

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 707

DEMURRAGE LIABILITY

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: August 24, 2012

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Canadian Pacific Railway Company (“CP”) submits these Opening Comments regarding the Notice of Proposed Rulemaking served in the above-captioned proceeding on May 7, 2012 (“NPRM”). CP strongly supported the Board’s decision to institute this proceeding,¹ and it applauds the Board’s decision to establish uniform and reasonable guidelines for demurrage liability. The Board’s proposal would effectively resolve the uncertainty created by conflicting decisions of federal courts of appeal, and do so in a way that ensures that demurrage charges are imposed on the appropriate party – i.e., the party that is responsible for railcar delays. CP submits these comments both to support the Board’s proposal and to suggest three limited modifications and clarifications to the proposal: (1) that the Board reconsider its requirement that “actual notice” of a demurrage tariff must be provided to each individual third party receiver; (2) that the Board remove the agency exception from proposed regulation 49 C.F.R. § 1333.3; and (3) that the Board clarify that its proposed rule is not intended to supplant existing principles of demurrage liability (in particular, the well-established rules and precedents governing the responsibility of consignors and consignees for demurrage incurred on account of their failure to load or unload cars in timely fashion).

¹ See Opening Comments of Canadian Pacific Railway Company, *Demurrage Liability*, Ex Parte 707 (filed Mar. 7, 2011) (“CP Opening ANPRM Comments”); Reply Comments of Canadian Pacific Railway Company, *Demurrage Liability*, Ex Parte 707 (filed May 20, 2011) (“CP Reply ANPRM Comments”).

I. THE PROPOSED DEMURRAGE LIABILITY RULES ARE BOTH NECESSARY AND REASONABLE.

CP supports the demurrage liability rules proposed in the NPRM because they are necessary both to ensure a well-functioning transportation network and to resolve uncertainty surrounding demurrage liability of third parties such as warehousemen and terminals. The Board's publication of final rules, and the information already available to third parties regarding railroad demurrage tariffs, are adequate to ensure that no third party receiver will be subject to demurrage liability without having notice of a railroad's demurrage rules.

A. The Board's Proposed Rules Are Necessary to Resolve Uncertainty and Create Appropriate Incentives for Third Party Receivers.

First, the proposed rules are necessary to ensure that the demurrage system creates appropriate incentives for all participants in the transportation network. Demurrage charges perform the important function of "promot[ing] car efficiency by penalizing undue detention of cars." *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920); see *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 271 U.S. 259, 262 (1926) ("The efficient use of freight cars is an essential of an adequate transportation system"). As CP explained in its Opening ANPRM Comments, railroads, shippers, receivers and intermediaries all share responsibility for maintaining the fluidity of the rail network. See CP Opening ANPRM Comments at 3-6. The efficient movement of North America's commerce depends upon an adequate supply of railcars, which, in turn, requires that railcars be loaded, unloaded and released promptly so they can be optimally utilized. In 2010 United States railroads originated 29,209,122 carloads using a fleet of just 1,309,029 railcars² – which means that each railcar was utilized, on average, in connection with 22 annual shipments.

² The 1,309,029 number includes freight cars owned by shippers and leasing companies. See RAILROAD FACTS at 51.

See Association of American Railroads, *Railroad Facts* at 24, 51 (2011 edition). Delay caused by holding railcars beyond the time reasonably required to load or unload them impairs network fluidity, reduces the supply of railcars available for loading, and adversely impacts all participants in the logistics chain. Demurrage addresses this problem by creating an economic disincentive to unreasonable delay in handling railcars. The Board and its predecessor have found that demurrage is an effective tool to encourage more efficient railcar usage. *See Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 797 (1975) (“The evidence indicates that shippers do respond to economic incentives by adjusting their operations to reduce the time necessary for loading.”).

Because of the important economic incentives that demurrage creates, the Board has authority under the Interstate Commerce Act to promote demurrage policies that “both compensate[] rail carriers for the expenses incurred when rail cars are detained by shippers and encourage[] the prompt return of rail cars to the rail network by serving as a penalty for undue car detention.” *South-Tec Development Warehouse, Inc.—Pet. for Declaratory Order—Illinois Central R.R. Co.*, STB Docket No. 42050, at 3 (Nov. 13, 2000). The Interstate Commerce Act authorizes railroads to “compute demurrage charges, and establish rules relating 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.” 49 U.S.C. § 10746.

The new Part 1333 rules proposed in the NPRM will ensure that demurrage policies continue to promote the efficient use of railcars and that these policies can be applied to third party receivers. There is no reason for terminals, transloaders, warehousemen and other third party receivers to be treated differently for demurrage purposes than shippers or consignees.

