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August 24, 2012

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**VIA E-FILING**

Honorable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings  
August 24, 2012  
Part of  
Public Record

Re: Docket No. EP 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice served May 7, 2012, and the extension order served June 13, 2012, please find attached the Initial Comments of Kinder Morgan Terminals on Notice of Proposed Rulemaking for filing in the above-identified proceeding.

Respectfully submitted,

/s/ James F. Moriarty  
James F. Moriarty  
*Attorney for*  
*Kinder Morgan Terminals*

Attachment

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. EP 707**

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**DEMURRAGE LIABILITY**

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**INITIAL COMMENTS OF  
KINDER MORGAN TERMINALS  
ON NOTICE OF PROPOSED RULEMAKING**

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Dated: August 24, 2012

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. EP 707**

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**DEMURRAGE LIABILITY**

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**INITIAL COMMENTS OF  
KINDER MORGAN TERMINALS  
ON NOTICE OF PROPOSED RULEMAKING**

Pursuant to the Rules of Practice of the Surface Transportation Board (“Board”), 49 C.F.R. § 1100 *et seq.* (2012), Kinder Morgan Terminals (“Kinder Morgan”) hereby submits its initial comments in response to the Board’s Notice of Proposed Rulemaking (“Proposed Rulemaking”) on demurrage liability in the above-identified docket.<sup>1</sup>

**I.  
EXECUTIVE SUMMARY**

No statutory authority, nor evidentiary basis, exists for the Board’s extraordinary proposal to rewrite the Interstate Commerce Act and to undo binding federal appellate court precedent. “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”<sup>2</sup> On its face, the Board’s Proposed Rulemaking violates the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, as well as the Hobbs Act that establishes exclusive jurisdiction in the federal courts of appeal for the review of the Board’s actions, 28 U.S.C. §§ 2321, 2342.

Even assuming that the Board had the legal basis and evidentiary support for the Proposed Rulemaking, were the Board to adopt the Proposed Rulemaking as written,

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<sup>1</sup> Notice of Proposed Rulemaking, Docket No. EP 707 (served May 7, 2012).

<sup>2</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

independent, third-party intermediaries such as Kinder Morgan would be left with only one option to avoid liability: notifying the rail carrier that it is acting as an agent for its customer. However, Kinder Morgan's relationship with its customer may not be as an "agent" under the traditional principles of agency. For all of these reasons, the Board must rescind the Proposed Rulemaking or clarify it as requested herein.

## **II. INTRODUCTION**

### **A. Background On Kinder Morgan And Its Operations**

Kinder Morgan is the largest independent terminal operator in North America with more than 180 terminals that store petroleum products and chemicals and handle bulk materials like coal, petroleum coke, and steel products.

Kinder Morgan's key assets in its terminals business include large liquids facilities that store refined petroleum products and alternative fuels in New York Harbor, Chicago, the Houston Ship Channel, and southern California. Kinder Morgan also has bulk terminal operations that handle such materials as coal in the Southeast, petcoke along the Gulf Coast, and steel products in the Midwest.<sup>3</sup> Kinder Morgan's facilities have approximately 100 million barrels of liquids capacity and handle about 100 million tons of materials annually. In 2011, Kinder Morgan handled more than 856,000 rail cars. None of the Kinder Morgan terminals, operations, or services are subject to the Board's jurisdiction.

Kinder Morgan's contractual relationship is with a shipper/consignor. Kinder Morgan contracts with over 1500 shippers for required services. Kinder Morgan's contracts with its shippers generally provide that Kinder Morgan will (a) receive and unload products from its shippers via vessel, barge, truck, pipeline, or rail, (b) store such products via warehouse, storage

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<sup>3</sup> Kinder Morgan also has terminals in Canada.

pad, or tank, and (c) reload the products using the mode of transportation required by the shipper. Except in certain circumstances where Kinder Morgan contractually agrees to reimburse a shipper for demurrage charges incurred as a result of Kinder Morgan's negligence or willful misconduct, Kinder Morgan does not assume any legal obligation to pay any rail charges incurred by a shipper, including demurrage charges. Kinder Morgan does not have any contracts with any rail carriers to pay demurrage charges owed by a shipper/consignor. Thus, no contractual privity exists between Kinder Morgan and any rail carrier as to demurrage. Instead, the shipper/consignor has a contract with the rail carrier, and Kinder Morgan has a contract with the shipper/consignor.

