

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 707

233011

DEMURRAGE LIABILITY

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**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Canadian Pacific Railway Company (“CP”) submits these Reply Comments regarding the Notice of Proposed Rulemaking served in the above-captioned proceeding on May 7, 2012 (“NPRM”). As CP explained in its Opening Comments, CP strongly supports the Board’s proposal to issue guidelines for demurrage liability that address an important gap in the demurrage system. Adoption of the Board’s proposed rules will resolve the lingering uncertainty created by conflicting decisions of federal courts of appeal regarding the demurrage liability of warehousemen and other intermediaries for railcar delays caused by their conduct. The Board’s proposal would ensure that demurrage charges are imposed on the party who is responsible for delaying a railcar and would promote the efficient utilization of railcars and the fluidity of the rail network.

CP’s Opening Comments supported the Board’s general approach, but proposed three modifications to the Board’s proposal: (1) elimination of the requirement that “actual notice” of a demurrage tariff must be provided to each individual third party receiver; (2) removal of the “agency exception” from the proposed new regulations; and (3) clarification that the Board’s proposed rules are not intended to supplant existing principles governing demurrage liability of consignors and consignees. Each of CP’s concerns was echoed by other commenters – many of the comments from large railroads, small railroads, shippers, and even some warehousemen

suggested similar modifications to the proposed rules. There is strong support in the record for the Board to modify its proposed rules in the manner CP suggested in its Opening Comments.

In contrast, the few comments that oppose the Board's proposed rules are not well grounded. Some commenters argue that the Board need not act at all because, according to them, demurrage works well in most cases. But this proceeding was rightly instituted to correct serious uncertainty about how to apply demurrage to intermediaries, and the fact that demurrage law is well-settled in other contexts is no reason for the Board to decline to correct that problem. Another commenter incorrectly claims that the Board is not permitted to promulgate demurrage rules and that issuing rules in this area "violates the APA" and creates a "constitutional crisis." Kinder Morgan Opening Comments at 11. These overheated arguments lack any merit – the Board plainly has authority over the reasonableness of demurrage tariffs, and it can issue rules defining when it would find a demurrage tariff to be reasonable.

I. THE BOARD SHOULD ADOPT ITS PROPOSED DEMURRAGE LIABILITY RULES WITH THE MODIFICATIONS PROPOSED IN CP'S OPENING COMMENTS.

CP was joined by many other commenters in supporting the demurrage liability rules proposed in the NPRM. Shipper interests,¹ short line railroads,² and Class I railroads³ all agreed

¹ See Opening Comments of the National Industrial Transportation League ("NITL Opening Comments") at 4 ("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.").

² See Opening Comments of the American Short Line and Regional Railroad Association ("Opening ASLRRRA Comments") at 3 ("ASLRRRA supports *in general* the concept of making the party who actually receives the cars responsible for the payment of any demurrage charges arising under the railroad's demurrage tariff.").

³ See BNSF Railway Company Opening Comments ("BNSF Opening Comments") at 2 ("By placing the responsibility for demurrage on the party most capable of mitigating against those charges, the proposed rule advances the traditional goals of demurrage, which are to provide for compensation for the use of railroad property and to encourage the efficient handling of rail

that the Board's proposal is necessary both to ensure a well-functioning transportation network and to resolve uncertainty surrounding the responsibility of third parties such as warehousemen and terminals to pay demurrage charges when they unduly delay railcars delivered to them. Indeed, a major association of third party logistics providers describes the Board's proposal as "a thoughtful, balanced and practical proposed rule that will greatly reduce demurrage liability disputes between rail carriers and warehouse operators." Opening Comments of Int'l Warehouse Logistics Ass'n at 1. While most commenters support the core aspects of the Board's rules, many of these same commenters have suggested limited revisions to the Board's rules similar to those proposed in CP's Opening Comments. These comments provide further support for the Board to make the limited changes to the proposed rules that CP has advocated.

