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SERVICE DATE – JULY 20, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42102

RAILROAD SALVAGE & RESTORATION, INC.—PETITION FOR DECLARATORY
ORDER—REASONABLENESS OF DEMURRAGE CHARGES

Docket No. NOR 42103

G.F. WIEDEMAN INTERNATIONAL, INC.—PETITION FOR DECLARATORY ORDER—
REASONABLENESS OF DEMURRAGE CHARGES

Decided: July 19, 2010

These declaratory order proceedings arise out of court actions initiated by Missouri & Northern Arkansas Railroad Company, Inc. (MNA), in the U.S. District Court for the Western District of Missouri, Southwestern Division, in Missouri & Northern Arkansas Railroad v. Railroad Salvage & Restoration, Inc., No. 07-5017-CV-SE-DW, and the Circuit Court of Jasper County, Mo., in Missouri & Northern Arkansas Railroad v. G.F. Wiedeman International, Inc., No. 07AO-CC00112. MNA initiated the court proceedings to collect unpaid demurrage charges from Railroad Salvage & Restoration, Inc. (Railroad Salvage), and G.F. Wiedeman International, Inc. (Wiedeman).

Railroad Salvage and Wiedeman (petitioners) filed motions to stay the court proceedings and to refer the following issues to the Board:

[W]hether the collection of demurrage charges for the following is an unreasonable practice:

- (1) as to cars constructively placed, because [MNA] failed to provide timely notices of such placement;
- (2) as to private cars held on private tracks, because such cars are excepted from demurrage charges;
- (3) as to all cars, because [MNA] wrongly assessed demurrage charges:
 - (a) on cars held in MNA's yard in anticipation of car orders not yet made by [petitioners];
 - (b) on cars that [MNA] was able to receive, but which were not delivered because of [MNA's] own disability;
 - (c) on cars for which MNA does not have adequate proof of dates of actual or constructive placement and/or release.

The U.S. District Court and the Missouri Circuit Court on September 27, 2007 and October 24, 2007, respectively, granted petitioners' motions and referred the above issues to the Board for review and decision.

The Board, in a decision served on December 20, 2007, instituted these declaratory order proceedings, granted Wiedeman's request to consolidate them, and adopted a procedural schedule. That schedule was postponed at the parties' request, in a decision served on February 29, 2008, to give them additional time to negotiate a settlement. In decisions served on April 10 and 11, 2008, respectively, the Board, at the parties' request, reinstated and modified the procedural schedule to extend the discovery completion date and the date to file opening statements. At the parties' request, the Board further extended the procedural schedule in decisions served on May 7 and June 10, 2008. On July 7, 2008, petitioners filed a joint opening statement. The Board, in a decision served on September 18, 2008, granted a 4-week extension of the procedural schedule in response to a letter from MNA reporting that the parties had reengaged in settlement discussions. MNA filed a reply statement on October 16, 2008, and petitioners filed a joint rebuttal statement on October 31, 2008.¹

BACKGROUND

Petitioners are commonly controlled, closely held corporations that receive, sell, and distribute metal materials. Specifically, they receive salvaged rail and other track materials at a yard in Joplin, Mo., that Railroad Salvage leases from Union Pacific Railroad Company (UP). Petitioners sort and grade the materials as relay, reroll, or scrap;² retain the relay quality materials; and ship the reroll and scrap quality materials to receivers in Arkansas and Mexico. Petitioners are located at the same address and share rail facilities. Their yard is served exclusively by MNA, and they claim they are dependent on rail transportation, asserting that it is not possible to obtain trucks and, even if it were possible, truck transportation to Arkansas and Mexico would be cost-prohibitive.

¹ On February 3, 2010, Railroad Salvage requested leave to voluntarily withdraw its petition for declaratory order (FD 42102), arguing that the Board proceeding had become moot after the referring District Court issued an order dismissing MNA's lawsuit with prejudice. On February 16, 2010, Railroad Salvage filed a letter reporting that MNA had filed motions with the District Court seeking a Relief from Judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure and an extension of time to file a Notice of Appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Railroad Salvage requested that the Board hold its request to withdraw its petition for declaratory order in abeyance until the District Court ruled on MNA's motions, and the Board granted Railroad Salvage's request in a decision issued March 1, 2010. On April 27, 2010, Railroad Salvage informed the Board that the District Court had reinstated MNA's lawsuit. Railroad Salvage requested leave to withdraw its request to voluntarily withdraw the petition for declaratory order. The Board grants Railroad Salvage's motion.

