

# Holland & Knight

50 North Laura Street, Suite 3900 | Jacksonville, FL 32202 | T 904.353.2000 | F 904.358.1872  
Holland & Knight LLP | www.hklaw.com

233095  
ENTERED  
Office of Proceedings  
September 21, 2012  
Part of  
Public Record

## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief of the Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

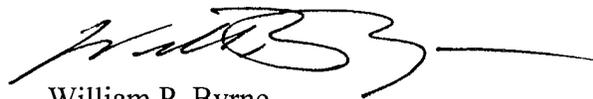
Re: EP 707 - Demurrage Liability - CSX Transportation, Inc. Reply Comments

Dear Ms. Brown:

Enclosed for electronic filing in the above referenced matter are the Reply Comments of CSX Transportation, Inc.

Thank you for your assistance.

Respectfully submitted,



William P. Byrne

Enclosure

cc:

Peter J. Shudtz, Esq.  
Paul R. Hitchcock, Esq.  
John P. Patelli, Esq.  
Mark Hoffmann, Esq.  
David Prohofskey, Esq.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Ex Parte No. 707

---

DEMURRAGE LIABILITY

---

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202  
Peter J. Shudtz, Esq.  
Paul R. Hitchcock, Esq.  
John P. Patelli, Esq.  
Mark Hoffmann, Esq.  
David Prohofskey, Esq.

Holland & Knight LLP  
50 N. Laura Street  
Suite 3900  
Jacksonville, FL 32202  
William P. Byrne  
Jameson B. Rice

*Attorneys for CSX Transportation, Inc.*

September 21, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Ex Parte No. 707

---

DEMURRAGE LIABILITY

---

REPLY COMMENTS OF  
CSX TRANSPORTATION, INC.

**INTRODUCTION**

CSX Transportation, Inc. ("CSXT") respectfully submits these Reply Comments in response to the comments of other interested parties regarding the Notice of Proposed Rulemaking ("NPR") served May 7, 2012 by the Surface Transportation Board (the "Board"). CSXT supports the reply comments filed by the Association of American Railroads ("AAR").<sup>1</sup> CSXT submitted its Opening Comments, filed August 24, 2012 ("CSXT Comments"), to address squarely the Board's handling of Section 10743 and to offer a more narrow resolution targeted directly at the conflict created by the *Novolog-Groves* circuit split. CSXT submits these Reply Comments to emphasize that the divergence of viewpoints expressed in the opening comments filed in response to the NPR demonstrates further that if a new rule is necessary, the Board should adopt the approach suggested by CSXT.

---

<sup>1</sup> While CSXT supports the AAR's position, which would (1) keep in place existing liability as to the named consignee and consignor, (2) expand liability to all receivers regardless of the receiver's status as a consignee or consignor in the bill of lading, and (3) provide limitations to agency, CSXT files separately to provide an alternative narrower solution that focuses solely on, and resolves, the *Novolog-Groves* conflict.

**I. Divergent Viewpoints Regarding the Board's Proposed Rule Threaten to Increase Division and Confusion in the Law.**

The divergence of opinion in the opening comments filed in response to the NPR suggests that the Board's proposed rule, as currently written, could significantly disrupt current practices and highlights the potential for confusion and further division. As will be demonstrated below, the comments filed by various intermediaries provide an example of this divergence with respect to the following topics: (1) their support, or lack thereof, for the Board's proposed rule, (2) whether demurrage should be assessed based on contract liability or fault (i.e., responsibility for detaining railcars), (3) whether intermediaries are agents and (4) whether agency should provide an escape from liability.

The International Warehouse Logistics Association ("IWLA") generally supports the Board's proposed rule, while emphasizing that contracts play an important role in avoiding demurrage liability disputes and encourages the Board to support more forcefully the private resolution of demurrage disputes through contract. IWLA Comments at 3. The National Industrial Transportation League ("NITL") only supports the Board's rule in part. It opposes an escape from liability through agency. NITL Comments at 4. The NITL takes the opposite view of the IWLA with respect to the basis for liability, and supports movement "away from the principle of contract-based liability" and toward holding liable the party who is at fault in over-detaining railcars (a "fault-based rule"), which the NITL believes is typically the intermediary. NITL Comments at 3.

