

INDEPENDENT FUEL TERMINAL OPERATORS ASSOCIATION

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AUG 24 2012

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August 24, 2012

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Surface Transportation Board
Attn: EP 707
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Notice of Proposed Rulemaking on Demurrage Liability

Dear Sir or Madam:

Enclosed please find an original and ten copies of comments on the Surface Transportation Board proposed rulemaking on Demurrage Liability (Docket No. EP 707).

Respectfully submitted,


Andrea Grant
Counsel

Enclosures

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COMMENTS
OF
THE INDEPENDENT FUEL TERMINAL OPERATORS ASSOCIATION
BEFORE THE
SURFACE TRANSPORTATION BOARD
ON
DEMURRAGE LIABILITY
Docket No. EP 707
August 24, 2012

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The Independent Fuel Terminal Operators Association (“IFTOA”)¹ hereby submits comments to the Surface Transportation Board (“Board”) regarding its Notice of Proposed Rulemaking relating to “Demurrage Liability.”² The Association appreciates the Board’s efforts to provide clear guidance to the regulated community regarding liability for railroad demurrage. However, current practices in the market already adequately deal with this issue, and independent, third-party intermediaries (terminals) fear that the proposed rule might (1) impose an unacceptable operational and costly compliance burden on them to avoid otherwise inapplicable demurrage liability; and (2) result in terminals paying demurrage charges far more often than they do today for delays that conduct by the terminal did not cause.

Accordingly, IFTOA strongly recommends that the Board withdraw the proposed rule and allow current market practices to continue. In the alternative, the Association asks the Board to clarify the proposed rule, confirming a current industry practice, described below, regarding notification to the serving railroad. Such confirmation is necessary to ensure the rule achieves the fairness and uniformity sought by the Board on this issue, but at the same, does not impose an unnecessary burden on third-party intermediaries (terminals).

I. Terminal Operations/Delays Caused by Rail Carriers

A. Terminals -- Agents for Shippers

Members of the Association operate petroleum terminals from which refined petroleum products such as gasoline and diesel fuel are sold and distributed. Many of the terminals routinely receive railcars of ethanol for blending with gasoline blendstock to produce finished gasoline. The terminal often acts as a third-party intermediary that handles the merchandise but has no property interest in the cargo. In those instances, when the terminal receives the goods, it is acting as an agent for the shipper -- the rail carrier’s customer. Typically, a train will include a substantial number of individual, manifest cars -- each car will be accompanied by its own paperwork (bill of lading) and must be processed separately. The terminal has every incentive to unload the cars as expeditiously as possible, move the ethanol into the distribution system, and return the cars to the serving carrier.

B. Rail Carrier Actions -- Delays

However, rail carriers, not the terminal, are often the source of delays. For example, despite the fact that a terminal may only have the capability to receive and unload 8 cars per day, it is not uncommon for a serving railroad, with full knowledge of the terminal’s capacity, to deliver 16 or more cars on a single day. Frequently, to facilitate their own operations and reduce costs, rail carriers hold cars they have

¹ IFTOA is an association of independent terminals that engage in the distribution of refined petroleum products.

² 77 Fed. Reg. 27384 (May 10, 2012).

received from shippers for several days and then bunch together for delivery to the independent terminal. Often, they provide no notice of placement so the terminal cannot notify its crews and prepare for these deliveries. These practices delay the return of the equipment. However, these delays are not the fault of the terminal, and the terminal should not be punished for actions over which it has no control.

C. Proposed Rule -- False Assumption Regarding Equal Market Power

The proposed rule assumes that if a rail carrier posts a tariff explaining its demurrage policy, the third-party intermediary (the terminal) may be held liable for demurrage unless the terminal has notified the rail carrier that it is acting as an agent and has identified its principal (the shipper). Moreover, the rule contemplates that the parties may enter into contracts pertaining to demurrage and be governed by those agreements in lieu of the posted tariff. These provisions imply that the Board believes that the parties engaged in shipment of merchandise -- (1) the shipper; (2) the third-party intermediary (the terminal); and (3) the rail carrier -- all have roughly equal power in the market and can make appropriate arrangements regarding which party should bear demurrage charges if delays occur beyond the free time. This is an incorrect assumption.