² Reroll rail may be relaid and used as track following a process known as rerolling. Relay rail is rail that has been used and may be used again—"relaid"—in its present condition.

MNA is a short line Class III railroad wholly owned by RailAmerica, Inc. (RailAmerica).³ MNA operates in Missouri and Arkansas over a number of lines, some of which are leased from UP and others purchased from the predecessors of UP and BNSF Railway Company (BNSF). MNA also operates over incidental trackage rights acquired from UP and BNSF.

According to petitioners, MNA's court complaints seek to collect \$208,690 in demurrage charges (\$196,665 from Railroad Salvage and \$12,025 from Wiedeman) that allegedly accrued on 347 cars (315 for Railroad Salvage and 32 for Wiedeman) between January 2005 and January 2007. Petitioners assert that only \$72,745 of the total demurrage charges was properly assessed—an amount they are willing to pay—together with reasonable interest. MNA says it is entitled to collect \$194,730 in demurrage charges (\$182,835 from Railroad Salvage and \$11,895 from Wiedeman) plus accrued interest and fees as provided in its tariffs.⁴

MNA's amended federal court complaint seeks a total of \$195,575⁵ in unpaid demurrage charges from Railroad Salvage, as follows: (1) \$54,550 in demurrage charges for the period from January 1, 2005 through July 31, 2005, under Item 470(A) of Railtex Demurrage Tariff RATX 6001 (RATX 6001), which provides that "Demurrage is assessed at the rate of \$50.00 per car per day for all time in excess of 24 hours for loading or 48 hours for unloading from the first 0001 hours after tender until release," plus 1% a month in interest and attorney fees, respectively, under Items 470(J)(1) and (2) of Tariff RATX 6001; (2) \$140,140 in demurrage charges for the period from August 1, 2005 through July 24, 2006, under Item 500(A) of Missouri & Northern Arkansas Railroad Freight Tariff MNA 6001 (MNA 6001), plus 2% per month in interest, under Item 90 of Tariff MNA 6001; and (3) \$885 in demurrage charges for the period from July 25, 2006 through October 2006, under Item 500(A) of Tariff MNA 6001-B, plus 2% per month in interest, under Item 90 of MNA 6001-B. Item 500(A) of Tariffs MNA 6001 and MNA 6001-B provides that "Demurrage is assessed at the rate of \$65.00 per car per day for all time in excess of 24 hours for loading or 48 hours for unloading from the first 0001 hours after tender until release."⁶

³ MNA was one of a number of railroads acquired by RailAmerica, a noncarrier holding company, in January 2000. See RailAmerica, Inc.—Control Exemp.—RailTex, Inc., 4 S.T.B. 479 (2000). RailAmerica, in turn, was acquired by Fortress Investment Group LLC in December 2006. See Fortress Inv. Grp. LLC—Control Exemp.—RailAmerica, Inc., FD 34972 (STB served Dec. 22, 2006).

⁴ To account for billing errors and a prior payment by Wiedeman, MNA reduced the assessed demurrage charges by \$5,485. See note 12, infra.

⁵ Petitioners say that the amount MNA seeks in its amended federal court complaint is understated by \$895 as a result of computation errors. We note, however, that adding the \$895 to \$195,575 does not equal the \$196,665 that petitioners claim MNA seeks in its amended federal court complaint.

⁶ MNA's amended federal court complaint includes a claim for \$2,800 for diversion/reconsignment and overloading charges, which are not at issue here.

As to Wiedeman, MNA's federal court complaint seeks \$11,895 in demurrage charges for the period from July 25, 2006 through January 2007 plus 2% per month in interest under Items 500(A) and 90 of Tariff MNA 6001-B.⁷

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. In this decision, we will first respond to the issues referred to us by the courts and then address the issues raised in the parties' pleadings that relate to the court-referred issues. We will next address those issues raised by the parties in their pleadings before the Board and not before the courts. In each category, we will explain the general principles that guide the Board's analysis and then determine whether, based on the evidence and argument submitted to the Board, petitioners have met their burden to establish that the assessment of demurrage was an unreasonable practice or otherwise unlawful.

Demurrage is a charge that both compensates railroads for the expenses incurred when rail cars are detained by shippers and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network. See Chrysler Corp. v. N. Y. Cent. R.R. Co., 234 I.C.C. 755, 759 (1939) (Chrysler); N. Am. Freight Car Ass'n. v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007) (NAFCA), 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 rules related to those charges, in a way that will facilitate freight car use and distribution and promote an adequate car supply.

