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

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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 Reply Comments of the International Warehouse Logistics Association for filing in the above proceeding.

Respectfully submitted,

Charles D. Nottingham

Attachment

ORIGINAL

232014



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE
INTERNATIONAL WAREHOUSE LOGISTICS ASSOCIATION

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Office of Proceedings

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September 21, 2012

INTRODUCTION

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 NPR requested comments and reply comments on the Board’s proposal. The International Warehouse Logistics Association (IWLA), on behalf of its 500 member businesses and their 100,000 employees, submits these reply comments in response to the Board’s May 7, 2012 NPR.

The IWLA filed opening comments on August 24, 2012. In its opening comments, the IWLA expressed strong support for the Board’s proposed rule. The IWLA also requested that the Board supplement its proposed rule to clarify that proper notice of constructive placement (the concept whereby rail carriers assign demurrage liability based on rail car receivers’ alleged inability to receive rail cars) must be based on an element of reciprocal actual notice – consistent with the proposed rule’s requirement of reciprocal actual notice in cases of actual placement demurrage liability. Specifically, the IWLA requested that the proposed rule be clarified to state that when a rail carrier is aware of a rail car receiver’s reasonable operational

or capacity constraints, yet initiates delivery of rail cars that exceed those constraints, then the rail carrier should be prohibited from claiming constructive placement demurrage liability. Rail carriers should be required to afford rail car receivers with an opportunity to respond to claims of constructive placement with an explanation of any reasonable facts or circumstances that prevented rail car receipt.

Additionally, the IWLA's opening comments requested that the Board add language to its proposed rule encouraging the use of private contracts to address demurrage liability. IWLA also urged the Board to encourage mediation, arbitration and the use of the Board's Rail Customer and Public Assistance Program to resolve demurrage disputes in a less costly manner.

The Board received a wide variety of comments on its proposed rule from a number of interested parties. The IWLA is confident that the Board will have no difficulty addressing most of the comments it has received. Rather than reciting and responding to every comment by every party, the IWLA will focus these reply comments on the issues of top concern to IWLA's members.

DISCUSSION

I. Comments of the Association of American Railroads

The Association of American Railroads' (AAR) comments deserve support in some cases and clarification or opposition in others. AAR's comments seem to support "...a proposal that recognizes the existing liability for demurrage based on designation in the bill of lading...." August 24, 2012 AAR Comments at 5 ("AAR Comments"). This comment appears to be contrary to the Board's clear statement in its NPR that "(b)ecause warehousemen and other

third-party receivers are often not signatories to the bill of lading, we do not believe that the bill of lading should be the contract that establishes demurrage liability.” NPR at 12. The IWLA supports the Board’s position on this issue and opposes AAR’s comment. The Board’s rationale for rejecting the use of bills of lading as the contract establishing demurrage liability is thoughtful and fully supported in its NPR. The IWLA urges the Board to remain resolute on this issue and to be wary of efforts by the rail industry to minimize the significance of the NPR by characterizing the NPR as not applying to any existing legal basis for liability. For example, AAR’s comments request that “...the Board should clarify that this proposed rule does not remove any existing legal basis for liability.” AAR Comments at 12. IWLA believes that AAR’s comment on this issue would undercut and render meaningless the Board’s proposed rule.

AAR’s comments also recommend that the Board abandon its proposed actual notice requirement. IWLA supports the NPR’s actual notice requirement and, accordingly, opposes AAR’s recommendation that it be abandoned. IWLA is willing to work in good faith with AAR and its members to improve lines of communication to ensure that the actual notice requirement is easy to implement. In the experience of IWLA’s members, freight rail carriers have no trouble communicating with rail car receivers when they choose to do so. In the event that rail carriers wish to structure their relationship with rail car receivers in a manner that is inconsistent with the NPR, then the proper way to do so is through contractual negotiations. IWLA strongly supports private contractual agreements between rail car receivers and rail carriers as the most efficient and flexible way to address concerns regarding demurrage liability and the efficient turnover of rail cars.