Kinder Morgan may not be an "agent" of the shipper/consignor under the traditional principles of agency and is not the consignee. Kinder Morgan has no control over the delivery or pick up of rail cars. Although each rail carrier and receiving facility is unique, even within its own facilities Kinder Morgan generally has no or very limited control over the placement, movement, or release of rail cars before, during, or after loading and unloading. In short, the rail carrier must agree to deliver, move, and pick up rail cars.

Despite Kinder Morgan's lack of operational control, rail carriers continually bill Kinder Morgan, and not the shipper or consignee, for demurrage charges. When this happens, Kinder Morgan is forced to dispute these charges, seek reimbursement from its customers, and, in some cases, incur late charges. This occurs even when Kinder Morgan is not responsible for any delay in the receipt and return of rail cars.

## **B. The Board's Notice Of Proposed Rulemaking**

On May 6, 2012, the Board issued its Proposed Rulemaking on demurrage liability in Docket No. EP 707. The Board issued its Proposed Rulemaking after considering the comments

filed in response to the Advance Notice of Proposed Rulemaking, which was published on December 6, 2010.

Numerous railroads and other entities submitted comments to the Advance Notice of Proposed Rulemaking. Notably, the Association of American Railroads and various rail carriers argued in their comments that there is no need for any Board rule on demurrage.<sup>4</sup> These commenters stated that demurrage charges have been, and continue to be, handled pursuant to contracts.

In its Proposed Rulemaking, the Board proposed a rule establishing that a person receiving rail cars from a rail carrier who detains the cars beyond the “free time” provided in the carrier’s governing tariff will generally be responsible for paying demurrage, if that person has actual notice of the demurrage tariff establishing such liability prior to the placement of the rail car. The Proposed Rulemaking also provides that if that person is acting as an agent for another party, that person 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.

In a decision issued June 13, 2012, the Board extended the deadline for comments to the Proposed Rulemaking to August 24, 2012. Kinder Morgan submits these comments in accordance with the Board’s extension order.

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<sup>4</sup> *See, e.g.*, Comments of the Association of American Railroads at 23-24, Docket No. EP 707 (submitted Mar. 7, 2011); Opening Comments of Canadian Pacific Railway Company at 23, Docket No. EP 707 (submitted Mar. 7, 2011).

### **III. COMMENTS**

#### **A. The Board’s Proposed Rulemaking, If Adopted As A Final Rule, Would Violate The Administrative Procedure Act**

The Administrative Procedure Act (“APA”) prescribes procedures for agency actions such as rulemaking, as well as standards for judicial review of agency actions.<sup>5</sup> The Supreme Court has held on many occasions that there is a “‘strong presumption that Congress intends judicial review’ of administrative action.”<sup>6</sup> The Proposed Rulemaking, if adopted in its present form, would violate the APA in that it is “not in accordance with law,” “contrary to constitutional right,” “in excess of statutory jurisdiction, authority, or limitations,” and “unsupported by substantial evidence[.]”<sup>7</sup> The Board’s Proposed Rulemaking also “entirely failed to consider an important aspect of the problem,”<sup>8</sup> and failed to articulate a “rational connection between the facts found and the conclusions made.”<sup>9</sup> As such, the Proposed Rulemaking violates the APA and, if adopted as a final rule, would be held unlawful and set aside by a reviewing court.

##### **1. The Proposed Rulemaking Is “In Excess Of Statutory Jurisdiction, Authority, Or Limitations” And Is Inconsistent With The Statutory Framework**

The Board has acted “in excess of statutory jurisdiction, authority, or limitations” in violation of the APA by expanding its jurisdiction beyond the four corners of its authorizing statute. A fundamental principle of administrative law is that “[a] reviewing court must be able to discern in the [agency’s] actions the policy it is now pursuing, so that it may complete the task of judicial review -- in this regard, to determine whether the [agency’s] policies are consistent

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<sup>5</sup> 5 U.S.C. § 500 *et seq.*

<sup>6</sup> *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

<sup>7</sup> See *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670 (D.C. Cir. 2011); 5 U.S.C. § 706(2).