The principle underlying demurrage is simple. When a shipper uses a railroad-owned rail car, it is depriving the railroad of an asset—the use of that rail car. Likewise, when a shipper's privately owned rail cars are idled on the railroad's tracks, it is depriving the railroad of the use of that track.⁸ A railroad has a right to set a reasonable time—free time—for a shipper to finish using rail assets and return them to the railroad. If a shipper keeps an asset for too long (beyond the allocated free time), it should compensate the railroad for the extended use of its asset (rail cars or track)—in other words, for demurrage. However, a shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay.

⁷ After correcting for a \$130 computation error for October 2006, petitioners say MNA's court petition seeks \$12,025 in demurrage charges from Wiedeman.

⁸ See NAFCA, slip op. at 6-8.

WAIVER

Before we examine petitioners' specific demurrage claims, we note that MNA argues that petitioners are precluded from raising any defenses for their nonpayment of demurrage charges. Specifically, MNA contends that petitioners failed to pay the assessed demurrage charges in full and to present disputes for adjustment in writing with supporting documentation within 30 days after the bill for demurrage was rendered pursuant to its tariffs. Based on this failure, MNA argues that petitioners have waived their defenses for nonpayment of demurrage.⁹

Petitioners claim MNA led them to believe that there was no need to dispute the assessed demurrage charges, asserting that MNA's regional manager and general manager verbally assured them "that as long as Petitioners continued to ship by rail over MNA, MNA would not seek to collect any billed demurrage charges." See Rebuttal, V.S. of Gaylon Jackson at 1. Petitioners argue that it was reasonable to accept these assurances because they came from the highest ranking MNA officials with whom petitioners regularly dealt, and who they contend had apparent authority to bind MNA by their assurances. Thus, petitioners argue that, by giving the alleged assurances, MNA departed from the dispute provisions of its tariffs.

The Board has recognized that "[a railroad] could have a separate agreement or understanding with a particular shipper to waive the written claim requirement" in a tariff. See Capitol Materials Inc.—Pet. for Decl. Order—Certain Rates and Practices of Norfolk S. Ry. Co., 7 S.T.B. 576, 581 (2004) (Capitol Materials). Whether or not the parties' course of conduct here established a binding agreement that is distinct from and overrides the dispute provisions of MNA's tariffs is a question of state contract law. It is the Board's policy to leave the resolution of such issues to the appropriate courts, and we will do so here. Id. As discussed below, however, based on the evidence submitted to the Board, there would be no need to reach the waiver issue because petitioners have failed to carry their burden to establish that the assessment of demurrage was improper.

COURT-REFERRED ISSUES

1. Failure to Give Timely Notice of Constructive Placement of Cars. Placement is defined as the delivery of a loaded or empty car to a customer. There are two kinds of placement in the rail industry—actual and constructive placement. See Capitol Materials, 7 S.T.B. at 584-85.

Under the MNA tariffs at issue here, actual placement occurs when the railroad places a rail car in an accessible position for loading or unloading or at a point designated by the shipper. See Tariff RATX 6001, Item 410; Tariffs MNA 6001 and 6001-B, Item 300; see also Capitol Materials, 7 S.T.B. at 584-85. Actual placement starts the free-time period during which the shipper must load or unload the car to avoid incurring demurrage charges. See Tariff RATX

⁹ See Reply at 7-9 citing (Tariff RATX 6001, Item 470(I)); (Tariff MNA 6001 and 6001-B, Item 90); Savannah Port Terminal R.R.—Pet. for Decl. Order—Certain Rates and Practices as Applied to Capital Cargo, Inc., FD 34920 (STB served May 30, 2008) (Savannah Port).

6001, Item 450(C), and Tariffs MNA 6001 and 6001-B, Items 450(C)(1) and 455(C)(1). Demurrage is based on a 24-hour period, or part thereof (see Tariff RATX 6001, Item 410, and Tariffs MNA 6001 and 6001-B, Item 300); it begins to accrue when free time (24 hours for loading and 48 hours for unloading) expires; and it continues to accrue until the shipper releases the car (see Tariff RATX 6001, Item 470(A), and Tariffs MNA 6001 and 6001-B, Item 500(A)). No demurrage accrues if the shipper releases the car within the free-time period. See Tariff MNA 6001 and 6001-B, Item 455(C)(4).