IWLA also supports the Board's proposal that "(a) rule holding that warehousemen are bound by rail carrier tariffs because they could learn about them if they tried to do so is not acceptable." NPR at 13

AAR's comments set forth a fallback position whereby rail carriers would only be required to send rail car receivers an electronic link by e-mail to a demurrage tariff available online. AAR Comments at 7. In the event that a rail carrier demurrage tariff is changed, then AAR proposes that its members only be required to notify rail car receivers that a change in the tariff has occurred, along with a description of the "material changes to the tariff." AAR Comments at 8. Although many IWLA members would prefer to receive the complete text of demurrage tariffs directly from rail carriers, IWLA is not seeking to be unnecessarily adversarial in this proceeding and therefore will support a modified actual notice mechanism, as follows. An e-mail link to the full text of a tariff would be acceptable to IWLA so long as a brief summary of the key, material provisions of the tariff are outlined in narrative form in direct communication to rail car receivers, along with the electronic link. These material provisions would include: 1) the amount of time a rail car receiver has to return rail cars and avoid demurrage liability; 2) any exceptions or extensions to the demurrage liability time-line; 3) the name, address, e-mail address and telephone number of the rail carrier employee who is authorized to respond to questions or concerns about the tariff or about a specific demurrage liability assessment; and 4) any other material information that the Board deems appropriate. Similarly, when tariffs are changed, notice of the change and a summary of the material changes would represent sufficient actual notice.

AAR also recommends that the Board abandon another key protection afforded to railcar receivers and handlers in the NPR – the provision allowing rail car receivers who are acting as agents of a source shipper to notify their rail carrier of their agency status and the identity of their principal and therefore be protected from demurrage liability. AAR asserts that a rail car receiver might only have agency status for some rail cars in a single shipment while other rail cars from the same source shipper might not be entrusted to the receiver as an agent. AAR claims that this would trigger the need for “...a car-by-car transfer of information between the receiver and the railroad that is simply beyond the capability of some railroads’ electronic data systems.” AAR Comments at 10. AAR also asserts that the NPR would result in source shipper/principals disclaiming that they had notice of their status as principals in order to evade demurrage charges.

IWLA supports the NPR’s treatment of the agency issue and strongly objects to AAR’s attempt to eliminate this balanced and thoughtful provision of the NPR. If the Board is concerned with the practical workings of the agency notification process, then the NPR could be amended to require that rail car receivers acting as agents notify their rail carrier in a one-time, comprehensive manner for each source shipper/principal. This notification should be in advance of any rail shipment and should describe which types of rail cars and commodities are covered by the agency status. IWLA members have no objection to providing the identity of their principal/source shippers to rail carriers. IWLA members maintain excellent lines of communication with their source shipper/principals and are highly incentivized to avoid any miscommunication on the principal-agent relationship as such a miscommunication could result in the loss of future business for the warehouse operator. There is no need for the Board to

expand the scope of the NPR, however, to micromanage relations and communications between rail car receivers and their source shipper customers. The rail car receiver relationship with source shippers is typically defined by private contract and is a relationship that goes beyond rail transportation and the Board's jurisdiction. Further, there is nothing in the record to indicate that there is a problem in this regard that calls for Board action. Rail car receivers are highly incentivized to maintain good lines of communication with their source shipper customers and would have no reason to risk losing a customer by inaccurately claiming agency status.

II. Comments of the National Industrial Transportation League

The National Industrial Transportation League's (NITL) comments focus on the question of appropriate notice to source shippers when they are being identified as principals. NITL's members are valued customers of IWLA's members and, as such, IWLA is committed to working in good faith and closely with NITL to address any concerns regarding demurrage liability. There is no doubt on the part of IWLA that its members will make sure that no source shipper principal is ever surprised to learn of its status as principal. IWLA members would be quickly out of business if they failed to honestly and clearly communicate with their customers. The question the Board should consider in this regard is whether NITL has effectively described a real problem and, if so, is this a problem the Board should address or is it the type of potential problem that can best be addressed by market forces and private contract.

IWLA has no objection to NITL's recommendation that once rail carriers are notified of an agent-principal relationship relating to demurrage liability, then rail carriers should be

obligated to notify the named principal of the demurrage tariff. August 24, 2012 NITL Comments at 7. This obligation can easily be met by the railroad sending an electronic link via e-mail, along with a brief description of material terms.

In response to NITL's assertion that an ambiguity exists regarding the mechanics of how actual notice would be provided, (NITL Comments at 6) IWLA supports the use of one-time, blanket notice.