<sup>8</sup> *Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 945 (9th Cir. 2010) (internal quotes omitted).

<sup>9</sup> *Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 384 F.3d 1163, 1170 (9th Cir. 2004) (internal quotes omitted).

with its mandate from Congress.”<sup>10</sup> An agency “may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”<sup>11</sup>

This week, the United States Court of Appeals for the District of Columbia Circuit reiterated the principles and the limitations of statutory construction for both the court and the agency in *EME Homer City Generation, L.P. v. EPA*, , 2012 U.S. App. LEXIS 17535, 115-116 (D.C. Cir. Aug. 21, 2012):

“As in all statutory construction cases,” the court must “begin with the language of the statute.” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Id.* at 461-62 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks and citation omitted)). Thus, under *Chevron U.S.A. Inc v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984), the first step in statutory interpretation requires a determination of “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,” *id.* If, after applying traditional tools of statutory construction, the court determines “the statute is silent or ambiguous with respect to the specific issue,” then, under step two, the court will defer to an agency’s statutory interpretation if it “is based on a permissible construction of the statute.” *Id.* at 843.

As these recently-reaffirmed principles of statutory construction make clear, the Board has exceeded its mandate through the Proposed Rulemaking.

Originally, Congress instituted a general policy regarding who could compute demurrage charges and establish rules and regulations on such charges:

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<sup>10</sup> *Atchison, Topka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 805-806 (1973); see *Trailways, Inc. v. ICC*, 673 F.2d 514, 519 (D.C. Cir. 1982) (“[The Supreme] Court has relied on the ‘simple but fundamental rule of administrative law’ . . . that the agency must set forth clearly the grounds on which it acted. For ‘(w)e must know what a decision means before the duty becomes ours to say whether it is right or wrong.’ This principle has been the foundation of courts’ analyses on many occasions.” (internal citations omitted)).

<sup>11</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.<sup>12</sup>

This definition did not specifically place responsibility for demurrage charges and rules into the hands of rail carriers alone.

However, in the *ICC Termination Act of 1995*,<sup>13</sup> which abolished the Interstate Commerce Commission and established the Board, Congress stated that “[i]n regulating the railroad industry, it is the policy of the United States Government . . . to minimize the need for Federal regulatory control over the rail transportation system[.]” Consistent with its stated policy of minimizing federal regulatory control, Congress narrowed the demurrage statute:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills 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 transportation of property.<sup>14</sup>

In effect, Congress gave rail carriers, not the Board, the authority to compute demurrage charges and create rules on demurrage that “fulfill the national needs[.]”

The Board has exceeded its jurisdiction beyond the four corners of its authorizing statute by wading into a regulatory area that Congress explicitly reserved for rail carriers. Congress knowingly shifted the power to create demurrage rules into the hands of the rail carriers.

Although the Board has jurisdiction over rates and rules,<sup>15</sup> the Board cannot override the will of Congress by creating its own demurrage rules, because to do so would be in “excess of statutory

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<sup>12</sup> *Railroad Revitalization and Regulatory and Reform Act of 1976*, Pub. L. 94-210, § 210, 90 Stat. 31 (1976) (codified at 49 U.S.C. § 1(6)).

<sup>13</sup> Pub. L. 104-88, 109 Stat. 803 (1995) (codified at 49 U.S.C. § 10101(2)).

<sup>14</sup> See 49 U.S.C. § 10746.

<sup>15</sup> See 49 U.S.C. § 10501(b).

jurisdiction, authority, or limitations” in violation of the APA.<sup>16</sup> The Supreme Court has stated that “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress,”<sup>17</sup> and must “give effect to the unambiguously expressed intent of Congress.”<sup>18</sup> The Board’s Proposed Rulemaking, however, is not grounded in Congressional authority and must be rescinded.