Constructive placement under the MNA tariffs occurs when a rail car cannot be placed at the shipper's facility because of a condition attributable to the shipper (e.g., no room on tracks in the shipper's facility) and the railroad holds the car either at its destination or at another available point and gives notice to the shipper. See Tariff RATX 6001, Item 410; Tariffs MNA 6001 and 6001-B, Item 300; see also Capitol Materials, 7 S.T.B. at 584-85. Constructive placement is standard industry practice and is reasonable as long as the shipper's inability to accept available cars is not attributable to the action or inaction of the railroad. See Capitol Materials, 7 S.T.B. at 584-85.

Demurrage for constructively placed rail cars is also based on a 24-hour period, or part thereof. See Tariff RATX 6001, Item 410; Tariffs MNA 6001 and 6001-B, Item 300. Demurrage begins to accrue when free time expires and continues to accrue until the shipper releases the car. See Tariff RATX 6001, Item 450(C)(1); Tariffs MNA 6001 and 6001-B, Item 300; see also Capitol Materials, 7 S.T.B. at 584-85. Free time cannot begin to run, and as a result demurrage charges cannot accrue, until the railroad gives the shipper notice that the cars are available for placement, and if that is not the practice of the railroad, until the railroad gives the shipper notice of constructive placement. See Tariff RATX 6001, Item 420(B) ("verbally, in writing, or electronically"); Tariffs MNA 6001 and 6001-B, Item 300 ("verbally or in writing").

As a general matter, a railroad cannot collect demurrage charges on cars it has constructively placed for which it has failed to provide timely notice. But the record evidence does not show, nor do petitioners allege, that MNA failed to provide timely notice of constructive placement. Absent an enforceable agreement to the contrary, petitioners would be liable for demurrage on the cars for which they received timely notice of constructive placement.

2. Proof of Dates of Placement and Release. In a court action to collect assessed demurrage charges, the burden of proof is on the railroad to provide evidence of actual or constructive dates of car placement and release and to show how the assessed charges were computed. See, e.g., Unger—Pet. for Decl. Order—Assessment and Collection of Demurrage and Switching Charges, NOR 42030, slip op. at 9 (STB served June 14, 2000).

Petitioners originally contend that MNA had not provided proof of actual or constructive placement on 28 cars. See Opening Statement, V.S. of Andrea Grissom at 3. In response, MNA's submitted copies of faxes notifying petitioners of the constructive placement of these cars. See Reply at 12 and V.S. of James Tilley, Exhibit C. In response, petitioners acknowledge that "MNA has now furnished those records as part of its response See Rebuttal at 7.

Accordingly, based on the evidence submitted to the Board, we find that proof of constructive placement has been established by MNA.¹⁰

3. Private Cars Held on Private Track. As noted, demurrage charges compensate a railroad for the actions of a shipper that deprive the railroad of the use of its rail cars and/or track. See Chrysler, 234 I.C.C. at 759. Thus, demurrage charges may not be assessed when private rail cars are held on private track, because the railroad is not being deprived of any of its assets.

Petitioners contend that MNA assessed demurrage charges on privately owned rail cars, marked GNTX and GONX. They claim that the railroad industry classifies all freight cars whose reporting marks end in “X” as private cars, regardless of ownership, and that MNA’s tariff exempts from demurrage charges “loaded or empty private cars held on private or leased storage tracks.” See Tariff RATX 6001, Item 400(C)(6); Tariffs MNA 6001 and MNA 6001-B, Item 310(E). Petitioners argue that it is an unreasonable practice under 49 U.S.C. § 10702(2) for MNA to assess demurrage charges on these cars, and in the alternative that their collection would violate 49 U.S.C. § 11101(e) because demurrage charges are not applicable to these cars under MNA’s tariffs. MNA challenges petitioners’ characterization of these cars as private because they are owned by TTX Company (TTX). MNA also states that it was charged car-hire for the time these cars were on its track, making its assessment of demurrage appropriate.¹¹

MNA’s tariffs, like many others, define a private car as “A car bearing other than railroad reporting marks and which is not a railroad-controlled car.” See Tariff RATX 6001, Item 410; Tariffs MNA 6001 and 6001-B, Item 300. Although TTX is a private corporation, it is owned and controlled by Class I railroads. It owns, operates, and maintains freight cars and leases them as needed to its owner railroads.