First, many commenters concur with CP that the "actual notice" requirement would create an unnecessary impediment to the functioning of the proposed rules. *See, e.g.*, AAR Opening Comments at 5-8; NS Opening Comments at 8-12. CP explained in opening comments that the intermediaries affected by the Board's rules are sophisticated actors who are or should be already on notice that they may be subject to financial penalties for delaying the release of railroad equipment that does not belong to them. *See* CP Opening Comments at 7. Even if those operators are not currently aware of their responsibility for demurrage, they will receive actual

cars."); Norfolk Southern Railway Company Opening Comments ("NS Opening Comments") at 4 ("By making clear that all receivers of railcars are part of an integrated network of railcar handling, and are responsible for compliance with the serving railroad's reasonable demurrage tariffs, the thrust of the Board's rule will further Congress's goal of having demurrage provide incentives for the efficient usage of railroad freight cars."); Union Pacific Railroad Company Opening Comments ("UP Opening Comments") at 5 ("By placing demurrage liability on the parties responsible for detaining rail assets, Part 1333 encourages those parties to avoid congestion created by detaining rail cars and consuming other network resources, which in turn benefits all rail customers.").

notice of that liability as a matter of law when the Board publishes the final Part 1333 rule in the Federal Register. *See id.* at 7-8.⁴

Other comments also confirm the need for the Board to remove or clarify the actual notice language. For example, ASLRRA's Comments show that actual notice requirement is particularly burdensome for smaller railroads. In part, this is because the act of providing actual written notice is more difficult for short line railroads, which often communicate with customers by telephone. ASLRRA Opening Comments at 3-4. But the more fundamental problem is the "difficulty in proving that another party received actual notice," a burden that can be difficult for a large railroad to satisfy and near-impossible for a small railroad with limited resources. *Id.* NITL similarly urges the Board to at least clarify the meaning of the actual notice requirement. *See* NITL Opening Comments at 6-7. Indeed, even terminals who oppose the Board's proposal in general agree that the Board's failure to "specify what would constitute actual notice . . . [or to] define what would be acceptable as a verification of the receipt of the notice" creates substantial uncertainty and the prospect of litigation over whether notice was "actual." Opening Comments of Int'l Liquid Terminals Ass'n at 2-3.

Second, several commenters concur with CP's suggestion that the Board remove the agency exception from the Part 1333 rules. *See, e.g.*, AAR Opening Comments at 8-11; NS Opening Comments at 14-18. As CP explained in Opening Comments, all a third party receiver would have to do under the proposed rule to avoid liability would be to 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 proposed agency exception would create a means

⁴ *See also 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.").

for third party receivers to avoid liability for demurrage charges caused directly by their conduct without demonstrating that another party has assumed responsibility for the liability resulting from that conduct. As CP explained, the exception is unnecessary to protect the interests of third party receivers who truly are acting solely as agents for another party, because such receivers can contractually arrange for their principals to reimburse them for demurrage charges. This unnecessary exception would serve only to make demurrage harder to collect, by permitting any third party receiver to avoid liability merely by pointing a finger at an alleged principal. The burden of the agency exception will fall particularly hard on smaller railroads. As ASLRRA argues, if intermediaries can avoid demurrage liability simply by claiming to be agents for another party – and without proving that such party would agree to accept the demurrage charges – then railroads could be caught in a situation where no party agrees to pay demurrage.⁵

Shipper interests echo these concerns about the agency exception. The National Industrial Transportation League strongly opposes the agency exception on the grounds that it would give “a third-party receiver of railcars 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.” NITL Opening Comments at 4. NITL correctly observes that “[t]he potential for abuse of this rule is extremely high” and could create increased disputes over demurrage liability. *Id.* at 4-5. In short, there is broad-based support among both railroads and shippers for eliminating the potential mischief that could be created by allowing third party receivers to avoid liability by invoking an “agency exception” to the proposed rules. The Board should remove the exception from the final rules and make clear that a third party receiver that believes that its

⁵ See ASLRRA Opening Comments at 5 (“Small carriers can go from pillar to post trying to collect legitimate accrued demurrage charges from consignees, consignors, warehousemen, other third party agents and principals who deny responsibility and point the finger at someone else who should be liable.”).

agency relationship with another party excuses it from paying demurrage is itself responsible for obtaining reimbursement from its alleged principal via contract.

Third, other commenters agree that Board should clarify that it does not intend to supplant existing rules and precedents governing demurrage liability. *See, e.g.*, AAR Opening Comments at 11-12; BNSF Opening Comments at 2-3. As the Board has recognized, the application of demurrage principles is “relatively straightforward” in most cases. NPRM at 3. The Board should clarify that its new rules are intended only to respond to the unique situation of demurrage for railcar delays caused by transportation intermediaries and not to replace existing grounds for demurrage liability.

II. The Arguments Opposing The Board’s Rules Should Be Rejected.

While most commenters support the Board’s rules (with various suggestions for improving them), a handful of intermediaries and terminals oppose Board action. None of the reasons cited by these intermediaries for the Board to withdraw its rules have merit.