Further, a comparison of the separate statutes for line-haul charges and demurrage charges confirms that Congress did not intend to provide the same agency notification procedures for both types of charges. Under the *ICC Termination Act of 1995*, Congress codified 49 U.S.C. § 10743, which provides specific rules and obligations regarding liability for the payment of rates. Congress specifically provided that consignees could avoid liability for rates by providing actual, written notice of the agency status.<sup>19</sup> For demurrage rates, however, Congress developed a stand-alone statute separate from the statute for general line-haul rates. In Section 10746, Congress did not provide specific rules and obligations regarding demurrage; instead, Congress delegated the responsibility for developing demurrage rates and rules to the rail carriers.

The Board itself acknowledged the difference between the line-haul rate and demurrage rate statutes, finding that Section 10743 applies to a rail carrier’s line-haul rates only, and does not apply to its demurrage rates.<sup>20</sup> However, despite this acknowledgement, the Board’s proposed agency notification procedure for demurrage liability is almost identical to the procedure that Congress clearly decided not to utilize for demurrage charges. Congress carved

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<sup>16</sup> 5 U.S.C. § 706(2)(C).

<sup>17</sup> *FDA*, 529 U.S. at 151.

<sup>18</sup> *Chevron*, 467 U.S. at 843.

<sup>19</sup> See 49 U.S.C. §10743 (providing that a consignee can avoid liability for rates “if the consignee gives written notice to the delivering carrier before delivery of the property—(A) of the agency and absence of beneficial title; and (B) of 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 original bill of lading.”).

<sup>20</sup> Proposed Rulemaking at 14.

out demurrage from the general rate liability provision and chose not to provide the same agency notice procedures. The Board cannot rewrite Section 10746 through a rulemaking and seek to impose demurrage liability in a manner that the statute itself does not provide.

**2. The Proposed Rulemaking Is “Unsupported By Substantial Evidence” That Receivers Of Rail Cars Are Responsible For Controlling Rail Cars**

The Board has not presented “substantial evidence,” as required by the APA, that demonstrates that entities like Kinder Morgan can control the receipt and return of rail cars and as a result should be responsible for demurrage charges. In allowing rail carriers to “impose charges on the party best able to get the cars back to the carrier,”<sup>21</sup> the Board relied upon rail carriers’ unsubstantiated arguments that the consignee is the entity responsible for detaining rail cars.

On the contrary, the evidence submitted here demonstrates that only the rail carrier or the shipper/consignor has the requisite control over the placement, movement, or release of rail cars before, during, or after unloading. The Board’s determination of liability should hinge upon operational control, not physical possession. Despite these facts, rail carriers continually bill Kinder Morgan, and not the shipper or consignee, for demurrage charges, even when the shipper is the party at fault. When this occurs, Kinder Morgan is forced to dispute these charges, seek reimbursement from its customers, and, in some cases, incur late charges. The Proposed Rulemaking would, in effect, codify the rail carrier’s practice of improper billing without any justification or support.

The Board’s failure to present “substantial evidence” to support its Proposed Rulemaking violates the APA. As such, the Board should not adopt the Proposed Rulemaking as a final rule.

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<sup>21</sup> Proposed Rulemaking at 13.

### **3. The Proposed Rulemaking Does Not Advance Congress's Policy Goals**

The Board's Proposed Rulemaking does not "fulfill[] 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 transportation of property."<sup>22</sup> The Board seeks to fulfill the statute's directive by imposing demurrage charges on the party "best able to get the cars back to the carrier."<sup>23</sup> However, there is no support for the Board's leap that intermediaries such as Kinder Morgan are the source of the problem.

The Board's Proposed Rulemaking does not account for the multitude of factors that impact an intermediary's ability to return cars to the rail carrier. As noted above, Kinder Morgan operates more than 180 terminals that provide services to more than 1500 customers. Kinder Morgan's terminaling operations are complex in nature and require detailed logistical planning. Kinder Morgan has no control over the delivery or pick up of rail cars, and although each rail carrier and receiving facility is unique, even within its own facilities Kinder Morgan generally has no or very limited control over the placement, movement, or release of rail cars before, during, or after loading and unloading. Further, Kinder Morgan does not control the readiness of the ultimate customer to receive the goods and the readiness of the rail carrier to pick up the empty cars. Lacking such control, Kinder Morgan does not dictate the length of time that a rail car sits at one of its facilities and cannot minimize the demurrage charges that accumulate during such time. It is unfair and unlawful to place the responsibility and liability for demurrage on a party that cannot control the return of rail cars to the rail carrier.

