

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35406

PORTLAND & WESTERN RAILROAD, INC.—PETITION FOR DECLARATORY
ORDER—RK STORAGE & WAREHOUSING, INC.

Digest:¹ On referral from a state court, the Board has performed a calculation of “demurrage” charges—charges for detaining a railroad’s rail cars beyond the “free time” stated in the railroad’s tariffs—that could be derived from a reasonable interpretation of the facts as presented by the parties. We determine that the reasonable total demurrage amount is \$19,390, rather than the \$104,120 originally sought by the railroad.

Decided: July 26, 2011

BACKGROUND

Portland & Western Railroad (PNWR or the Railroad) is a rail carrier operating a 520-mile system. It is a wholly owned subsidiary of Genesee & Wyoming Railroad, Inc. PNWR is the only railroad serving the facility of RK Storage & Warehousing, Inc. (RK) in Portland, Ore., at which RK receives steel products that it subsequently trucks within the Northwest.²

In 2009, PNWR filed an action against RK in an Oregon state court seeking payment of demurrage charges allegedly owed for detaining rail cars in the period June 2006 through July 2008.³ RK filed an answer denying most of the Railroad’s claims, along with a counterclaim in which it seeks compensation for storing the Railroad’s cars between the time RK finished unloading a car and the Railroad’s retrieval of the empty car (“storage fees”).⁴ There

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² RK is a Department of Transportation-registered motor carrier. RK Response to Pet. for Declaratory Order filed Nov. 29, 2010 (RK Reply) at 9.

³ Portland & W. R.R. v. RK Storage & Warehousing, Inc., No. 0907-10274 (Or. Cir. Ct., Multnomah Cty. filed July 24, 2009); Pet. Vol. I, Ex. 1 at 30-32.

⁴ Pet. Vol. I, Ex. 2 at 34-38.

are 14 contested demurrage invoices.⁵ The Railroad asked the court to refer the dispute to the Board, and the court agreed, referring the “determination of all matters that fall within [the Board’s] jurisdiction.”⁶

On September 8, 2010, the Railroad filed a petition for declaratory order seeking a Board ruling that its demurrage charges were reasonable, but that RK’s storage fees were unreasonable, under the Interstate Commerce Act. RK filed a reply on November 29, 2010. On December 17, 2010, the Railroad sought leave to file a tendered surreply to RK’s Reply. On February 18, 2011, the Railroad submitted the court’s order granting extended abatement of the case and directing the parties to request a Board decision prior to July 28, 2011. RK next filed a motion to file a tendered surreply to the Railroad’s December 2010 and February 2011 submissions.

As discussed below, we find that the reasonable total demurrage is \$19,390, rather than the \$104,120 originally sought by the Railroad.

PRELIMINARY ISSUE

Our rules generally prohibit the filing of a reply to a reply (surreply) in a Board proceeding. 49 C.F.R. § 1104.13(c). In seeking leave to submit a surreply to RK’s Reply, the Railroad argues that RK provided several allegedly new defenses for nonpayment of demurrage charges for the first time in its reply. Similarly, RK seeks permission to file a surreply to (1) the Railroad’s tendered surreply and (2) the Railroad’s submission of the court’s February 18 order. As neither of the tendered surreplies advances the record needed to determine the reasonable amount of demurrage, both requests for leave to submit surreplies will be denied, and the surreplies are not made part of the record.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(c) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty.

Our decision calculates that, for the disputed bills, the reasonable demurrage totals \$19,390,⁷ which is below the \$104,120 PNWR originally billed. The primary reason for the difference is that the Railroad frequently missed switches onto the RK unloading track that

⁵ Pet. Vol. I, Ex. 12. RK admits to owing \$5,970 in demurrage charges. RK Reply 5.

⁶ Pet. Vol. I, Ex. 7 at 128-129. The court did not submit its February 18, 2010 order to the Board, but rather relied upon the parties to bring the matter before us.

⁷ This figure does not account for payments RK has made on these invoices. See money orders and checks from RK to PNWR at Pet., Vol. I, Ex. 11. Nor does this figure include pre-judgment interest, a matter for the court to resolve.

increased the number of days the cars were held and that thus caused more demurrage to accrue.⁸ The Railroad's invoices contain many examples of cars held over from 1 month to the next (e.g., invoices 3668, 4384, 4487, and 4544).⁹ In most instances, our assessment of the record shows that, but for the missed switches, there would have been sufficient capacity on RK's unloading track for PNWR to actually place traffic held over from the prior month onto RK's unloading track. For example, some of the cars constructively placed¹⁰ in April 2008 were shown on the Railroad's records as actually placed and released throughout May, June, and July of that year. The records reveal that these held-over cars arrived at PNWR's yard in the latter part of April and, had they been properly switched by the Railroad, would have been actually placed, unloaded, and released¹¹ no later than May 2, 2008.

