

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707

DEMURRAGE LIABILITY

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COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: August 24, 2012

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The National Industrial Transportation League (“League” or “NITL”) submits these comments in response to the Notice of Proposed Rulemaking that the Surface Transportation Board (“Board” or “STB”) issued on May 7, 2012, in which the Board requests comments on a proposed rule concerning demurrage liability. The NPRM follows the Board’s collection of information regarding current practices involving the assessment of demurrage in response to an Advance Notice of Proposed Rulemaking issued on December 6, 2010.¹

I. STATEMENT OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907 and currently has over 500 company members. These members range from some of the largest users of the nation’s and the world’s transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League’s members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Many members of the League are engaged in transportation of goods via rail subject to the jurisdiction of the Board and therefore have a strong interest in demurrage liability.

¹ *Demurrage Liability*, STB Docket No. EP 707, slip op. (STB served Dec. 6, 2010) (75 Fed. Reg. 76,496 (Dec. 10, 2010)).

II. INTRODUCTION

The Board's NPRM is directed in large part at resolving an unsettled issue of law involving a third-party intermediary's liability for demurrage when carrier equipment is held beyond the designated free time. Historically, a key factor in determining whether an intermediary, such as a warehouseman, would be responsible for demurrage turned on whether the warehouseman was named as the consignee or consignor in the bill of lading and, thus, was a party to the contract of carriage.² However, as explained in the NPRM, this contract-based liability principle has recently been questioned by the courts in circumstances where either the intermediary asserts that it was unaware of its consignee status or asked the shipper not to name it as consignee on the bill of lading.³ Based on a conflict in the courts as to the conditions required to hold an intermediary responsible for demurrage under these circumstances, "the Board determined that it needed to revisit its demurrage precedent to consider whether the agency's policies accounted for current statutory provisions and commercial practices."⁴

In issuing the proposed rule, the Board is guided by the statutory requirement that railroads "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property."⁵ Thus, Congress recognized that demurrage may be used to encourage a fluid transportation network through the assessment of charges against parties that fail to promptly load and unload rail cars.

² *Id.* at 3 n.5.

³ *Id.* at 4.

⁴ *Id.* at 5.

⁵ 49 U.S.C. § 10746.

Against this backdrop, the Board has proposed a rule which defines when a party may be subject to demurrage. The proposed rule specifically states in part: “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 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 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.”⁶

As discussed below, the League supports a demurrage rule that is based on the actual conduct of the parties handling the rail cars but believes the agency provision is fatally flawed and that other clarifications to the rule are needed.

III. THE PROPOSED RULE IMPROPERLY PERMITS THE SHIFTING OF DEMURRAGE LIABILITY TO SHIPPERS WITHOUT PROOF OF AN AGENCY RELATIONSHIP

Under its proposed rule, the Board has moved away from the principle of contract-based liability and suggests the establishment of a fault-based rule accompanied with a notice requirement of the potential liability exposure. Thus, under the proposal, any receiver of rail cars, including a warehouseman, may be held liable for demurrage only if: (1) the receiver detains rail cars beyond the designated free time period; and (2) has actual notice of the liability potential prior to placement of the rail cars. However, the Board further proposes to permit an intermediary that may have caused the delay to shift the liability for demurrage to its principal if the warehouseman is acting as an agent for another party with an interest in the goods and the warehouseman notifies the rail carrier of its agency status and the identity of the principal.

⁶ *Demurrage Liability*, slip op. at 20.

The League supports the proposed rule to the extent that it would require the receiver of rail cars that caused the loading or unloading delays to be responsible for demurrage. This fault-based rule properly places accountability on the party that fails to efficiently handle the rail cars. The League further agrees that a party who may be liable for demurrage should have notice of the liability risk in advance of its receipt of rail cars, since such notice may encourage more efficient loading and unloading practices (subject to its comments below regarding the form and receivers of the notice below). However, the League is very concerned with the proposed rule to the extent that it provides a third-party receiver of rail cars unchecked authority to shift demurrage liability to shippers or other parties by merely claiming the existence of agency status in a notice to the railroad—*especially since no notice of the agency status must also be provided to the shipper.*⁷ Given that destination demurrage is often the result of a receiver's actions, this aspect of the rule essentially lets the fox guard the hen house.