The Board, in singling out intermediaries, loses sight of the fact that the rail carrier has adequate protections to ensure an adequate supply of rail cars: the rail carrier can recover

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<sup>22</sup> 49 U.S.C. § 10746.

<sup>23</sup> Proposed Rulemaking at 13.

demurrage charges from the contractually-obligated shipper. In effect, the rail carrier is made whole for demurrage charges, while the shipper and intermediary can refer to their separate contract to determine who is responsible for the charges paid by the shipper. Congress's goals are accomplished by leaving the issue in the hands of the industry participants: the rail carrier, shipper, and intermediary.

#### **4. The Proposed Rulemaking Is “Not In Accordance With Law” Because It Violates The Principles Of Judicial Review**

The Board's attempt to settle a circuit court split by proposing its own demurrage rules demonstrates its unlawful “nonacquiescence” with binding appellate court rulings. Even if the Board is attempting to assist the industry by clarifying the issue of demurrage, the Board's proposal to reverse and vacate the decisions of the federal appellate courts defeats the purpose of judicial review and the APA. Congress has specifically provided for court review of Board decisions.<sup>24</sup> Congress did not, however, provide that the Board is able to review and reverse those court decisions with which it disagrees. Here, the Board's “refusal to acquiesce” to the circuit court orders “undermines all of the advantages of appellate review that . . . Congress intended to recognize.”<sup>25</sup> The Board's proposed nonacquiescence creates the precise constitutional crisis that courts have instructed federal agencies to avoid.

Further, the Board's Proposed Rulemaking creates uncertainty for future cases. If the Proposed Rulemaking becomes a final rule, federal trial courts will be left to resolve whether they must follow the Board's rule or the applicable circuit court order in a subsequent demurrage case. Accordingly, the Board must not adopt its Proposed Rulemaking because it violates the APA and is an unlawful circumvention of clear Congressional principles of appellate review.

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<sup>24</sup> See 28 U.S.C. §§ 2321, 2342.

<sup>25</sup> *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992).

## **B. The Proposed Rulemaking Is A Proposal Sought By No Industry Participant**

As stated above, the Association of American Railroads and various rail carriers argued in their comments in response to the Advance Notice of Proposed Rulemaking that there is no need for any Board rule on demurrage.<sup>26</sup> These commenters stated that demurrage charges have been, and continue to be, handled pursuant to contracts. For at least this reason, the Board should rescind its Proposed Rulemaking and allow industry participants to continue to handle the issue of demurrage liability amongst themselves.

## **C. The Proposed Rulemaking Is A Solution In Search Of A Problem**

Despite its efforts to solve a perceived problem in the rarely-litigated, “narrow issue” of demurrage liability,<sup>27</sup> the Board has not provided an adequate explanation as to why its Proposed Rulemaking is necessary when demurrage liability is easily handled through contracting. If the Proposed Rulemaking is not adopted, intermediaries such as Kinder Morgan would not escape demurrage liability; instead, they are bound by contracts in the same way that the shipper and rail carrier are bound by their respective contract. Further, the current contracting scheme does not burden the rail carrier or leave it uncompensated. Rail carriers are able to protect their interests through their contracts and can readily assess demurrage charges to the shipper with whom it has a contract. Nothing has changed the ability of the parties to resolve the issue contractually and without overarching Board-mandated rules and procedures.

Through the Proposed Rulemaking, the Board has, in fact, created a problem by seeking to change the “quasi-contractual”<sup>28</sup> relationship between the receiver of the freight and the rail

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<sup>26</sup> See, e.g., Comments of the Association of American Railroads at 23-24, Docket No. EP 707 (submitted Mar. 7, 2011); Opening Comments of Canadian Pacific Railway Company at 23, Docket No. EP 707 (submitted Mar. 7, 2011).

<sup>27</sup> *Norfolk Southern Railway Co. v. Groves*, 586 F.3d 1273, n.4 (11th Cir. 2009).