TTX cars are railroad-controlled. When TTX cars are in the possession of, and being utilized by, individual railroads, they are under the control of that railroad. See TTX Co.—

¹⁰ Having acknowledged the records supporting the dates of actual or constructive placement, petitioners contend that the collection of demurrage charges on these cars is unreasonable because in all instances there were less than 15 cars in their yard at the time of constructive placement. See Rebuttal at 7-8.

¹¹ Railroads have historically provided cars to service widely dispersed shippers through what is known as a “car pooling system.” Under that system, railroad-owned cars move back and forth over the national rail system serving multiple shippers. Because a particular railroad-owned car may move over the lines of many carriers other than those of its railroad owner, carriers have established a system of paying for the use of each others’ cars, called the “car hire” program. Under that program, each carrier holding another carrier’s cars pays the owning carrier car-hire charges, called “per diem,” for the time the owning carrier’s cars are on the holding carrier’s tracks. Just as demurrage motivates a shipper to load and unload railroad-owned cars quickly, a holding carrier has an incentive to move “foreign” cars off of its tracks as quickly as possible to avoid paying excessive car-hire charges.

Applic. for Approval of Car Serv. With Respect to Flatcars, 7 S.T.B. 778, 792-93 (2004).

Although TTX cars may be placed in “shipper-controlled” pools where they are dedicated for the use of a particular shipper, see id., there is no indication in the record that the cars at issue were in such a pool. Because they are railroad-controlled and railroads must pay car-hire charges for the time they are in railroad control, it is not unreasonable for the railroad to assess demurrage charges when these rail cars are held beyond the free-time period. Accordingly, we find that the TTX cars do not fall under the demurrage exception for private cars in MNA’s tariffs and that MNA’s assessment of demurrage charges on these cars does not constitute an unreasonable practice.

4. Cars Held in MNA’s Yard in Anticipation of Petitioners’ Orders. As indicated, demurrage is intended to compensate railroads for the expenses they incur when rail cars are detained by shippers and to penalize shippers for undue car detention. See Chrysler, 234 I.C.C. at 755. Cars held in a railroad’s yard in anticipation of a shipper’s order, if held for the convenience of the railroad and not at the request of the shipper, are not detained by the shipper and therefore are not subject to demurrage charges. Accordingly, it would be an unreasonable practice for a railroad to assess demurrage on such cars.

In their submissions to the Board, petitioners have not offered evidence or argument to support a claim that MNA assessed demurrage on cars that were held in MNA’s yard in anticipation of orders by petitioners. Accordingly, petitioners have failed to establish that demurrage was improperly assessed based on this claim. The Board will not address how this issue might be resolved based on facts that may be before the courts but are not before the Board.

5. Cars Not Delivered Because of MNA’s Own Disability. As noted earlier, actual placement occurs when the railroad places a rail car in an accessible position for loading or unloading or at a point designated by the shipper, and constructive placement occurs only when a rail car cannot be placed at the shipper’s facility because of a condition attributable to the shipper. Free time cannot run, demurrage cannot accrue, and charges may not be assessed if a railroad’s own disability prevents the actual or constructive placement of a rail car.

In their submissions to the Board, petitioners have not offered evidence or argument to support a claim that MNA assessed demurrage on cars that were neither constructively nor actually placed due to an MNA disability. Accordingly, petitioners have failed to establish, on the record before us, that demurrage was improperly assessed based on this claim. Again, the Board will not address how this issue might be resolved based on evidence that may be before the courts but is not before the Board.

OTHER ISSUES

The parties have also asked us to resolve a number of other issues not raised in the court referrals. We address those issues below.

1. Cars Containing Railroad-Owned Freight. Petitioners argue that it is an unreasonable practice under 49 U.S.C. § 10702(2) and MNA’s tariffs for MNA to assess demurrage charges on

cars containing railroad-owned freight. MNA's tariffs provide that demurrage charges may not be assessed on cars moving the railroad's own material. Specifically, Tariff RATX 6001, which was applicable from January 1 through July 31, 2005, defined "Railroad" broadly to include not only MNA but the 23 other railroad subsidiaries of RailAmerica, see Item 400(C), and provided in Item 400(C)(1) that demurrage charges could not be assessed on "Cars for loading or unloading of 'Railroad' company material while held on 'Railroad' tracks or private sidings connecting therewith." Similarly, Item 310 of Tariffs MNA 6001 and MNA 6001-B, which was applicable from August 1, 2005 through January 31, 2007, provided that demurrage charges could not be assessed on "Cars for loading or unloading of MNA company material while held on MNA tracks or private sidings connecting therewith."