The International Liquid Terminals Association ("ILTA") opposes the Board's proposed rule. It does not disagree with a fault-based rule for demurrage liability, but believes that shippers, not intermediaries, are typically at fault for demurrage, stating "the shipper is

fundamentally responsible for incurred expenses associated with the movement of product to or from a terminal" and "is in the best position to determine the legitimacy of a demurrage charge and who should be responsible for the costs." ILTA Comments at 2. According to the ILTA, "terminals in most cases simply do not have any significant control over rail car movements at their facilities . . . and have a strong financial incentive to load and unload rail cars as quickly as possible to maximize throughput." *Id.* at 4. The ILTA points out that currently, demurrage contracts between the terminal and the shipper shift liability to the party who is at fault for the demurrage. *See Id.* at 2. This suggests that a fault-based rule is unnecessary, because this is already accomplished by contract. Regarding agency, the ILTA states that "third-party terminals, as a rule, handle products exclusively as agents for their customers who are typically owners of the products." ILTA Comments at 3.

The Independent Fuel Terminal Operators Association ("IFTOA") also opposes the Board's rule. With respect to agency, it agrees with the ILTA that "[t]he 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." IFTOA Comments at 1 (emphasis in original).

Kinder Morgan Terminals ("KM") also opposes the Board's proposed rule, claiming that the Board lacks the authority to promulgate its proposed rule. KM supports contractual liability over a fault-based scheme, stating that "the Board has not provided an adequate explanation as to why its Proposed Rulemaking is necessary when demurrage liability is easily handled through contracting." KM Comments at 12. It disagrees with the ILTA and the IFTOA's view that the terminal is usually an agent. Rather, KM states that it "may not be an 'agent' of its shippers

under the traditional principles of agency. KM merely performs a service on behalf of its customers." *Id.* at 15.

Three out of the four intermediaries that filed comments to the NPR express disapproval towards the Board's proposed rule. Those that disapprove are further divided on the issue of why they disapprove, and on their proposed solutions to the problem. Thus, the Board's proposal carries the potential for increasing division and confusion in the law regarding demurrage, which "directly contradicts the Board's stated intent to 'promote uniformity in this area'" and "'assist in providing clarification for the industry.'" ILTA Comments at 3.

**II. If a New Rule is Necessary, the Narrow Issue Presented in the *Groves-Novolog* Circuit Split Requires an Equally Narrow Solution.**

The comments to the NPR filed by the intermediaries indicate it may be unnecessary for the Board to promulgate a new rule. Not one intermediary in any filing in this proceeding expressed a lack of knowledge about a carrier's publications, rules or tariff, or that lack of information was the source of a problem for that intermediary. Similarly, not one intermediary filed comments to the NPR expressing that it was being named as a consignee in the bill of lading without its knowledge, or that such a situation was posing a problem for the intermediary. Yet, these were precisely the problems raised by the *Groves-Novolog* split that the Board set out to address.

The comments filed in this proceeding have made it clear that a warehouse is a sophisticated, commercial enterprise fully capable of knowing when it faces liability for demurrage, and skilled at negotiating with its business partners to arrange for the handling of demurrage bills. For example, the IWLA stated, "IWLA members stand ready to enter into contracts with rail carriers to protect both parties' interests and to minimize disputes over

demurrage. Private contractual agreements can be tailored to address the unique operational and capacity limits of warehouse operators in a manner more effective than even the most thoughtful general rulemaking." IWLA Comments at 3. According to KM, "Kinder Morgan contracts with other 1500 shippers for required services. . . . Except in certain circumstances where Kinder Morgan contractually agrees to reimburse a shipper for demurrage charges incurred as a result of Kinder Morgan's negligence or willful misconduct, Kinder Morgan does not assume any legal obligation to pay any rail charges incurred by a shipper, including demurrage charges." KM Comments at 2-3. The ILTA said, "[i]f the terminal is the actual cause of a delay that triggers demurrage charges to be paid by the shipper, then the shipper has a straightforward, contractual ability to recover those costs from the terminal." ILTA Comments at 2. The IFTOA added, "Currently, terminals work under approximately four types of typical arrangements with carriers [listing arrangements]. . . . 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." IFTOA Comments at 2.