A few examples from the record will help to illustrate the significant effect of missed switches. The disputed demurrage bills cover 3 periods and roughly 14 months: June – July 2006; December 2006 – July 2007; and May – July 2008. In theory, RK's unloading track has a maximum capacity of approximately 60 cars per month (20 weekdays times 3 cars), or 840 cars over 14 months. During the months in question, however, the actual RK inbound traffic was approximately 310 cars, of which about half (154 cars) accrued demurrage charges, according to PNWR's records. Ranking by the amount of demurrage charged, the top 30 cars accounted for over half of the total invoiced demurrage. Twenty-two cars accrued 30 or more demurrage days; and 8 cars on the 2008 invoices accrued 50 or more demurrage days.

In conceding that it owes approximately \$6,000 in demurrage,¹² RK accounts only for those occasions on which it took longer than 48 hours to unload. But RK would also have accrued demurrage charges on those occasions when, through no fault of PNWR, a large number of inbound cars arrived either on the same day or within a few days.¹³ In such cases, even though the number of cars available for placement exceeds the space available on the receiver's track, the railroad is entitled to demurrage for cars that are not unloaded before the expiration of free time. Here, with so many cars arriving all at once, it would have been impossible for RK to

⁸ A "switch" occurs when a railroad places railcars on, and removes railcars from, a shipper or receiver's track. An instance where the carrier does not do so when anticipated is termed here a "missed switch."

⁹ The invoices are found at Pet. Vol. I, Ex. 12.

¹⁰ Constructive placement occurs when the customer is notified that a car is available for unloading but the car cannot be "spotted" (actually placed on the customer's unloading track) for a reason that is outside the railroad's control.

¹¹ Our calculation of what we conclude are reasonable levels of demurrage generally uses as the duration for unloading a car the time between actual placement and release of a car, as shown on the Railroad's invoices. See discussion at p. 7 below.

¹² See n.5 above.

¹³ See, e.g., invoices 3668, 4039, and 4226 (Pet. Vol. I, Ex. 12 at 177-78, 184, 190).

avoid incurring some demurrage for cars that were constructively placed, even if PNWR had provided all of the customary switches. Therefore, while we find the reasonable charges to be lower than the amounts sought, they are higher than the amounts conceded by RK.

Below, we will discuss demurrage generally and PNWR's demurrage tariffs specifically, and we will explain how we calculated the reasonable demurrage charges under the tariffs, using assumptions and principles provided by the parties in the record. We will walk through a few specific examples to illustrate our methodology. Finally, we will address RK's claim of entitlement to storage fees.

I. Demurrage Generally.

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained by freight receivers or shippers and serves as a penalty for undue car detention to encourage the speedy return of rail cars to the rail network. See Chrysler Corp. v. N.Y. Cent. R.R., 234 I.C.C. 755, 759 (1939); N. Am. Freight Car Ass'n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007), aff'd sub nom. N. Am. Freight Car Ass'n v. STB, 529 F.3d 1166 (D. C. Cir. 2008). Demurrage charges are subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges and establish related rules in a way that will facilitate freight car use and distribution and promote an adequate car supply. Several courts have referred demurrage matters such as this one to the Board under the doctrine of primary jurisdiction. See, e.g., Union Pacific Railroad Co. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997).

The principle underlying demurrage is simple. When a shipper or receiver uses a railroad-owned rail car, it is depriving the railroad of an asset—the use of that car. A railroad has a right to set a reasonable time—free time—for a shipper/receiver to finish using a car and return it to the railroad. If a shipper/receiver keeps a rail car for too long (beyond the allocated free time), it compensates the railroad in the form of demurrage payments for the extended use of the car. Capitol Materials Inc.—Pet. for Decl. Order—Certain Rates & Practices of Norfolk S. Ry., 7 S.T.B. 576, 577 (2004) (Capitol Materials).

Demurrage is assessed on a per-day basis for detention in excess of allowable free time (generally, 48 hours for unloading). The demurrage clock begins with actual or constructive placement and ends upon the customer's release of the car back to the carrier.¹⁴ Generally, carriers assess demurrage in 1 of 2 ways: straight demurrage or average demurrage. The main difference is that under straight demurrage, a freight shipper/receiver gets no credit for releasing cars early, while average demurrage permits a shipper/receiver to offset demurrage charges by earning credits for other cars released within the free time. Id. at 578.