First, some terminal groups oppose Board action on grounds that the current demurrage system “has been working well for years.” Opening Comments of Independent Fuel Terminal Operators Association at 3. It is true that the current demurrage system has functioned effectively in the “simplest case[s],” as the Board has recognized.⁶ But the record shows that the current system does not work well for allocating liability in the case of delays caused by intermediaries. On the contrary, there is 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”). This uncertainty is the product of a severe and irreconcilable split among the

⁶ Advance Notice of Proposed Rulemaking at 3-4 (served Dec. 6, 2010).

federal circuit courts on this issue. At least one federal court substantially reduced the ability of rail carriers to assess demurrage charges on third party receivers by holding that 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). *See Norfolk So. Ry. Co. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009). The *Groves* approach creates the opportunity for third party receivers to avoid 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 Board is right to propose rules to remedy this problem and to create an appropriate framework for imposing demurrage liability on third party receivers who are directly responsible for railcar delays.

Second, other groups complain that railcar delays are often caused by railroad conduct such as the “bunching” of car deliveries in a manner that prevents the intermediary from unloading them all in the allotted time and that terminals should not be liable for demurrage in those situations. *See, e.g.*, Opening Comments of Independent Fuel Terminal Operators Association at 1-2; Opening Comments of International Liquid Terminals Association at 2. These anecdotal claims that demurrage might be unwarranted in some situations provide no justification for excusing intermediaries from demurrage liability altogether. When a shipper or intermediary believes that it has been unfairly charged demurrage that was caused by bunching or other railroad conduct, those disputes typically are resolved informally and amicably through discussions with the railroad. If those informal discussions fail and an intermediary continues to believe that a railroad has adopted unreasonable demurrage practices or unfairly assessed demurrage charges against it, the intermediary can file a complaint with the Board challenging

those practices. *See* 49 U.S.C. §§ 10702(2), 11701(b). The fact that intermediaries and railroads may disagree about whether extraordinary circumstances make the assessment of demurrage charges unfair in a particular case is no reason for the Board to withdraw the proposed rule altogether.

Third, Kinder Morgan Terminals takes the misguided position that the Board lacks legal authority to adopt the proposed rules. *See* Kinder Morgan Opening Comments at 5-9. Kinder Morgan's theory appears to be that, because 49 U.S.C. § 10746 states that "rail carrier[s]" may establish rules related to demurrage charges, the Board's proposed rules intrude on "a regulatory area that Congress explicitly reserved for rail carriers." Kinder Morgan Opening Comments at 7. Kinder Morgan seriously misreads the Interstate Commerce Act, which plainly gives the Board authority to promulgate the proposed rules.⁷ The demurrage provisions of § 10746 are of a piece with the general regulatory approach of the Interstate Commerce Act. That is, railroads have the right to establish rates and practices in the first instance, but the Board has the authority to ensure that those railroad-established rates and practices are reasonable. Indeed, the language that Kinder Morgan trumpets from § 10746 almost exactly parallels the Act's language providing railroads the right to establish reasonable rules and practices.⁸ But there is no question that the Board has authority to determine the reasonableness of railroad-established rules and practices.

⁷ Indeed, the logical import of Kinder Morgan's position that the Board has no authority over demurrage is that railroads have unbridled legal authority to impose any demurrage tariffs they wish. If that were true, then railroads could impose demurrage tariffs that apply to intermediaries like Kinder Morgan, and this proceeding would be unnecessary.

⁸ *Compare* 49 U.S.C. § 10702 ("A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable (1) rates . . . for transportation and service it may provide under this part; and (2) rules and practices on matters related to that transportation or service.") *with id.* § 10746 ("A rail carrier providing transportation subject to the jurisdiction of the Board under this part 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.").

That authority plainly includes the ability to establish regulations and issue guidance that set the boundaries of what constitutes a reasonable practice. For example, in recent years the Board has issued guidance about what it considered to be reasonable fuel surcharge practices⁹ and initiated proceedings to solicit public comments about the reasonableness of tariffs relating to coal dust¹⁰ and hazardous materials transportation.¹¹ The proposed Part 1333 rules are similarly well within the Board's authority to issue regulations clarifying the scope of what rules railroads may reasonably establish.¹²

