



WILLIAMS MULLEN

AUG 24 2012

Direct Dial: 202.293.8134
cnottingham@williamsmullen.com

August 24, 2012

232863

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

Re: Ex Parte 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice served on May 7, 2012 (as amended June 13, 2012), attached please find the Comments of the International Warehouse Logistics Association for filing in the above proceeding.

Respectfully submitted,

Charles D. Nottingham

Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

COMMENTS OF THE
INTERNATIONAL WAREHOUSE LOGISTICS ASSOCIATION

Charles D. Nottingham
Williams Mullen, PC
1666 K Street, NW
Suite 1200
Washington, DC 20006
(202) 293-8134

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Retained Counsel for the International Warehouse Logistics Association

August 24, 2012

Introduction and Summary of Position

In a Notice of Proposed Rulemaking (NPR) served on May 7, 2012, the Surface Transportation Board (Board) proposed a rule governing assessment of demurrage liability. The proposed rule states:

“Any person receiving rail cars from a rail carrier for loading or unloading who detains the rail cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if that person has actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. However, if that person is acting as an agent for another party, that person is not liable for demurrage if the rail carrier has actual notice of the agency status and the identity of the principal.” NPR at 10.

The International Warehouse Logistics Association (IWLA), on behalf of its member businesses, submits these comments in response to the Board’s May 7, 2012 NPR. The IWLA commends the Board for dedicating significant time and staff resources to develop a thoughtful, balanced and practical proposed rule that will greatly reduce demurrage liability disputes between rail carriers and warehouse operators. In particular, the IWLA supports the NPR’s recognition that rail carriers and warehouse operators should be encouraged to communicate directly with each other regarding rail carriers’ tariff terms and warehouse operators’ agency status. The IWLA agrees with the underlying premise of the NPR -- that direct, timely and transparent communication is the most effective approach to minimizing demurrage disputes.

The IWLA respectfully requests that the Board take an important additional step to clarify that rail carriers and warehouse operators have similar reciprocal “actual notice” requirements in instances involving “constructive placement” of rail cars. As the NPR notes, “constructive placement” refers to the concept whereby a rail carrier starts the demurrage process by claiming that it is ready to deliver rail cars to a receiver, but that the receiver is unable to take receipt. NPR at 6. Constructive placement demurrage disputes are especially burdensome on warehouse operators as they are forced to rebut rail carrier claims relating to a non-event (non-delivery of rail cars) many days or weeks after the claimed rail car delivery attempt.

The NPR notes the importance of “proper notice of constructive placement”, but fails to offer clarifying language that would assign to rail carriers and warehouse operators similar reciprocal actual notice rights and responsibilities that would minimize constructive placement demurrage disputes. In addition to clarifying what constitutes proper notice of constructive placement, the IWLA urges the Board to affirmatively recognize that rail car receivers who have reasonable scheduling and capacity limitations may directly notify their rail carriers of such limitations in advance and therefore be insulated from reasonably avoidable constructive placement claims. By encouraging the same type of direct, timely and transparent communication on the subject of constructive placement as the NPR encourages generally, the Board will enable the parties to avoid numerous disputes while foreclosing the need for further Board clarification on demurrage liability arising from constructive placement disputes.

On the question of whether demurrage charges should be included under 49 U.S.C. Section 10743, the IWLA supports the Board’s analysis and conclusions contained in the NPR.

The IWLA agrees with the Board's conclusion that "...the language of Section 10743 focuses on shipping charges, i.e. 'rates for transportation of a shipment of property' and not on accessorial charges such as demurrage." NPR at 14. The IWLA is concerned that a contrary interpretation of Section 10743 could result in demurrage charges being viewed by rail carriers as a profit center rather than a cost recovery and penalty mechanism for undue car detention.