Petitioners' argument is based on an interrogatory to MNA which asked why, in a meeting held on or about June 6, 2006, MNA communicated to a Railroad Salvage representative MNA's willingness to waive the collection of \$65,715 in demurrage charges on 49 cars. Petitioners contend that MNA responded that "In June, 2006 billing adjustments were made to the specific cars in question to reflect the fact that the cars in question moved railroad owned material and the Class I [railroad] provided economic relief to MNA in order to avoid the imposition of demurrage charges." See Opening Statement at 6 and V.S. of Grissom at 2 and Appendix AG-3.

In reply, MNA states that its interrogatory response accurately reflected the statements of MNA officials at a particular meeting, but that the statements themselves were inaccurate. It claims that it subsequently discovered that demurrage charges were assessed on the 49 cars because 47 of them were outbound revenue movements containing petitioners' railroad scrap and the other 2 were inbound movements for which it incurred car-hire charges. MNA notes that, in June 2006, it gave Railroad Salvage \$89,810 in demurrage relief for cars containing railroad-owned freight, but that this relief was not for the 49 cars at issue here. See Reply, V.S. of Tilley at 48 and Table 1. And even if petitioners can show that a Class I railroad granted car-hire relief, MNA argues that the relief could have been granted for any number of reasons that would not make its assessment of demurrage charges unreasonable.

As a preliminary matter, given the inconsistency between MNA's discovery response and its reply evidence, MNA should have submitted a corrected interrogatory response to petitioners. We admonish parties to follow the Board's regulations on discovery. See 49 C.F.R. § 1114.29 ("A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.").

MNA's tariff exceptions for railroad-owned freight did not extend to the freight of Class I railroads. In any event, based on the evidence submitted to the Board, petitioners have not established that all of the 49 cars carried railroad-owned materials as defined by MNA's tariffs.¹²

¹² MNA notes that petitioners identified three cars that "appear to contain M&NA company material . . . [that s]uch cars are excepted from demurrage . . . [and] that demurrage should be reduced by \$4,900 . . ." See Reply, V.S. of Tilley at 53. MNA does not identify the cars or otherwise explain this statement.

The sole evidence petitioners offered to support their claim that demurrage was improperly assessed was the interrogatory response that MNA essentially disavowed by verified statement and supporting evidence.

Moreover, it is not clear that MNA received car-hire relief from a Class I railroad to offset demurrage charges on the 49 cars. But even if it did, MNA was under no obligation to pass the relief on to petitioners in the form of reduced or waived demurrage charges unless required to do so by MNA's tariffs or the parties had an arrangement or understanding to this effect. Petitioners have not introduced evidence of such a tariff exception or an understanding into the record. Thus, based on the evidence submitted to the Board, petitioners have not met their burden to establish that MNA improperly assessed demurrage charges on these 49 cars.

2. Wrongful Constructive Placement. Petitioners claim that the assessment of demurrage charges on many of the rail cars that were not actually placed on Railroad Salvage's track is unreasonable. They contend that MNA constructively placed rail cars at times when actual placement was possible. According to petitioners, there is enough track at and near Railroad Salvage's metal materials yard to hold 63 rail cars. Allowing for the efficient movement of cars for loading, unloading, and staging, petitioners claim that they "can easily accommodate at least 15 railcars at the metal materials yard before the ability to move those cars within the yard would be impacted." See Opening Statement, V.S. of Jackson at 2. Thus, petitioners argue that rail cars should not have been constructively placed unless 15 or more rail cars were on Railroad Salvage's tracks when new cars were tendered for placement. Relying on a spreadsheet they developed from documents and responses MNA provided in discovery, petitioners contend that the assessed demurrage charges should be reduced to eliminate car-days under constructive placement for 99 rail cars that allegedly were constructively placed when there were 15 or fewer cars on Railroad Salvage's tracks.¹³

MNA contends that petitioners' position on constructively placed cars is simplistic and unrealistic, particularly because a car count does not address the positioning of cars or the ability of track to accept additional cars. MNA argues that, by using a car count to find room to place freight cars on Railroad Salvage's track, petitioners' analysis overlooks: (1) whether placing more cars would have caused gridlock and required additional switch moves at petitioners' expense; (2) how the cars were spaced relative to each other; and (3) whether the available track may have been blocked by other cars located on track near the connection with MNA. Additionally, MNA faults petitioners' analysis for assuming that the cars actually placed on Railroad Salvage's tracks are moved the very next day, and MNA questions how petitioners determined that there were 15 or fewer cars on Railroad Salvage's track. See Reply at 13, and V.S. of Tilley at 53 and 56.