The potential for abuse of this rule is extremely high and would have serious implications for shippers. One concern is that the rule will incentive third party warehousemen to assert an agency relationship when such relationship may not exist in order to avoid liability for demurrage. Second, if the assertion of an agency relationship is improper, the shipper would not even be aware of the claimed agency status even though such assertion could have significant financial implications for the shipper. Under the proposal, the first time a shipper will have an opportunity to challenge a third-party receiver's invocation of the rule is *after* the shipper receives a demurrage invoice, which may be several weeks or even months after the receiver notified the carrier of the agency status. By this time, the receiver could have accumulated substantial demurrage charges, which the shipper may be forced to pay while it tries to resolve

⁷ *Id.*

the agency issue. Thus, the proposed rule may actually increase the number of disputes over demurrage liability, rather than resolve such conflicts as is intended.

At the very least, a third-party receiver invoking this provision should be required to copy the principal on its notice to the rail carrier of the agency status. This would permit the purported principal to timely dispute the agency status, before it receives a hefty bill for demurrage. Moreover, if a dispute arises as to the agency status, the alleged agent should be liable to the rail carrier for the demurrage charges until the dispute is resolved. This comports with agency law, which makes an agent liable to a third party when the agent does not have authority to bind the purported principal, but still makes a representation to the third party on behalf of the purported principal.⁸ Also, as a matter of equity, a purported agent should not be able to shift its responsibility for demurrage to its purported principal until it can prove that it had authority to act as agent.

In addition, the rule contradicts core principles of agency law. Under agency law, a principal is not liable for the acts of an agent unless the agent has authority.⁹ Authority must be based on the manifestations of the principal.¹⁰ Under the rule, however, liability attaches based on the manifestations of the agent. That is, as long as the intermediary declares that it is an agent and identifies the shipper, liability shifts to the purported principal. Although the rule would appear to first require the existence of an agency relationship, the practical application of the rule does not require the agent to establish that relationship before it provides notice to the railroad. This is a fatal flaw in the rule.

⁸ Restatement (Third) of Agency § 6.10 (2006).

⁹ *See Id.* at §§ 6.01, 6.02, 6.03, 7.03.

¹⁰ *Id.* at § 2.01, 2.03 (defining authority as being predicated on the principal's manifestations).

Furthermore, while the existence of an agency relationship may be obvious when the parties have established the relationship in a written contract, in many cases, no contract exists and determining the agency status would require a complicated and time-consuming fact-intensive inquiry. This circumstance undermines a key objective of the rule, namely, to facilitate the efficient resolution of demurrage disputes. Furthermore, the Board recognizes in the NPRM that communications between shippers and warehousemen as to the status of the warehousemen “as consignee” may not exist,¹¹ but this only provides further support for the League’s concern that an agency relationship between the shipper and a warehouseman may not be clearly established or documented.

IV. ASPECTS OF THE RULE ARE UNCLEAR AND SHOULD BE CLARIFIED

A. The “Actual Notice” Requirement Is Ambiguous.

The meaning of “actual notice” under the rule is unclear. The rule requires actual notice in two situations: (1) if a carrier wants to hold a receiver of rail cars liable for demurrage, the carrier must provide actual notice to the receiver of the carrier’s demurrage tariff; and (2) if an agent wants to shift its liability for demurrage to its principal, it must give actual notice of the agency status and principal’s identity to the rail carrier. The League respectfully requests that the Board clarify whether, in each situation, blanket notice (*i.e.*, a one-time notice covering all future rail car deliveries) is acceptable or if notice must be provided with each and every delivery. With respect to holding a receiver liable for demurrage, if a blanket notice was allowed to cover the future receipt of railcars, the Board should require the railroad to provide additional notices whenever the carrier’s demurrage tariff changes. If the Board were to adopt the requirement of a receiver to furnish actual notice of an agency status to the railroads (subject to the League’s comments above), the Board should permit a blanket notice to be provided for the

¹¹ *Demurrage Liability*, slip op. at 11.

sake of efficiency, particularly with respect to arrangements governing large volumes of traffic. However, the use of a blanket notice for this purpose should identify the duration of the agency relationship in order to avoid indefinite coverage of all future demurrage on the principal's rail cars.