Those third-party receivers are essential links in the transportation network, and unnecessary delays in railcar loading or unloading caused by those parties can have a significant adverse effect on the fluidity of the rail network. The economic incentive of demurrage liability is an important tool for ensuring that third party receivers load, unload and release railcars in a timely fashion.

As the Board noted in the Advance Notice of Proposed Rulemaking, however, recent federal court decisions have created significant uncertainty about “the liability of warehousemen and similar third-party car receivers for railroad demurrage.” Advance Notice of Proposed Rulemaking, *Demurrage Liability*, Ex Parte 707 at 2 (served Dec. 6, 2010) (“ANPRM”) (citing conflicting decisions in *Norfolk So. Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) and *CSX Transp., Inc. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007)). At least one federal court substantially reduced the ability of rail carriers to assess demurrage charges on terminals, transloaders, warehousemen and other third party receivers by adopting a formalistic contract-based approach to demurrage liability. *See Groves*, 586 F.3d at 1276. Under *Groves*, rail carriers could not assess demurrage charges against a third party receiver named as consignee in the bill of lading unless the receiver affirmatively “assented” to assume demurrage liability (or, at a minimum, received adequate prior notice of its consignee status). As CP and other commenters explained in comments on the ANPRM, the *Groves* approach creates the opportunity for third party receivers to shirk responsibility for delays in the return of cars to the national rail network that are caused by their own inefficient behavior. *See, e.g.*, CP Opening ANPRM Comments at 6-11.

The *Groves* decision created a pressing need for the Board to resolve the uncertainty surrounding third party demurrage liability and to create an appropriate framework for assessing

such liability. The Board's proposed rules fill that important need and establish a reasonable and fair way to impose demurrage liability on parties who are directly responsible for railcar delays.

B. The Board's Conduct-Based Approach For Assessing Demurrage Liability Is Reasonable and Fair.

The Board's proposed rules would not only resolve the uncertainty about third party demurrage liability, they would do so in a way that promotes efficient utilization of railcars and ensures fair treatment of all parties. While the Board's approach is not premised on precisely the same analysis as that advocated by CP in its comments on the ANPRM, it effectively addresses the key policy concern raised by CP – namely, the need to create incentives for warehousemen, terminals and other third party receivers to return railcars promptly. As CP explained in its ANPRM comments, most third party receivers are sophisticated participants in the transportation network and are well aware of carriers' demurrage policies. Such parties should be held responsible for delays in releasing railcars caused by their own actions (or inaction). *See* CP Opening ANPRM Comments at 18-20.

The Board's approach wisely recognizes that demurrage liability should not turn primarily upon whether or not a receiver of railcars has been named consignee in the bill of lading, or is aware of that fact. Instead, demurrage liability should be "tie[d] . . . to the conduct of the parties directly involved with handling the railcars." NPRM at 13 (emphasis added). Under this conduct-based standard, what matters is that a third party receiver accepts a railcar from a delivering carrier, and detains that railcar beyond the "free time" provided for loading and unloading in the carrier's demurrage tariff. As the Board recognizes, such a standard "would advance the goals of § 10746 by permitting the carrier to impose charges on the party best able to get the cars back to the carrier." *Id.*

While the Board’s proposal departs from the bill-of-lading-centered analysis that historically has been used to assess demurrage liability with respect to consignors and consignees, the NPRM persuasively justifies and explains that departure. *See* NPRM at 11-13. As the Board notes, “the bill of lading is the contract of carriage for the goods themselves,” while demurrage concerns the railroad equipment carrying those goods. *Id.* at 12 (emphasis added). Regardless of whether a third party receiver is party to or aware of the terms of the bill of lading for goods, the receiver is unquestionably accepting railroad equipment by its decision to receive railcars at its facility. If the third party receiver is (or should be) aware of a demurrage tariff applicable to that equipment at the time it accepts the railcars, it is reasonable to hold that receiver liable for any demurrage charges incurred under the tariff. Put differently, a third party receiver that chooses to accept delivery of a railroad’s equipment that is subject to a demurrage tariff has effectively consented to demurrage liability. Even if a contractual obligation were necessary to establish demurrage liability for a receiver, a receiver’s action in accepting railroad equipment while knowing of the terms for use of such equipment is more than sufficient to create such a contract. *See* Restatement of Contracts (Second) § 19 (providing that conduct can manifest assent to a contract).³