The IWLA respectfully encourages the Board to supplement the NPR by highlighting the important role that contracts can play in avoiding demurrage liability disputes. IWLA members stand ready to enter into contracts with rail carriers to protect both parties' interests and to minimize disputes over demurrage. Private contractual agreements can be tailored to address the unique operational and capacity limits of warehouse operators in a manner more effective than even the most thoughtful general rulemaking. While the NPR references the parties' right "...to alter their relationship by contract...", (NPR at 10) the IWLA hopes that a more forceful statement of Board support for private resolution and avoidance of disputes through contractual agreements would encourage rail carriers to proactively engage with warehouse operators in executing contracts.

The IWLA also encourages the Board to supplement the NPR by adding a strong statement of agency support for mediation and arbitration to resolve demurrage liability disputes. Additionally, the NPR would be further strengthened if it encouraged rail carriers and warehouse operators to avail themselves of the Board's Rail Customer and Public Assistance Program to resolve demurrage liability disputes in a less formal and less costly manner. IWLA members have first-hand experience in working with Board staff in the Rail Customer and Public Assistance Program and can attest to the staff's professionalism, fairness and dedication.

The NPR offers the Board an excellent opportunity to market the success and availability of the Rail Customer and Public Assistance Program.

BACKGROUND

The IWLA represents approximately 500 businesses that collectively employ approximately 100,000 workers. IWLA members embody the Third Party Logistics Provider (3PL) business model to provide a range of warehousing, inventory, customer service and other value added services to manufacturers, farmers, importers, exporters, retailers, distributors and virtually all components of the U.S. economy. IWLA members have been able to increase hiring in recent years, despite serious economic “headwinds”, thanks to a sustained focus on reducing costs and increasing efficiencies. At the heart of the success of the U.S. 3PL industry is the ability to operate in a reasonable regulatory environment with ground rules that are cost-efficient and sensible.

For more than 100 years demurrage liability disputes have been a costly and time consuming burden on IWLA members. Much of this burden can be alleviated by the type of thoughtful, balanced ground rules proposed in the Board’s NPR. IWLA promotes best practices and helps to educate and advise its members in navigating the economic, regulatory, legal and policy realities that confront 3PL businesses every day. The IWLA’s Rail Council consists of 3PL providers who routinely depend on freight rail service. The Rail Council endeavors to promote best practices in rail operations and harmonious relations with rail carriers. The IWLA Rail Council looks forward to helping its members to implement the Board’s Final Rule in this

proceeding. Additionally, the Rail Council looks forward to working with rail carriers to avoid demurrage disputes by promoting increased use of private contractual agreements.

As has been previously expressed in this docket by the IWLA, demurrage plays an important role in encouraging the efficient handling of rail cars and in keeping the supply chain moving. In the vast majority of cases, demurrage disputes are resolved fairly and effectively. As proponents of best practices and continuous process improvement, IWLA members rarely cause demurrage disputes. IWLA members are highly motivated and incentivized to turn rail cars around quickly and to free rail cars from valuable warehouse space as soon as possible. The prevailing modern day commercial practice in the warehousing industry adds additional incentives on warehouse operators to promptly unload and return rail cars. Warehouse operators generally are only compensated from the time rail cars are unloaded and merchandise is actually stored at warehouse facilities. Warehouse operators have no commercial incentive to detain rail cars and, in fact, benefit from the efficient release and flow of rail cars throughout the logistics supply chain.

To place the rail car supply chain that serves a typical IWLA member in the proper perspective, it is important to recognize that IWLA members are typically not receiving high speed unit trains. The vast majority of IWLA member inbound rail shipments arrive by traditional manifest boxcars. According to highly experienced IWLA rail receivers, a typical boxcar makes less than 12 revenue-producing trips per year – a number that, according to IWLA members, has not changed in more than 12 years. The realities of the manifest boxcar business model have not changed much in many years, despite significant improvements by larger railroads in the use of information technology to track rail cars. In view of the long-term

stability of the manifest boxcar supply chain, it is extremely unlikely that the demurrage liability policy changes outlined in the NPR, as well as the modest additional changes described in these comments would impose any measurable burden on the efficiency of the manifest boxcar supply chain and scheduling cycle. To the extent that manifest boxcar operations can be made more efficient, these gains can best be achieved through rail carrier and receiver cooperation and collaboration that results in contractual agreements that reward and incentivize efficient rail car handling. IWLA members stand ready to significantly expand the use of these types of contracts that offer benefits and increased certainty to rail carriers and warehouse operators.