¹⁴ A shipper “releases” a car by notifying the railroad that the loaded car is ready for pickup by the railroad; a receiver releases a car by notifying the railroad that an unloaded car is ready for pickup.

II. PNWR's Demurrage Tariffs.

PNWR Tariff 9001, in effect from May 1, 2005 through April 30, 2007, provided that a freight receiver had 48 hours of free time for unloading, after which the Railroad was entitled to straight demurrage at the rate of \$80 per day or fraction of a day until the car was released.¹⁵ PNWR Tariff 9500, which took effect May 1, 2007, and continued in effect through the remainder of the period in which demurrage is disputed, also provided for straight demurrage but changed the rate to \$50 per day or fraction thereof.¹⁶ Under both tariffs, free time would start when (1) a car was actually placed on the shipper/receiver's track (actual placement), or (2) the car was constructively placed.

Providing 48 hours free time for unloading is standard practice in the railroad industry. See, e.g., R.R. Salvage & Restoration, Inc.—Pet. for Decl. Order—Reasonableness of Demurrage Charges, NOR 42102, et al. (R.R. Salvage), slip op. at 3 (STB served July 20, 2010), appeal pending sub nom. R.R. Salvage & Restoration, Inc. v. STB, No. 10-3074 (8th Cir. filed Sept. 20, 2010); Capitol Materials, 7 S.T.B. 578; Unger, Trustee of Ind. Hi-Rail Corp., Debtor—Pet. for Decl. Order—Assessment & Collection of Demurrage & Switching Charges, NOR 42030, slip op. at 7 n.15 (STB served June 14, 2000). The daily demurrage fees here (\$80, later reduced to \$50) are not substantially different from the range we have seen in other cases. See, e.g., Capitol Materials, 7 S.T.B. at 579 (in 2004, noting demurrage charges between \$50 and \$75 per day). RK does not allege that either the amount of free time or the daily charge is unreasonable.

III. PNWR's Practices in Providing Switching for RK.

There were many occasions on which PNWR's rail yard became crowded because of the line haul railroad's delivering at one time a large number of cars destined for businesses located on PNWR's tracks. PNWR took 2 actions to deal with this crowding. Sometimes, in an effort that benefitted RK, PNWR spotted (placed) railcars at RK's track on the weekend, which was not a normal day for providing rail service to RK.¹⁷ Sometimes, however, PNWR did not provide a weekday switch to RK, because "PNWR prioritized switching and spotting in such a way that decreased the congestion" by providing switches to customers whose tracks had a larger railcar capacity than RK's and by skipping the switch for RK.¹⁸ The latter practice obviously disfavors RK.

¹⁵ Pet. Vol. I, Ex. 8 at 132, 140.

¹⁶ Pet. Vol. I, Ex. 9 at 144, 152.

¹⁷ Pet. Vol. I at 13; Vol. II, Ex. A-6, Affidavit of Todd Vincent at 187 ("Although PNWR is not required to spot railcars on RK Storage's track on Saturdays and Sundays, it has done so on multiple occasions in an effort to accommodate RK Storage").

¹⁸ Pet. Vol. I at 14-15.

PNWR's Trainmaster testified that the Railroad's "customary business practice" was and is to provide RK with 1 switch per day, Monday through Friday.¹⁹ This customary practice was so expected that, according to the Railroad, when it did not spot any cars to RK on a weekday "for a reason not attributable to RK Storage and it affected the demurrage charges, then RK Storage was credited for the non-spot."²⁰ This testimony establishes that the Railroad did not intend to charge demurrage to RK for those occasions when the Railroad skipped a weekday switch because of yard congestion.²¹

We recognize PNWR's motivation to provide other, larger customers with a switch ahead of RK. Nevertheless, because of the customary practice between these parties—1 switch each weekday—RK should not have to pay any demurrage charges that resulted from the Railroad's failure to provide a switch because of congestion in PNWR's yard. RK is not responsible for that.

Even though the tariff established straight demurrage, the Railroad voluntarily provided some demurrage credits to offset its skipped switches. But these credits did not fully account for the cumulative impact when there were cars in constructive placement at the time of a missed switch. In general, a missed daily switch delays the unloading schedule of a customer's inbound traffic by one day, and any cars that happened to be on constructive placement at the time of the missed switch would be due an extra demurrage credit. The ultimate impact of a missed switch on a customer's demurrage account varies, depending on the number of cars on constructive placement.