³ As explained in CP’s Opening ANPRM Comments, a contractual relationship is not necessary to establish demurrage liability for a receiver. *See* Opening ANPRM Comments at 22-23. While *Eastern Central* held that intermediary demurrage liability must be grounded in “contract, statute, or custom,” *Responsibility for Payment of Detention Charges, Eastern Central States*, 335 I.C.C. 537 (1969), that holding was predicated, in part, on a finding that no statutory authority existed for applying demurrage tariffs to third party receivers. *Middle Atlantic*, 353 F. Supp. at 1120. The legal landscape governing demurrage has changed significantly since then – most importantly through Congress’s decision in the Railroad Revitalization and Regulatory Reform Act of 1976 to authorize reasonable demurrage rules that “fulfill the national needs” related to freight car use and distribution. *See* Pub. L. 94-210, § 211, 90 Stat. 31, 46 (1976) (codified at then 49 U.S.C. § 1(6); now codified as amended at 49 U.S.C. § 10746). The Board’s statutory authority to establish reasonable demurrage policies gives it ample discretion to

II. THE BOARD SHOULD CLARIFY AND MODIFY THE PROPOSED RULES TO ENSURE THAT DEMURRAGE MAY BE ASSESSED AGAINST PARTIES RESPONSIBLE FOR RAILCAR DELAYS.

While CP strongly supports the Board’s proposed rules in this proceeding, CP respectfully suggests that the Board should modify and clarify the proposed rules to ensure that demurrage tariffs may be applied to parties whose conduct causes railcar delays.⁴ First, the Board should reconsider its proposal requiring railroads to provide individualized actual notice to each third party receiver. This “actual notice” requirement is unnecessary because receivers of rail cars are (or should be) already on notice that they may be subject to demurrage charges. Third party intermediaries such as warehousemen or terminal operators are sophisticated participants in the logistics chain who should be presumed to know that there can be financial consequences for delaying the release of railroad equipment that does not belong to them. Those parties clearly know the identity of the rail carriers that serve their facilities, and can readily determine the particular demurrage terms applicable to the railcars they are receiving. As described in comments on the ANPRM, CP and other rail carriers publish their demurrage tariffs on their websites. *See* CP Opening ANPRM Comments at 5-6.

Moreover, “actual notice” that third party receivers will be subject to demurrage if they detain railroad equipment will be provided by the Board itself when it publishes the final Part 1333 rule in the Federal Register. *See Perales v. Reno*, 48 F.3d 1305, 1316 (2d Cir. 1995) (“Due process cases have long recognized that publication in the Federal Register constitutes an adequate means of informing the public of agency action.”). When the Board adopts the

authorize demurrage to be imposed on the responsible receivers even in the absence of any formal contract.

⁴ CP refers the Board to the Opening Comments of the Association of American Railroads (“AAR”) filed today in this proceeding, which elaborate upon these suggested modifications to the proposed rule and which CP joins in full.

Part 1333 rules, it will be a matter of public record that third party receivers can be subject to carriers' demurrage tariffs. Board decisions in other rulemaking proceedings become fully effective and enforceable without any requirement that carriers provide further notice of the new regulations to potentially affected shippers, consignees and third parties. Given the "actual" notice of potential liability set forth in the Board's decision, and the ready availability of the demurrage terms applied by each rail carrier (via its website), there is no practical reason to require railroads to provide additional, special notice individually to every third party receiver to which the railroad may deliver railcars. Indeed, such a requirement is likely to generate *Groves*-like disputes between carriers and third parties regarding whether the third party "actually knew" that it might be subject to demurrage charges by accepting a shipment from the railroad.

If the Board nevertheless chooses to retain a notice requirement, it should provide clearer guidance as to what will constitute adequate notice. For example, the Board should clarify that notice of a demurrage tariff need only be given once to a party to constitute "actual notice" for purposes of proposed Part 1333, and that after the initial notice is given a railroad need not provide separate notice each time it delivers a railcar. CP believes that the fair implication of the NPRM is that written notice need only be provided once, but the Board should clarify this point in the final rule. If the Board does not provide such clarification, receivers may take the position that a new "renotification" of the carrier's demurrage tariff must accompany each new delivery in order for the tariff to be enforced against the receiver under Part 1333. The Board should make clear that it is not requiring such wasteful and inefficient renotifications, and that one notice to each receiver is sufficient.