¹³ Petitioners' spreadsheet is a line-by-line study of all 347 cars at issue here. As pertinent to constructively placed cars, the spreadsheet shows the date of constructive placement and the number of cars in Railroad Salvage's yard on the date of constructive placement. Petitioners attribute this data to an MNA document titled "Cars Placed at Customer Facility," but a copy of this document shows no data on the number of cars in Railroad Salvage's yard. See Opening Statement, V.S. of Grissom at 3-4 and Appendices AG-1 and AG-6.

As noted, a railroad generally cannot claim demurrage for any rail car based on constructive placement unless notice was correctly issued for the proper reasons, see Capitol Materials, 7 S.T.B. at 585, and there was no agreement or course of conduct excusing shippers from the dispute provisions of the railroad's tariffs. Here, petitioners provide circumstantial evidence that the number of cars in their yard supports an argument that they could actually have accepted cars that were constructively placed. In other words, petitioners argue that since they had space for more rail cars, it was unreasonable for the carrier to constructively place those cars at a remote location, rather than to just deliver those cars to the shipper's facilities.

The problem with petitioners' argument is that they did not object to MNA's notices of constructive placement¹⁴ when they assert they had the space and ability to accept those cars that were constructively placed¹⁵ MNA's demurrage tariff provides that cars may be constructively placed because of any condition attributable to the consignor or consignee . . ." Opening Statement, VS of Grissom, Appendix 4. Petitioners have submitted no evidence that MNA's constructive placement of these rail cars reflected anything other than MNA's determination that it was not feasible to actually place the cars at that time. Nor does the record establish that petitioners ever informed MNA that they could accept rail cars whenever there were fewer than 15 cars on their property. Absent a contrary general indication, or specific indications, from petitioners that they could accept actual placement of these cars, it was not unreasonable for MNA to rely on its own determination regarding the feasibility of actual placement.¹⁶ Accordingly, we find that petitioners have not met their burden to establish that MNA's constructive placement of these 99 rail cars was unreasonable.

3. Cars Placed on Tracks not Owned by Petitioners. Petitioners argue that it would be unreasonable to allow MNA to collect demurrage charges on 3 rail cars that were constructively placed on tracks not owned or controlled by petitioners. They contend that MNA has failed to explain the location of these tracks and the reasons for the constructive placements. MNA

¹⁴ As noted, we do not decide here whether the parties modified the dispute resolution provisions of the MNA tariffs by their course of conduct. In the absence of a court finding that the tariffs were modified, we assume, for purpose of addressing this issue, that the tariffs apply. See Capitol Materials, 7 S.T.B. at 581.

¹⁵ We assume here, for the sake of argument, that petitioners had the ability to accept the railcars that were constructively placed. But as MNA points out, there are many conditions beyond mere car numbers that could affect a shipper's ability to accept cars. Moreover, petitioners do not adequately explain how they were able to determine after the fact that fewer than 15 cars were on Railroad Salvage's track at any specific time.

¹⁶ While it appears that MNA faxes notice of its decision to constructively-place cars, it is not clear whether MNA first gives availability notice (i.e. that MNA has the cars and is ready to deliver them) before making constructive placement decisions. If it was MNA's practice to give availability notice and there was sufficient room on petitioners' property to accept cars, petitioners could have responded to MNA's availability notice by requesting that the cars be delivered, thereby avoiding constructive placement.

responds that it had to place the rail cars on track not owned by petitioners because there was no room on Railroad Salvage's track and that it had to charge demurrage because petitioners exceeded the free time for loading and unloading.

Railroads may constructively place rail cars on tracks not owned or controlled by the shipper if the cars cannot be placed at accessible positions for loading or unloading, or at a point designated by the shipper. Item 410 of Tariff RATX 6001 provides for holding constructively placed rail cars on "railroad" tracks, and Items 300 and 310 of Tariffs MNA 6001 and MNA 6001-B provide for holding constructively placed rail cars "on MNA tracks." Although MNA has not identified the exact location of where the cars were stored, the exact location of constructively placed rail cars is not material for purposes of computing demurrage charges as long as actual placement was not possible and proper notice of constructive placement was timely given.