In contrast with those situations in which PNWR skipped a weekday switch due to congestion, there was a 3-day period when the Railroad did not provide switches to RK, and so informed RK, because the condition of RK's track made service unsafe.²² RK was responsible

¹⁹ Pet. Vol. II, Ex. A-6 at 187; see also Vol. I at 13 (narrative).

²⁰ Pet. Vol. I at 14.

²¹ PNWR's Manager of Customer Service states that "PNWR's policy and procedure has always been to provide RK Storage with one spot per day, Monday through Friday, but there were times that RK Storage did not receive a spot. When this was attributable to PNWR, or due to heavy congestion at the Linnton Yard, PNWR's track being blocked, PNWR allegedly not providing notice of available cars, or if I could not determine the reason, then I provided extra credit days to RK Storage to account for any additional demurrage accrued as a result of no spotting." Pet. Vol. II at 5-6.

²² The track was not safe for service between June 25-27, 2007, during a period covered by a disputed demurrage invoice. Pet. Vol. II, Ex. A-3 at 85, 91; Ex. A-5 at 188. A second incidence of unsafe track conditions occurred in August 2008, outside the period of the disputed invoices. Pet. Vol. II, Ex. A-1 at 6, 73; Ex. A-2 at 85.

for the condition of its unloading track, and therefore it was reasonable for the railroad to charge demurrage that accrued as a result of these 3 days of missed switches.

IV. Our Method for Calculating the Reasonable Amount of Demurrage Accrued.

Applying the demurrage tariffs in place and the established switching practices of the Railroad, and using the dates for constructive placement, actual placement, and car release, we examined demurrage in close detail and calculated the reasonable amount of demurrage had the Railroad provided RK with its usual 1 switch per weekday. Our calculation is premised on the assumption that cars could be actually placed on the same day they were constructively placed.²³ We describe below our method of determining this amount. After explaining the basis for our calculation, we provide examples from the disputed invoices to illustrate our process. All of our calculations are contained in workpapers that will be made available to the parties upon request.

A. Car-by-car Calculation. For each car, we ascertained when the car would have been spotted on RK's track, but for skipped switches that were due to rail yard congestion. This method yields the same result as if we gave a credit for every day that a car accrued demurrage because of PNWR skipping a weekday switch. As mentioned, this accounting permits demurrage to accrue when the condition of RK's track caused the inability to spot railcars. We generally used the same duration for unloading (time between actual placement and release) as shown on the Railroad's invoices, unless RK's placement records differed substantially from the invoices, at which point we ascertained which of the records were more likely correct (see second example calculation below).

B. Track Capacity. The parties disagree on the number of railcars that safely can be placed on RK's unloading track. The Railroad claims that the track has a capacity of 2 to 3 cars.²⁴ RK asserts that its track usually can accommodate 4 cars, citing 2 occasions on which 4 cars were placed.²⁵ Nonetheless, the records of both parties show that the Railroad usually would spot 3 cars at a time on RK's track, and RK analyzed the Railroad's service in light of 3 cars being spotted each weekday.²⁶ For all these reasons, we use a 3-car capacity when calculating the reasonable demurrage.

²³ PNWR started its demurrage clock at 8 a.m. The actual placement times listed on the Railroad's invoices indicate that, when the Railroad provided a switch to RK, it usually was well after 8 a.m. In addition, the invoices show several occasions on which cars were actually placed on the same calendar day that they had been constructively placed. Accordingly, we find that, space permitting, a car could be placed on the unloading track on the same calendar day that it was constructively placed.

²⁴ Pet. Vol. I at 10 & Vol. II, Ex. A-6 at 187.

²⁵ RK Reply 10.

²⁶ Id.

C. Spotting Oldest Cars First. Under straight demurrage, when cars have been in constructive placement but not yet physically delivered, the customary practice for any railroad is to deliver the oldest railcars (those that have been held the longest) first. In other words, cars are pulled out of constructive placement and delivered as soon as possible on a first in, first out basis.²⁷ Here, PNWR confirms that, as a customary business practice, it delivered the oldest rail cars first.