Another important clarification the Board should provide should it choose to retain an actual notice requirement is guidance as to what will constitute acceptable proof that "actual"

notice has been given to a third party receiver. The NPRM proposes that notice of a demurrage tariff must be written and that it could be submitted electronically if the receiver possesses the requisite capabilities. *See* NPRM at 13. The Board’s final rule should clarify that delivery of written notice (either by mail or by electronic means for a receiver with that capability) is sufficient to establish actual notice. It would subvert the purpose of the rule if a receiver could claim a lack of “actual notice” by refusing to read a written notice of tariff terms delivered by mail, or refusing (or neglecting) to open an email containing a notice of tariff terms. Proof of delivery of the written tariff terms or of instructions for accessing the tariff terms electronically through a hyperlink or other means should be sufficient. For example, “actual notice” for a paper notice of tariff terms should be proven definitively by a delivery confirmation by the U.S. Postal Service or other commercial carrier. Similarly, “actual notice” for an electronically conveyed notice should be proven definitively by evidence that the notice was sent to an email address that the receiver uses for communications with the railroad. If the Board chooses to retain the “actual notice” requirement of proposed § 1333.3, it should clarify that proof of delivery of tariff terms (or instructions for accessing tariff terms electronically) constitutes adequate “actual notice,” and that a third party receiver cannot avoid demurrage obligations by placing its head in the sand and refusing to read tariff terms that the railroad provided to it.

Second, the Board should reconsider the need for the “agency exception” proposed in Section 1333.3. Such an exception is inconsistent with the statutory interpretation and “conduct-based” rationale underlying the proposed rule, and would create a potential “loophole” allowing third party receivers to avoid demurrage charges caused by their conduct. In the NPRM, the Board concluded that 49 U.S.C. § 10743’s provisions allowing agents to avoid liability for “additional freight charges” by providing notice of their agency relationship does not apply to

demurrage; the Board reasoned that § 10743 was “directed to payment of rates for the movement of property by the party with ownership of the property” and “should not be deemed to apply to demurrage.” NPRM at 14. Simply put, the Board held that demurrage charges are separate and distinct from freight charges (and separately attributable to the conduct of the third-party) and thus are not encompassed by § 10743. Under the Board’s interpretation of the Interstate Commerce Act, therefore, the statute does not prescribe any “agency exception.”

Moreover, creating such a regulatory exception to the proposed “conduct-based” standard for demurrage liability could result in the same sort of demurrage liability-ducking that led to the instant proceeding. Under the proposed rule all a third party receiver must do to avoid liability is allege a principal-agent relationship – it need not prove the existence of such a relationship or establish the principal’s willingness to assume demurrage charges. The Board’s proposed agency exception would thus allow third party receivers to avoid liability for demurrage charges caused directly by their conduct without demonstrating that another responsible party will assume the liability resulting from that conduct. Such a rule is both unworkable and unnecessary to protect the interests of third party receivers who can legitimately look to a principal to reimburse them for demurrage liability. If a third party receiver is indeed acting solely as an agent for another party, and does not want to be responsible for demurrage charges incurred in handling railcars on that party’s behalf, then the receiver can, and should, contractually arrange for the principal to reimburse it for such charges. But neither the Board nor railroads should be responsible for determining whether an agency relationship exists, nor should the carrier be required to look beyond the party whose conduct results in unreasonable detention of rail equipment to enforce tariff provisions addressed to such conduct. Rather, a third party receiver

that receives railcars as agent for another party should be responsible for obtaining reimbursement from its alleged principal via contract.

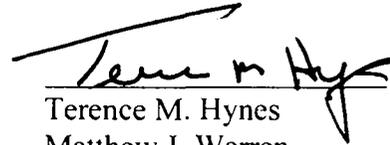
Finally, the Board should clarify that proposed Part 1333 is intended to eliminate uncertainty regarding the liability of third party intermediaries for demurrage, and is not intended to alter or supplant existing rules and precedents governing the demurrage liability of shippers and consignees. The Board recognized in the ANPRM that in the “simplest case[s], demurrage is assessed on the ‘consignor’ (the shipper of the goods) for delays at the origin and on the ‘consignee’ (the receiver of the goods) for delays at destination.” ANPRM at 3. This proceeding was not instituted to change the settled rules for those “simple” cases, but rather to address a narrow conflict in the federal courts about how demurrage could be applied to third party intermediaries. *See id.* But the language of proposed Part 1333 is broad enough to suggest that it applies to all demurrage charges. If so – and if the Board chooses to retain the “actual notice” standard – railroads would be required to undertake the extremely burdensome task of providing individualized notice of their demurrage tariffs to each and every shipper and consignee they serve. CP does not believe that the Board intended to promulgate such a burdensome requirement. The Board should clarify that Part 1333 supplements existing bases for demurrage liability and does not create new or different obligations for demurrage imposed on shippers and consignees.

CONCLUSION

For the foregoing reasons, the Board should adopt the rules proposed in the NPRM with the modifications proposed above and in the AAR's Opening Comments.

Respectfully submitted,

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