III. Comments of the American Short Line and Regional Railroad Association

The American Short Line and Regional Railroad Association (ASLRRA) asserts in its comments of August 24, 2012 that the NPR is too burdensome on small railroads. ASLRRA states that any requirement of written communication by small railroads to rail car receivers would "...place a new burden on the small carrier..."(ASLRRA Comments at 3). ASLRRA also asserts that "...small railroads, particularly those who are acting as handling lines, may not even know who the receiver is." *Id.*

IWLA members generally enjoy excellent relations with small railroads and do not wish to see any unreasonable new burdens imposed on them. Most IWLA members are also smaller businesses who are too often faced with burdensome regulation or uneven bargaining power in the marketplace. IWLA believes, however in the simple, fair-minded proposition that if a business intends to charge monetary penalties to another business that it regularly serves, then common decency should provide that this intent be communicated in writing. IWLA would support the Board adopting a more flexible notice standard for small railroads. In specific, a short written summary of the key, material terms of demurrage liability should be all that is

required of Class III railroads. IWLA further notes that when smaller railroads seek to collect demurrage penalties from IWLA members, the smaller railroads seem to have no problem identifying and writing to the rail car receiver to request payment.

IV. Comments of Kinder Morgan Terminals

IWLA takes exception to the assertion by Kinder Morgan Terminals that the NPR is a proposal sought by no industry participant. August 24, 2012 Kinder Morgan Terminals Comments at 12. IWLA commends the Board for dedicating significant time and Board resources towards resolving a set of issues that have resulted in a split in the federal circuit courts of appeals as well as great hardship on warehouse operators. While IWLA would have drafted the NPR in a slightly different manner to focus more on constructive placement and the need for more contractual arrangements, IWLA nevertheless applauds the Board's initiative in this proceeding.

Kinder Morgan also asserts that the NPR is a solution in search of a problem. *Id.* This claim is inconsistent with Kinder Morgan's earlier description of the burdens it endures under current demurrage liability practices. As described on page 3 of Kinder Morgan's comments: "Despite Kinder Morgan's lack of operational control, rail carriers continually bill Kinder Morgan, and not the shipper or consignee, for demurrage charges." Kinder Morgan's own description of its travails under current demurrage policy provides a strong rationale and justification for the Board to proceed with the NPR in keeping with its broad statutory authority to oversee the rates and practices of the freight rail industry.

Kinder Morgan's comments also question the need for this rulemaking because "...demurrage liability is easily handled through contracting." *Id.* This comment assumes that rail carriers are currently incentivized to address demurrage liability issues via contract rather than in unilaterally imposed tariffs. While IWLA strongly favors contractual resolution of demurrage liability terms, far too often rail carriers seem to favor the tariff approach which allows the carrier to unilaterally set the terms of the liability arrangement. Without a commitment by rail carriers to pursue contractual agreements, rail car receivers lack a willing partner in contract. The Board's proposal, by setting forth basic protections and guidelines for rail car receivers, should encourage increased contractual negotiations and private resolution of demurrage disputes.

V. Comments of the Union Pacific Railroad Company

Union Pacific's (UP) comments seek clarification in the proposed rule to require rail car receiver/agents to notify their rail carrier of their agency status prior to delivery of rail cars to the receiver/agent. August 24, 2012 Comments of UP at 8. This is a reasonable request which IWLA supports. UP also requests clarification that a blanket disclaimer from a receiver that it is always an agent would not be adequate notice of agency status. *Id.* IWLA agrees that a generic, vague blanket notification of agency status is insufficient. IWLA notes, however, that many rail car receivers only have a few source shipper customers and often receive only a very specific type of shipment. In these situations, it would be efficient and reasonable for a receiver to notify a carrier that all shipments of a specific commodity or rail car type from a specific, named source principal are governed by an agent-principal agreement. IWLA urges the Board

to take this example into account in the event that it opts to address the blanket notice of agency issue.

IWLA agrees with UP's statement that "UP is not suggesting that a receiver-agent should be required to provide agency notification on a shipment-by-shipment basis." UP Comments at 9.