4. Interest. Petitioners contend that the interest rates in MNA's tariffs (1% per month under Item 470(J)(1) of Tariff RATX 6001 for the 7-month period extending from January 1, 2005 through July 31, 2005, and 2% per month under Item 90 of Tariffs MNA 6001 and 6001-B for the 18-month period extending from August 1, 2005 through January 31, 2007) for the late payment of demurrage charges are unreasonably high and constitute an unfair penalty. Citing Grand Trunk W. R.R. v. Bliss Laughlin Indus. Inc., 1990 U.S. Dist. Lexis 8742 at 34-35 (Grand Trunk), they argue that a reasonable rate of interest that makes a carrier whole in a demurrage case is the treasury bill rate. Petitioners' reliance on Grand Trunk, however, is misplaced. In that case, the applicable tariff apparently did not provide an interest rate that would apply in connection with the collection of demurrage charges. In the absence of a tariff interest rate, the court simply found that the treasury bill rate would be an "appropriate" interest rate. Id. at 35. The court was not ruling on whether the carrier could have charged a higher rate, had one been in the tariff (as it was here).

Petitioners also request that we declare the assessment of 2% per month interest to be an unreasonable practice. They claim, without explanation, that the interest charged by MNA exceeds the rate adopted in the Board's regulations.¹⁷ But the interest provision in our regulations is for use in a different context. The interest rate component of our awards is meant only to compensate the shipper for the lost use of money that it has properly paid to the carrier before initiating a claim for damages,¹⁸ and to do so at a rate that is objective and readily

¹⁷ When the Board awards damages, it computes interest at "the coupon equivalent yield (investment rate) of marketable securities of the United States Government having a duration of 91 days (3 months)." See 49 C.F.R. § 1141.1(a); Notice of Revised Procedures to Calculate Interest Rates (served and published at 42 FR 20701 on Apr. 18, 1977).

¹⁸ Under the Interstate Commerce Act and our regulatory framework, a shipper that receives rail service is expected to pay the charges assessed for those services under a lawful tariff, and then to proceed to litigation if it wishes to dispute the charges. See Peale v. Central R.R. Co. of N.J., 18 I.C.C. 25, 33 (1910) (ICC would not enjoin collection of tariff charges pending litigation: "The law lays upon the carrier the obligation to collect and upon the shipper to pay the lawful tariff charges.")

determinable after the fact. It was not the agency's intent, in adopting that regulation, to address what a rail carrier could assess as interest charges on unpaid balances when it extends credit to a shipper, much less what it might be allowed to assess a delinquent shipper where, as here, it faces the necessity of taking a collection action.

Neither the Interstate Commerce Act nor the Board's regulations dictate the level of interest or finance charges that a railroad may assess in its tariffs. MNA argues that the interest rates set out in its tariffs are not unreasonable compared to those that apply to credit card balances. We note that it is not unusual for railroad tariffs to assess finance charges on unpaid freight balances of 1%-1.5% per month (12%-18% per annum). See, e.g., Canadian Pacific Railway Tariff 2, Item 94, issued Dec. 1, 2008 (1% per month or 12% per annum on all overdue charges for supplemental services including demurrage); The Kansas City Southern Railway Company Tariff 9011-G, Item 130, issued Dec. 16, 2008 (1.5% per month or 18% per annum for freight charges or other charges); CSX Transportation Inc. Tariff 8100, Section XVI, Item 16030, issued May 1, 2006 (12% per year on overdue line haul freight charges).

Here, Railroad Salvage, an unsecured creditor that MNA claims has a history of non-payment, is being asked to pay interest at the rates of 1 and 2% per month. Because Railroad Salvage has not presented a reasoned analysis or even addressed industry practice, it has not established that these interest charges are unreasonable or that their assessment by MNA constitutes an unreasonable practice.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Railroad Salvage's request to withdraw its request for leave to voluntarily withdraw its petition for a declaratory order is granted.
2. Petitioners' requests for declaratory orders are granted to the extent specified above, and this consolidated proceeding is discontinued.
3. This decision is effective on its service date.
4. Copies of this decision will be mailed to:

The Honorable Dean Whipple
United States District Court for the Western District of Missouri Southwestern
Division
400 E. 9th Street
Kansas City, MO 64106

RE: No. 07-5017-CV-SE-DW

and

The Honorable David C. Dally
Circuit Court of Jasper County
Jasper County Courthouse
Carthage, MO 64836

RE: No. 07AO-CC00112

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