludes that it should create an exception from demurrage for receivers who are acting as agents for third parties, it should do so in a manner that ensures both that the principal-agent relationship is real *and* that the principal accepts its responsibility to pay for demurrage charges incurred as a result of the behavior of its agent. In the context of railcar deliveries that are not realistically optional on the part of the carrier, this should at minimum require formal agreement *by the principal* to a process for payment and collection of demurrage bills, either through the agent or directly from the principal in the jurisdiction in which the demurrage charges were incurred.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Meyer", written over a horizontal line.

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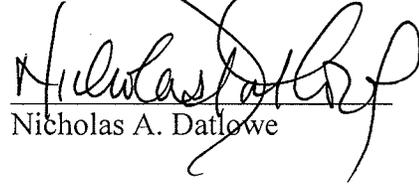
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Attorneys for Norfolk Southern Railway Company

Dated: August 24, 2012

CERTIFICATE OF SERVICE

I, Nicholas A. Datlowe, certify that on this date a copy of the Comments of Norfolk Southern Railway Company in Response to Notice of Proposed Rulemaking, filed on August 24, 2012, was served by email or by first class mail, postage prepaid, on all parties of record.


Nicholas A. Datlowe

August 24, 2012