B. The Rule Should Require Actual Notice of Demurrage Tariffs to Parties Identified as Principals by Third Party Receivers of Rail Cars.

Under the proposed rule, a person receiving rail cars can only be liable for demurrage if that person received actual notice of the carrier's demurrage tariff. The rule, however, implicitly assigns liability to a principal if its agent received rail cars on the principal's behalf and the carrier gave the agent actual notice of its demurrage tariff. Thus, the rule deems a principal to have constructive knowledge of the notice received by its agent. This appears to conflict with the Board's adoption of actual notice as a prerequisite to liability. In addition, it conflicts with the *Restatement (Third) of Agency*, which requires an agent to have actual or apparent authority to *receive the notification* as a prerequisite to constructive notice.¹²

To resolve the conflict, the League suggests that the Board require a rail carrier to provide actual notice of its demurrage tariff to the principal. This should not be burdensome for the carrier since the carrier will know the principal's identity and can satisfy the actual notice requirement by sending an electronic or written communication. Also, any burden is outweighed by the benefit to the principal in receiving notice and a fair opportunity to direct the actions of its agent to avoid incurring demurrage charges or to address the consequences when such charges are incurred.

¹² Restatement (Third) of Agency § 5.02(1) (2006).

C. **The Rule Should Be Clarified to Ensure that Only the Party that Detains Rail Cars Is Liable for Demurrage.**

Absent a contrary agreement, the proposed rule provides that a rail carrier may collect demurrage from the receiver who detains the cars if the carrier gave the receiver actual notice of its demurrage tariff. The Board explained that the notice requirement should not be burdensome to rail carriers, because “[a]s a matter of course, each rail carrier informs its customers of its various shipping policies, including its demurrage policies.”¹³

In reality, a number of rail carriers generally have a poor track record of promptly updating their customers on even basic items, such as changes to their rate tariffs. Moreover, carriers have no incentive to incur the cost and administrative burden of providing notice to third-party receivers with whom they have no privity of contract. Accordingly, carriers may find it easier to try and circumvent the rule by simply revising their demurrage tariffs to make shippers, with whom they have direct dealings, liable for demurrage in all instances where cars containing their goods are detained beyond the designated free time period.

The rule does not clearly indicate whether it prohibits this practice by restricting demurrage liability to *only* the person who receives rail cars. As mentioned above, a carrier may find it easier to hold a shipper liable for demurrage since the carrier has direct dealings with the shipper and can more easily notify the shipper of its demurrage tariff. While holding the shipper liable for demurrage in all instances seems at odds with a key policy of the rule, that responsibility for demurrage should be on the party in the best position to avoid it,¹⁴ it is consistent with the policy that the person incurring demurrage must have agreed to be subject to

¹³ *Demurrage Liability*, slip op. at 12.

¹⁴ *Id.* at 10-11.

the terms of the carrier's demurrage tariffs.¹⁵ Moreover, the latter policy—predicating liability upon an agreement—appears to be more central to the Board's rule, because in all instances, the rule only permits liability after receipt and assent to the carrier's demurrage tariff. Accordingly, the rule is subject to conflicting interpretations on whether only the person who receives rail cars can be liable for demurrage. The League recommends that the Board clarify the text of the rule to make it clear that only the party that detains the cars beyond the free time period will be responsible for demurrage, subject to the notice requirement. This could be achieved by modifying the text to state: "A serving rail carrier shall only assess demurrage upon a person receiving rail cars for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff and the receiver will only be liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to placement of the rail cars."

¹⁵ *Id.* at 12.

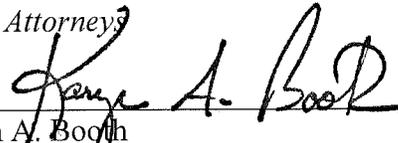
V. CONCLUSION

For the foregoing reasons, the League respectfully requests that the Board modify the proposed rule to prevent improper notification of agency status and clarify the text of the rule to address the concerns expressed herein.

Respectfully submitted,

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By Its Attorneys

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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