If a rail carrier causes delays (e.g. bunches cars or provides no notice of placement) a terminal cannot stop dealing with the carrier. It has no choice or alternative in the market. It cannot go elsewhere for its railroad services. Usually, there is only one carrier that has access to the tracks. Without the ability to "walk away" from a supply/transportation arrangement, the terminal has little or no leverage. It must work with the carrier. Therefore, as discussed below, the current industry practice regarding demurrage liability provides a greater degree of equity and should be maintained.

D. Current Market Practices

Currently, terminals work under approximately four types of typical arrangements with carriers. First, the serving rail carrier simply delivers cars, at its discretion, to the terminal, and the carrier indicates that it has no responsibility for delays once it has placed the cars. Second, the carrier brings cars to the terminal's track, and the terminal and carrier work, in a somewhat, cooperative manner to arrange deliveries, unloading and return of equipment. Third, the terminal makes all of the arrangements to pick up cars, and the carrier does not assist with the process. Fourth, the parties operate under the terms of a posted tariff that is accompanied by a posted agreement. In most of these situations, the contract with the carrier does not address demurrage liability.

As a result, the market has adjusted and provided its own approach to the issue of demurrage. In almost all instances, the rail carrier has a contract with its customer, the shipper of the ethanol. If delays occur and the cars are not returned within the free time, the carrier will seek demurrage payment from its customer. In turn, the customer/shipper will seek reimbursement for such charges from its agent, the terminal, but only if the shipper believes that the terminal caused the problem. Indeed, shippers

generally understand the problems terminals face as a result of rail carrier actions. Therefore, frequently, shippers pay the demurrage charges, recognizing that it is a cost of doing business. Thus, the market has established its own mechanism for dealing with demurrage. This system has been working well for years, and it does not impose demurrage charges on independent, third-party intermediaries unless the delays relating to unloading and returning of the equipment are the fault of the terminal.

Recommendation: Accordingly, the Association believes that this market-created approach should continue. The Association recommends that the Board withdraw its proposed rule. It should not establish new rules and guiding principles in this area.

II. Notification Requirement Clarification

The Board's proposed section 1333.3 provides:

Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with 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 that person has provided the rail carrier with actual notice of the agency status and the identity of the principal.

Emphasis added.

Under current industry practice, many third-party intermediaries (terminals) already follow this rule and have done so for the past several years. When a third-party intermediary (terminal) first enters into a contract with a new customer to act as that party's agent and to receive railcars on its behalf, the terminal notifies the serving rail carrier that (1) it has no economic interest in the commodities being delivered; (2) it is acting only as an agent for the principal/customer; and (3) it identifies the principal for which the commodities are to be received. When the contract between the terminal and the customer ends, the terminal notifies the serving rail carrier regarding that event. If delays occur, the principal/customer of the goods pays the demurrage, and only if it believes that the delays were caused by the third-party intermediary, does the principal/customer seek reimbursement. This approach has been working well for several years and has minimized demurrage disputes.

If, however, the proposed rule were to require more frequent and specific notifications to the rail carrier, such a rule would prove to be very costly and burdensome. A typical, good-sized terminal may have 60 or more cars delivered each day. These cars may have been shipped by as many as 30 or more shippers. Thus, more frequent and specific notifications would be time-consuming, demand significant

organization and impose costs on the terminal in an effort to avoid future liability for which the terminal may have no fault.

Recommendation: Accordingly, the Association recommends that if the Board decides to promulgate its rule, it should confirm that the rule is an adoption of existing industry practice: When the terminal and the principal/customer first enter into a contractual agreement, the terminal will (1) notify the serving rail carrier that it is acting solely in an agency capacity to the transaction, and (2) identify the principal/customer to the transaction.

III. Conclusion

The Association commends the Board for its efforts to bring clarity and uniformity to the issue of demurrage liability. However, the Association believes that the market has already adopted a workable solution to deal with delays and the associated demurrage charges. No new rule is necessary and, indeed, would cause unintended economic harm. Thus, the Association recommends that the Board withdraw its proposed rule.

In the alternative, if the Board proceeds with the rulemaking process and decides to adopt the rule, the Board should confirm that it is simply adopting existing notification practices. When a third-party intermediary enters into a contract to receive goods for a party, the terminal should (1) notify the rail carrier that the terminal is acting only as an agent; and (2) identify the principal to the transaction.

The Association believes that these recommendations will promote greater fairness in the industry and avoid imposing unnecessary burdens on third-party intermediaries, particularly in those situations where they do not cause the underlying delays that trigger demurrage charges.

* * *

Thank you for your consideration.