IWLA members depend upon efficient rail service and generally maintain excellent relations with rail carriers. The IWLA promotes the private resolution of disputes with rail carriers that would avoid the need for Board action. The IWLA values the role of the Board, however, in establishing baseline protections for rail customers and rail car receivers who often lack bargaining power when confronted with demurrage liability demands from rail carriers.

DISCUSSION

This section of the IWLA's comments will examine the most important provisions of the NPR and will focus on significant opportunities for improving the NPR.

I. The NPR's Reciprocal "Actual Notice" Provisions

At the heart of the NPR is the Board's recognition that rail carriers and warehouse operators are linked together in a supply chain that functions most effectively when direct communication between the "links" is encouraged. Rather than allowing demurrage disputes to be governed by often random and unilateral designations contained in bills of lading, the

NPR takes a fresh approach that is more compatible with the information age and communication technology relevant to the current business environment. The NPR rewards timely, direct and clear communication between rail carriers and warehouse operators by affording each party, respectively, protections and assurances if they abide by the proposed rule. When a rail carrier directly notifies a warehouse operator of reasonable demurrage terms, the rail carrier can be assured that these terms will be effective. Similarly, when a warehouse operator directly notifies a rail carrier of the warehouse operator's agency status and the identity of the principal, then the warehouse operator can be protected from demurrage liability. Meanwhile, this direct communication enables the rail carrier to avoid the cost of seeking demurrage from the wrong party.

The IWLA agrees with the NPR's actual notice approach and with its rejection of "passive" forms of demurrage liability notice, such as "electronic billboards." NPR at 12. The IWLA stands ready to assist rail carriers in identifying and communicating with warehouse operators who receive rail service in order to facilitate implementation of the proposed rule. Rail carriers and IWLA members serve the same customers and should be encouraged to communicate directly with each other whenever possible to advance their shared customer service mission. The NPR's actual notice requirement will also avoid a wide range of inevitable disputes revolving around when an electronic billboard or rail carrier web site was updated with new demurrage liability terms and the appropriate standard of due diligence that warehouse operators should be held to in monitoring passive forms of notice. Since actual notice will improve communication and eliminate uncertainty, it is reasonable to anticipate that

it will also work to reduce demurrage disputes – thereby advancing the bottom-line interests of rail carriers and warehouse operators alike.

II. Constructive Placement

The IWLA respectfully requests the Board to take this opportunity to refine and clarify the respective rights and responsibilities of rail carriers and warehouse operators with respect to constructive placement. Constructive placement refers to the rail carrier practice of starting the demurrage “clock” by claiming that it is ready to deliver rail cars but the receiver is unable to receive. IWLA members report that, in most cases, rail carriers and warehouse operators work together effectively to avoid constructive placement claims. For example, when a warehouse operator learns that a shipper is sending too many rail cars to a warehouse with capacity constraints, the warehouse operator will request the rail carrier to embargo or otherwise calibrate service to the shipper to avoid a backup of rail cars in the supply chain. Similarly, in most cases, rail carriers cooperate with warehouse operators’ requests not to attempt rail car delivery during scheduled warehouse facility closings, such as over weekends or holidays.

Despite the cooperative relationship described above that generally governs dealings between rail carriers and warehouse operators, constructive placement continues to present the most burdensome and unpredictable aspect of the demurrage liability issue for warehouse operators. Warehouse operators structure their staffing, equipment, real property and operational plans around efficiently handling rail car deliveries. When rail car delivery does not occur, warehouse operators are not in control of rail cars and are understandably skeptical

about constructive placement claims that assign demurrage liability related to rail cars that were never delivered.