According to the Railroad, however, on numerous occasions, RK requested delivery of specific newer cars first, even though there were older rail cars on constructive placement.²⁸ RK maintains that in some instances the Railroad's train crew indicated it would be too difficult to retrieve the older cars because of congestion.²⁹ On those occasions, RK apparently believed it had no realistic option other than to accede to delivery of a newer car first, if it contained the same kind of steel product as the older car.³⁰

Congestion in and around a rail yard may be a reasonable basis for failing to deliver a requested older car, but if that occurs, the railroad may no longer reasonably charge demurrage on that car. It is not necessary to resolve the parties' difference on this issue, however, because of the Railroad's recognition that older cars customarily should be delivered before newer cars. Thus, we will calculate demurrage under the "first in, first out" principle that the Railroad acknowledges.

In any event, because charges for holding cars were calculated on the basis of straight demurrage—under which debits are not offset by credits for early release of cars—and because the daily charge for a 20-day-old car is the same as the charge for a 2-day-old car, the delivery of a newer car ahead of older cars had only a very minor effect on the amount of reasonable demurrage. The only occasion on which delivery of a newer car would affect the total amount of demurrage was when a very new car was delivered ahead of a car that was accruing demurrage, and the new car was unloaded during the free time. If, however, a newer car that already was accruing demurrage were delivered ahead of an older car, the net effect on the demurrage would be zero, because all cars accrued demurrage at the same rate on any given day.

D. The Record Contains Evidence to Ascertain When Cars Constructively Placed in May 2006 (Prior to First Contested Invoice) Would Have Been Spotted. The first contested invoice,

²⁷ Pet. Vol. II, Ex. A-6 at 190.

²⁸ Id.

²⁹ RK Reply 6, 11.

³⁰ RK Reply 11. It would have been helpful if RK had kept and provided a record of each occasion on which PNWR's crew asked not to be required to deliver an older car. In addition, RK had the right to demand delivery of an older car first and could have kept records when it did so. These records also could be useful for calculating demurrage.

No. 3668, lists cars released in June 2006.³¹ This invoice shows that the Railroad constructively placed some of these cars in May 2006. Although the demurrage invoice covering May 2006 is not contested, the record contains the Railroad's printout of both the date and time of placement and release of RK's cars in May 2006.³² Thus, for cars listed as constructively placed in May 2006, we were able to determine (1) whether there was available space on RK's unloading track at the time of constructive placement, and thus (2) when actual placement would have occurred, given a daily switch on weekdays. The same is true for other contested invoices where the prior month's invoice was not also contested. That enabled us to recalculate what would have been the reasonable demurrage.

E. Examples: Calculation of 3 Cars' Demurrage.

We provide examples to illustrate issues that arose in calculating the reasonable demurrage.

1. Railroad Invoice No. 3668, Car TTPX 81459, which illustrates the issue of a missed switch.³³ The invoice shows that this car was: constructively placed on May 23, 2006, at 16:05 (4:05 p.m.); actually placed on May 31, 2006, at 17:00 (5 p.m.); and released on June 1, 2006, at 11:25 a.m. The amount of demurrage listed as due is \$560 (9 days between constructive placement and release, less 2 days' free time = 7 days X \$80). When we calculated the demurrage due on this car, we examined the Railroad's record showing cars constructively placed in May and determined that, on the day the Railroad constructively placed this car, there was space on RK's track and that this car should have been spotted on RK's track the same day, May 23. Next, we applied the same duration for unloading as the Railroad's invoice reveals: the car was released within 1 day after actual placement. Accordingly, we calculate that no demurrage should have accrued on this car, which would have been unloaded during the free time (48 hours) the tariff afforded.

2. The next example is from the same invoice, No. 3668, Car IHB 98213.³⁴ The invoice shows that this car was: constructively placed on May 22, 2006, at 8:00 a.m.; actually placed on June 3, 2006, at 8:30 a.m.; and released on June 16, 2006, at 9:45 a.m. According to the record, RK took 13 days to release the car after it was spotted on its unloading track. The amount of demurrage listed as due is \$1,760 (24 days between constructive placement and release, less 2 days' free time = 22 days X \$80). Our examination of the Railroad's record of cars constructively placed in May 2006 revealed that, on the date of constructive placement, there

³¹ Pet. Vol. I, Ex. 12 at 177-178.

³² Pet. Vol. II, Tab A-5, Ex. K at 175.

³³ This car is found at Pet. Vol. I, Ex. 12 at 178, first car at top of page, listed as "Sequence 39").