<sup>28</sup> *Id.* at 1278 (“By accepting delivery of a shipment, the consignee's conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges.”).

carrier. The Board has now established that the receiver, by default, is liable for demurrage charges regardless of whether the receiver is a party to a contract or has been listed as a consignee by the shipper. Instead, the Board assumes the intermediary to be a party to the contract unless the intermediary gives notice of its agency status. This type of Board interference in the currently-existing relationships between industry participants serves only to create unnecessary confusion and should be avoided by rescinding the Proposed Rulemaking.

**D. Certain Aspects Of The Proposed Rulemaking Should Be Clarified In Order To Alleviate Substantial Burdens On Intermediaries**

Kinder Morgan has demonstrated herein that the Proposed Rulemaking violates the APA, is inconsistent with Congressional mandate, and is an unnecessary intervention into the private contractual relationships between industry participants. Nevertheless, if the Board proceeds with adopting the Proposed Rulemaking, it must clarify certain aspects of the rules in order to alleviate substantial burdens on intermediaries.

**1. Any Final Board Rule Should Clarify That Third Parties Will Be Able To Issue Blanket Notices Regarding Agency Status**

The Board found in its Proposed Rulemaking that it would be improper to “force a non-party to a shipping contract (the warehouseman) to take affirmative steps to determine the role assigned to it by the direct parties to the contract (the shipper and the carrier).”<sup>29</sup> In doing so, the Board sought to ensure that its Proposed Rulemaking would not be “incompatible with contract law principles.”<sup>30</sup> Yet, the Proposed Rulemaking forces an intermediary to take affirmative steps of a different kind in order to avoid liability: demonstrate the agency relationship.

The Board’s alternative approach, as reflected in the Proposed Rulemaking, could be even more burdensome. Instead of requiring Kinder Morgan to determine whether it may be

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<sup>29</sup> Proposed Rulemaking at 12.

<sup>30</sup> *Id.*

liable by ascertaining whether it is listed as a consignee, the Board *presumes* that Kinder Morgan is liable and requires it to take steps to shift the liability.

At a minimum, any final Board rule should include a provision that allows Kinder Morgan and other intermediaries to issue a blanket notice to each rail carrier. Intermediaries, including the more than 180 terminals operated by Kinder Morgan, should not be required to give notice of agency status for each and every delivery for its more than 1500 customers. Instead, Kinder Morgan and similarly-situated intermediaries should be able to provide a one-time blanket notice to a rail carrier as to its agency status and the identity of the principal.

The Board provides for such a blanket notice in Appendix B of the Proposed Rulemaking, but not in the proposed rule itself. In Appendix B, the Board estimated the burden on rail carriers and warehouses to comply with the proposed rule. The Board estimated that 75 warehouses might consider asserting agency status.<sup>31</sup> The Board further estimated that, on a three-year basis, each of these warehouses would need “one hour to provide notice to each customer, assuming an average of 19 customers” per warehouse over the three years. The Board then stated that “the burden will be minimal after the first year as . . . only new customers would have to be notified.” This last sentence makes clear that intermediaries would be required to provide only a one-time blanket notice to a rail carrier and would not have to provide notice for each and every delivery.

Section 1333.3 of the proposed rule, however, is unclear as to whether an intermediary such as Kinder Morgan would be able to issue a blanket notice. The proposed rule states that anyone “acting as an agent for another party . . . is not liable for demurrage if that person has

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<sup>31</sup> The Board drastically underestimates the number of intermediaries that might consider asserting agency status. As stated above, Kinder Morgan alone has more than 180 terminals, each of which would conceivably assert agency status under the Proposed Rulemaking.

provided the rail carrier with actual notice of the agency status and the identity of the principal.<sup>32</sup> The Board should clarify Section 1333.3 to alleviate the seemingly substantial burden on intermediaries.

This is especially important for Kinder Morgan, that, as stated above, has over 180 terminals and 1500 customers. Otherwise, Kinder Morgan would have to expend considerable time and resources to provide rolling notice of the agency status of each terminal for each delivery. It would be unduly burdensome to require Kinder Morgan's individual terminals to provide notice to the rail carrier for each shipment on behalf of its 1500 customers.