The Board's Advance Notice of Proposed Rulemaking (ANPR) in this matter (served on December 6, 2010) specifically requested comments about constructive placement. ANPR at 11. Further, the NPR describes four conditions aimed at protecting warehouse operators. "First, liability does not begin unless a car is placed at the warehouseman's facility or proper notice of constructive placement is provided to the entity upon which liability is to be imposed." NPR at 10. Proper notice of constructive placement is, as the NPR recognizes, a critically important component of a balanced, transparent demurrage system that minimizes foreseeable disputes. The IWLA urges the Board to add some definition to "proper notice of constructive placement".

For notice of constructive placement to be proper, it must be reasonable and afford the recipient of the notice the ability to promptly respond with a description of any relevant facts and circumstances that should reasonably counter the claim of constructive placement. If a warehouse facility can only receive eight rail cars at a time and is not open for business on Sundays, for example, delivery of 15 cars on Sunday should never trigger a constructive placement claim. Similarly, when a rail carrier is aware of a rail car receiver's reasonable operational constraints, yet initiates delivery of rail cars from a source shipper that exceeds the receiver's capacity, then the receiver should not be assigned constructive placement liability. While rail carriers are typically quite familiar with receivers' "door capacities" and other operational constraints, a description of reasonable operational constraints can be submitted in writing by rail car receivers in advance of deliveries.

Constructive demurrage disputes can be minimized by adopting the same emphasis on direct, two-way communication as is recommended elsewhere in the NPR. Rail carrier notices of constructive demurrage liability should specifically inform the receiver of the circumstances that prevented actual placement of rail cars and reference a specific failure of the receiver to meet reasonable operational expectations. In turn, rail car receivers should have an opportunity to provide rail carriers with actual notice of reasonable constraints on a receiver's ability to accept rail cars due to facility hours of operation, capacity constraints, weather emergencies, and other reasonable limits on a receiver's ability to accept railcars.

The IWLA recognizes that constructive placement demurrage liability provides an important protection against the occasional receiver who fails to reasonably staff, equip, maintain and operate its facility so as to allow the efficient delivery of rail cars. As such, IWLA is not advocating for a prohibition on constructive placement. Rather, IWLA requests that the Board take note of the extraordinary nature of constructive placement when it is unilaterally defined and imposed – a scenario that is susceptible to abuse if not carefully regulated or addressed in contractual agreements. Unlike actual placement demurrage claims, constructive placement claims are based not on a receiver's actual handling or mishandling of rail cars, but rather on a rail carrier's assertion that a receiver was not adequately prepared to take possession of cars. One party's assertions, of course, are not always accurate, and the party being assigned liability deserves an opportunity to respond and rebut the assertion. IWLA members have experienced cases where a rail carrier knowingly attempts to deliver a large volume of rail cars that exceeds the warehouse operator's facility capacity and then proceeds with a constructive placement claim. These types of disputes can be minimized by the Board's

adoption of a rule that promotes two-way communication and provides guidance on what constitutes “proper notice” of constructive placement.

IWLA members are highly motivated to avoid situations that give rise to constructive placement claims. Warehouse operators earn revenue by efficiently handling rail cars and storing and processing customers’ goods. There is no incentive to not receiving as many rail cars as possible. By encouraging the same type of direct, timely and transparent communication on the subject of constructive placement as the NPR encourages generally, the Board will enable the parties to avoid numerous disputes while foreclosing the need for further Board clarification of demurrage liability arising from constructive placement disputes.

CONCLUSION

The IWLA appreciates the Board’s thoughtful and thorough examination of demurrage liability issues over approximately the past three years. With some additional guidance on constructive placement, the NPR should enable the Board to adopt a final rule and then move on to other important regulatory responsibilities without the need to revisit these issues. In the end, IWLA members hope to address rail service and demurrage concerns via private contractual agreement with individual rail carriers. The NPR marks a significant milestone in clarifying the parties’ responsibilities in the rail demurrage liability area. Increased use of private contractual agreements will provide the most effective remedy to demurrage liability disputes.

In sum, the IWLA thanks the Board for creating this opportunity for comment on an important issue. The IWLA stands ready to implement a prospective final rule in this matter

as soon as possible; to further educating its members on best practices in logistics services; and to working cooperatively and in good faith with its rail carrier partners to better serve their shared customers.

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