Nor is there any merit to Kinder Morgan's claim that the Board may not act "to undo binding federal appellate court precedent." Kinder Morgan Opening Comments at 1. In the first place, a key impetus for this proceeding was the fact that federal appellate courts have failed to reach a consensus on how to treat intermediary liability. Indeed, it is likely that the Supreme Court's decision not to resolve the conflict among the federal circuit courts was influenced by the fact that the Board chose to institute this proceeding.¹³ More importantly, there is no merit to the notion that the Board is forbidden from issuing rules relating to demurrage because federal courts have ruled on the issue. An agency is free to reinterpret its statute after the statute has

⁹ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (Aug. 3, 2006)

¹⁰ *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Fin. Docket No. 35557 (Nov. 21, 2011)

¹¹ *CF Industries, Inc. v. Indiana & Ohio Ry. et al.* – Pet. for Declaratory Order, STB Fin. Docket No. 35517 (Sept. 30, 2011)

¹² Indeed, the fact that most rail industry commenters support the Board's approach belies the suggestion that the Board is somehow intruding on railroad's freedom to establish demurrage rules.

¹³ The primary argument made by the United States in its *amicus curiae* brief opposing *certiorari* in *Groves* was that the Board had instituted this proceeding and might use it to craft "a default rule . . . for demurrage liability." Br. of United States, *Norfolk So. Ry. Co. v. Groves*, No. 09-1212 (filed Dec. 10, 2010).

been interpreted by a federal court, and it is free to adopt rules that alter that interpretation.¹⁴ In short, the Board plainly has the authority to interpret its governing statute and to issue regulations that provide guidance to railroads, shippers, and intermediaries about reasonable rules for assessing demurrage charges.

Kinder Morgan's proposals to "clarify" the Board's rules should be rejected because they would eviscerate the rule under the guise of "clarification." For example, Kinder Morgan asks the Board to allow it to use the agency exception so that it can "benefit from the procedures for avoiding demurrage liability" even when it is not acting as an agent. Kinder Morgan Opening Comments at 15 (seeking right for intermediary to use agency exception even though it "may not be an 'agent' of its shippers under the traditional principals of agency"). This candid request for permission for non-agents to claim agency status for purposes of "avoiding demurrage liability" illustrates the mischief that is created by allowing the agency exception in the first place. The Board should eliminate the agency exception and make clear that the parties who cause railcar delays are, in the first instance, responsible for demurrage charges. If a terminal wishes to shift responsibility for paying demurrage to its customers via contract, it has the right to do so. But the Board should not permit terminals to use the agency exception as a device "for avoiding demurrage liability."

Finally, the International Warehouse Logistics Association proposes that the Board adopt a new rule requiring railroads to provide "actual notice" that railcars have been constructively placed at a receiver's facility. *See* IWLA Opening Comments at 8-10. IWLA proposes that constructive placement be permitted only if the railroad provides "notices of constructive

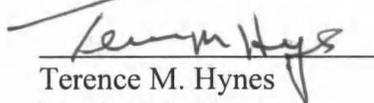
¹⁴ *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005) (holding that agency can adopt interpretation of ambiguous statutory provision that conflicts with a prior federal court decision).

demurrage liability” that provide the receiver with both notice of the placement and an opportunity “to promptly respond with a description of any relevant facts and circumstances that should reasonably counter the claim of constructive placement.” *Id.* at 9. This proposal should be rejected for several reasons. In the first place, IWLA’s proposal for new Board regulations defining constructive placement raises an issue that was not contemplated in the Board’s Notice of Proposed Rulemaking and is therefore outside the scope of this proceeding. Moreover, there is no record to support the need for new constructive placement rules. While IWLA asserts that such rules would be desirable for its members, the record does not show there is currently a systemic problem with respect to intermediaries knowing that a car has been constructively placed. While disputes may arise about constructive placement in individual cases, those issues, like most demurrage disputes, are best handled on a case-by-case basis. There is no need for new Board rules in this area. Finally, IWLA’s proposal would hinder attempts to impose demurrage liability fairly on all receivers. According to IWLA, the demurrage clock should begin ticking not when railcars are placed at a receiver’s facility, but only after the railroad has delivered notice of the placement and given the receiver the opportunity to object to the placement. As a result, IWLA’s proposal would delay the start of the demurrage clock, and thus would diminish both the receiver’s incentive to release railcars quickly and the rail industry’s ability to optimize the utilization of railcars. And it would also substantially complicate railroad’s efforts to collect demurrage, for instead of being able to rely on the time of delivery to calculate demurrage charges railroads would be forced to make subjective determinations of whether the receiver had provided reasonable notice of limits on its ability to accept railcars. The Board should not adopt this unnecessary and complicating proposal.

CONCLUSION

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

Respectfully submitted,



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