³⁴ This car is found at Pet. Vol. I, Ex. 12 at 177, middle of the page, listed as "Sequence 19").

was available space on RK's storage track, and this car should have been spotted on RK's line the same day, May 22. We then compared the railroad's invoice showing 13 days between actual placement and release with RK's record for the same car. The RK record shows that the car was actually placed on RK's track on June 14, 2006 (not June 3) at 3:00 p.m. and was released on June 15, 2006 (not June 16), at 9:45 a.m.³⁵ Thus, according to RK's record, RK released the car within 24 hours of actual placement.

To resolve the discrepancy in the duration of unloading time, we examined the invoice (No. 3668) and found that the Railroad listed 3 other rail cars that it had placed on RK's unloading track on June 3: those listed as Sequences 30 through 32. In addition, the Railroad also provided full switches (3 cars) on June 5 and June 8. Therefore, by the Railroad's own invoice, it could not also have spotted Car IHB 98213 on June 3. For that reason, we found that RK's record showing actual placement of the car on June 14 was the better evidence. We also credited RK's record showing release of this car on June 15, but even if this car had been released on June 16 at 9:45 a.m. (as the Railroad's invoice shows), the release occurred within the 48 hours of free time. Accordingly, we calculate that no demurrage should have accrued on this car.

3. Invoice No. 3729, Car TN 8009, is an example of a situation in which the parties' records contain different dates for the actual placement of a car. The invoice shows that this car was: actually placed on July 3, 2006, at 3:25 p.m.; and released on July 12, 2006, at 1:45 p.m. According to the invoice, RK took 9 days to release the car after it was spotted on its unloading track. The amount of demurrage listed as due is \$480 (9 days between actual placement and release, less 3 days' free time³⁶ = 6 days X \$80). We compared the railroad's invoice showing 9 days between actual placement and release with RK's record for the same car. The RK record shows that the car was actually placed on July 6, 2006, (not July 3) and was released on July 12, 2006, at 3 p.m.³⁷ RK, as a company offering warehousing and transloading services that depend on inbound deliveries by rail, kept close tabs on its unloading track and inbound rail shipments. Therefore, had car TN 8009 been placed on July 3, 2006 in accordance with the invoice, we find it highly unlikely that its placement would not have been recognized by RK until July 6, 2006. Even if the car had been placed after hours on July 3 (i.e., after RK personnel left for the evening), its presence would have been detected on July 5, 2006, when RK personnel returned from the holiday. For that reason, here we credit the date on RK's record over the date on the Railroad's invoice. Thus, according to RK's placement record, RK released the car within 6 days of actual placement, and the reasonable amount of demurrage is \$320 (6 days between actual placement and release, less 2 days' free time = 4 days X \$80).

³⁵ Reply, Ex. C at p. 18.

³⁶ On this car, the Railroad gave an extra day's demurrage credit (3 free days), possibly as an adjustment for the July 4 holiday.

³⁷ Reply, Ex. C at p. 20.

To summarize, in each case, we ascertained the date on which a car that was constructively placed could have been actually placed, given the Railroad providing each weekday switch, except for when RK's unloading track was in unsafe condition. We used the same unloading time as actually occurred, according to the best record evidence. This resulted in reasonable demurrage in the amount of \$19,390 for the disputed invoices. The total amount does not account for any payments RK has already made to PNWR on these invoices or for pre-judgment interest.

V. RK's Counterclaim for Storage Charges.

Finally, as mentioned, the Railroad asks us to declare that there is no reasonable basis for RK's counterclaim in court asserting that the Railroad owes RK "storage charges." We have stated in the past that parties may have separate agreements, outside of the demurrage tariffs, governing amounts due for holding cars. Capitol Materials, 7 S.T.B. at 581. Here, however, no evidence of any such agreement was presented to the Board, and in its reply to the Board, RK did not reassert its claim to storage charges.

VI. Opportunity for Parties to Comment.

The parties will have 20 days after service of this decision days to comment on the Board's methodology for ascertaining the reasonable amount of demurrage for these disputed bills. Accordingly, this decision is not final. Replies to any comments will be due 30 days after service of this decision. After reviewing any comments, the Board will issue a final decision in which it will either make any necessary adjustment to the reasonable amount of demurrage or affirm the calculation made here.

It is ordered:

1. The requests of PNWR and of RK to file surreplies are denied.
2. PNWR's request for a declaratory order is granted to the extent specified here.
3. A copy of this decision will be served on:

Presiding Court Judge
Circuit Court of State of Oregon for Multnomah County
Multnomah County Courthouse
1201 SW Fourth Avenue
Portland, OR 97204

Re: No. 0907-10274

4. Comments on the Board's methodology in this decision are due August 16, 2011.
Reply comments are due August 26, 2011.

5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.