**2. Any Final Board Rule Should Clarify That “Agency” Is Not Limited To The Traditional Principles Of Agency**

The Proposed Rulemaking allows a person to avoid demurrage liability if “that person has provided the rail carrier with actual notice of the agency status and the identity of the principal.”<sup>33</sup> However, as stated above, Kinder Morgan may not be an “agent” of its shippers under the traditional principles of agency. Kinder Morgan merely performs a service on behalf of its customer. Kinder Morgan has no control over the delivery or pick up of rail cars, and generally has no or very limited control over the placement, movement, or release of rail cars before, during, or after loading and unloading. As such, in order to avoid demurrage liability under the proposed rule, Kinder Morgan would have to provide “actual notice of the agency status” even though it may not be a traditional agent. The Board should qualify any final rule to allow Kinder Morgan and similarly-situated warehousemen and other entities to benefit from the procedures for avoiding demurrage liability.

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<sup>32</sup> Proposed Rulemaking at Appendix A, § 1333.3.

<sup>33</sup> Proposed Rulemaking at Appendix A, § 1331.3 (emphasis added).

### 3. Any Final Board Rule Should Clarify That Demurrage Is Limited To Railroad-Owned Rail Cars

The Board includes conflicting definitions of “demurrage” in the Proposed Rulemaking. The background section of the Proposed Rulemaking defines “demurrage” as limited to railroad-owned rail freight cars: “Demurrage is a charge for detaining railroad-owned rail freight cars for loading or unloading beyond a specified amount of time (called ‘free time’).”<sup>34</sup> The proposed rule itself, however, defines “demurrage” differently: “‘Demurrage’ is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail.”<sup>35</sup> The definition in the proposed rule is not limited to railroad-owned rail freight cars and would apply to any rail car, regardless of whether the railroad or the shipper owns or leases the rail car.

The Board should clarify the definition of demurrage in the Proposed Rulemaking to be limited to railroad-owned cars. Kinder Morgan estimates that close to 100% of tank cars and approximately 20% of open top and covered hopper cars for bulk transportation are owned or leased by the shipper. The rail carrier has no interest in a rail car that is owned or leased by the shipper. As such, neither Kinder Morgan nor the shipper should be required to compensate the *rail carrier* for detaining the *shipper’s* own rail cars. In fact, many rail carriers already include such a distinction in their demurrage tariffs.<sup>36</sup> The Proposed Rulemaking should only apply (if

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<sup>34</sup> Proposed Rulemaking at 2 (emphasis added).

<sup>35</sup> Proposed Rulemaking at Appendix A, § 1331.1 (emphasis added).

<sup>36</sup> See, e.g. Norfolk Southern, *Demurrage and Storage, An explanation of Norfolk Southern’s tariff series, NS 6004* at 10 (available at [http://www.nscorp.com/nscorphtml/pdf/demurrage\\_faq.pdf](http://www.nscorp.com/nscorphtml/pdf/demurrage_faq.pdf)) (“All railcars owned or leased by Norfolk Southern or other railroads are subject to demurrage. Private cars owned or leased to shippers are not subject to demurrage but may be subject to storage charges.”); CSX, *Quick Guide to Managing Demurrage and Private Storage* at 5 (available at [http://www.csx.com/share/wwwcsx\\_mura/assets/File/Customers/Price\\_Lists\\_Tariffs\\_Fuel\\_Surcharge/8100/CSXDemurrageGuide.pdf](http://www.csx.com/share/wwwcsx_mura/assets/File/Customers/Price_Lists_Tariffs_Fuel_Surcharge/8100/CSXDemurrageGuide.pdf)) (“Demurrage is a fee charged for the extended use of railroad-owned railcars.”).

at all) to those cars owned by rail carriers, and should not apply to any rail cars owned or leased by the shipper.

**IV.**  
**CONCLUSION**

WHEREFORE Kinder Morgan Terminals respectfully requests that the Board rescind its Notice of Proposed Rulemaking or, if the Board decides to adopt the proposed rules, clarify the rules as described herein.

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*Attorneys for Kinder Morgan Terminals*

Dated: August 24, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of August 2012, I served a copy of this document upon all parties of record in this proceeding by first class mail, postage prepaid.

/s/ Matthew T. Eggerding  
Matthew T. Eggerding