VI. Comments of BNSF Railway Company

BNSF seeks clarification from the Board that the bill of lading can continue to be used to allocate demurrage liability. August 24, 2012 Comments of BNSF at 3. The NPR is clear on this issue and requires no clarification. There is simply no ambiguity and therefore no need for clarification in the NPR's statement that "(b)ecause warehousemen and other third parties are often not signatories to the bill of lading, we do not believe that the bill of lading should be the contract that establishes demurrage liability." NPR at 12. Again, IWLA urges the Board to remain resolute on this critical issue. Following BNSF's comments to their logical conclusion would place rail car receivers and other third parties in the untenable and unreasonable position of being subject to multiple systems of demurrage liability, including via the bill of lading which they are not a party to. Such a liability regime would certainly increase demurrage liability disputes with resulting costs to all parties concerned.

VII. Comments of CSX Transportation, Inc.

In addition to comments similar to other rail carrier interests that have already been addressed in this reply, CSX sets forth some distinct recommendations that deserve response.

CSX raises a concern that rail car receivers might provide inaccurate information to a rail carrier about the identity of the principal in a principal-agent relationship. August 24, 2012 Comments of CSX at 13. While the record in this proceeding does not establish that this is a problem requiring Board attention, IWLA does not object to being held responsible for the accuracy of its agency notification to rail carriers so long as any disputed information is actually material to the rail carrier's ability to contact the principal and to assign demurrage liability. An incidental, non-material error or minor discrepancy or typographical error should not give rise to a rail carrier "hounding" a receiver/agent for demurrage penalties.

If the Board decides to address CSX's concern on this issue, it would only be fair to hold rail carriers responsible for inaccurate or unreasonable claims of actual placement or constructive placement demurrage liability. Inaccurate or unreasonable demurrage claims cost rail car receivers significant time and money. If the Board chooses to address CSX's concerns, then it should also clarify that rail car receivers may bring unreasonable or inaccurate demurrage claims to the Board's Rail Customer and Public Assistance Program and seek mediation to secure corrective action and cost reimbursement by rail carriers.

VIII. Comments of Norfolk Southern Railway Company

In addition to offering comments already addressed in this reply, Norfolk Southern (NS) raises some additional arguments that merit response. NS references constructive placement and urges the Board to avoid addressing constructive placement issues in this proceeding.

August 24, 2012 Comments of NS at 7, FN 1. IWLA notes that constructive placement has been a vitally important component of the Board's efforts to clarify demurrage liability issues

throughout this proceeding. For example, 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 Board's NPR in this matter 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.

The reasonableness of constructive placement liability is therefore front and center in this proceeding and deserves attention and clarification. The Board should clarify that when a rail carrier is aware of a rail car receiver's reasonable operational or capacity constraints, yet initiates delivery of rail cars that exceeds those constraints, then the rail carrier should be prohibited from claiming constructive placement demurrage liability.

NS also raises a concern that a shipper/principal might be located overseas and therefore beyond the reasonable reach of NS to pursue demurrage claims. NS Comments at 16. IWLA has no objection to the Board clarifying that a named principal must be located in the United States. IWLA notes that its members are, in turn, vulnerable to overseas shippers who disregard reasonable operational and capacity constraints at a destination warehouse and ship more rail cars than can be accepted by the receiver -- resulting in demurrage claims against the innocent warehouse operator. This problem can also be mitigated by the Board if it clarifies the constructive placement issue as described above.

IWLA objects to NS' claim that rail car receivers are not legally allowed to claim agency status for purposes of handling rail cars. NS Comments at 17. NS' argument ignores the reality that the vast majority of rail cars in operation in the U.S. are not owned by rail carriers. Most

rail cars are owned by shippers who are entitled to entrust them to a third party as an agent if they so choose. NS' creative effort to limit rail car receivers' agency status to the freight and not the rail car implies that rail carriers typically own the rail car. This is simply not the case, and the Board should reject this argument.

CONCLUSION

IWLA appreciates the Board's thoughtful and patient efforts to bring clarity to the demurrage liability issue. IWLA also appreciates being given an opportunity to respond to interested parties' comments. IWLA urges the Board to address the constructive placement demurrage liability issue as described above. When a rail carrier is aware of a rail car receiver's reasonable operational or capacity constraints, yet initiates delivery of rail cars that exceed those constraints, then the rail carrier should be prohibited from claiming constructive placement demurrage liability. Constructive placement claims cause the biggest demurrage problems for warehouse operators and they are the most burdensome types of claims to protest. It would be a missed opportunity for the Board to leave the constructive placement controversy for continued litigation in the courts and before the Board when a simple, short clarification in this proceeding could bring an end to these disputes.