The commercial reality evidenced by the comments of the intermediaries (or lack thereof) indicates that *Novolog* was correct—no special notification is necessary for a warehouse.<sup>2</sup> It follows that the *Groves* decision is an exception to current case law and practice. The Board is

---

<sup>2</sup> See *CSX Transp. Co. v Novolog Bucks Cnty.*, 502 F.3d 247, 262 (3rd Cir. 2007) ("[A]n entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers, but may avoid liability, if it is an agent, by following the notification provisions of 49 U.S.C. § 10743(a)(1). . . . Because it is undisputed that *Novolog* did not comply with the statutory notification provision, it will be unnecessary to determine whether it acted as an agent in the instances where it was named as the consignee."); see also NPR at 8 (describing the electronic tools available to the intermediary to learn of its consignee status); AAR Comments to the Advance Notice of Proposed Rulemaking dated December 6, 2010 in this proceeding at 25-27 (recognizing that the warehouseman has a relationship with its customers at one or the other end of distribution chain, and that it has the ability to reject the goods; it should therefore not be presumed to be powerless to know of, or be unable to affect, its designation in the bill of lading).

right to explore how it may return uniformity to the law, but it would be imprudent to overhaul current demurrage law in order to resolve this rare exception, especially where shippers, carriers and intermediaries have relied on existing law for over a century to create the current system. As stated by an intermediary, the IFTOA:

[T]he 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.

IFTOA Comments at 3.

The Board could resolve the *Novolog-Groves* split without promulgating a new rule, similar to the action taken by the Board's predecessor, the Interstate Commerce Commission, in Ex Parte No. 495, when it decided, after comment, not to issue a rule desprescribing the Uniform Bill of Lading. In this case, the Board could issue a decision not to promulgate a rule regarding demurrage, and in that decision, clarify that (i) when an intermediary is named as a consignee in the Uniform Bill of Lading, it is presumptively liable for demurrage; and (ii) apart from the agency exception of Section 10743, an intermediary consignee in the Uniform Bill of Lading may only avoid liability for demurrage if it can show that it had no way of becoming aware of the carrier's demurrage tariff. The Board could further clarify that an intermediary named as a consignee will be considered aware of the carrier's demurrage tariff if the carrier has previously sent the intermediary an electronic link to its demurrage tariff.

If the Board determines that a new rule is necessary, however, the wide array of opinions regarding the Board's proposed rule provides further reason for the Board to adopt a solution that only makes a modest addition to existing law—one that is targeted at resolving the *Groves* conflict, but no more. Under CSXT's proposal, if an intermediary named as a consignee in a bill of lading receives written or electronic notice of the rail carrier's demurrage tariff, then that

intermediary would be liable for demurrage so long as it accepts a rail car from that rail carrier without having provided previous notice of agency under Section 10743. CSXT Comments at 4. For clarity, any proposed rule should include the following disclaimer: *"Nothing in this rule is intended to alter, modify or amend any existing legal basis concerning the liability of a consignee for demurrage charges under the bill of lading or other transportation contract and Section 10743."* *Id.* at 5.

CSXT's proposal resolves the narrow problem regarding notice, without disturbing established custom and practice, current contractual relationships, the uniform bill of lading, Section 10743 (including the intermediary's current ability to declare agency), or the binding decisions of the United States courts of appeals or a century of precedent, any of which, if disturbed, could be divisive and add confusion. See CSXT Comments at 5-12.

### **III. Section 10743 Applies to Demurrage**

In reply to the suggestion that Section 10743 should not apply to demurrage,<sup>3</sup> CSXT refers the Board to CSXT's Comments. CSXT disagrees with the Board's statement in the NPR that "there is no apparent reason why Congress would make § 10743(b) inapplicable to demurrage for a prepaid shipment." NPR at 16. Section 10743 does not, and was not intended to, govern the full gamut of scenarios in which a party, whether consignor or consignee, is liable for freight charges. For example, when a consignor ships to itself but does not reassign the

---

<sup>3</sup> See e.g. IWLA Comments at 2-3; see also KM Comments at 8.

goods, the statute does not expressly provide for liability on the consignor. Yet it would be unreasonable to interpret this absence to mean that the consignor is not liable.<sup>4</sup>

Section 10743 is the result of at least two separate amendments to the Interstate Commerce Act made at different times, that arose in response to judicial decisions in specific cases.<sup>5</sup> The original parenthetical phrase "other than a prepaid shipment" stated in the original Section 3(3), was later restated to be a separate sentence at the end of subsection (b) upon recodification of title 49 in 1978 (at that time, Section 10744). In each of the steps resulting in the current subsections of Section 10743, Congress enunciated the law as it deemed appropriate at the time. It is likely that Section 10743(b) was rendered inapplicable to prepaid bills of lading to ensure that the railroad would not be paid twice: once by the consignor/shipper and again by the new consignee.

---

<sup>4</sup> See e.g. 4 SAUL SORKIN, GOODS IN TRANSIT § 22.02[1] (Matthew Bender) ("In the absence of statute, regulation, bill of lading, or other contact between the parties which provides to the contrary, the consignor is primarily liable for freight charges.") (citing *S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) (further citations omitted)).

<sup>5</sup> In *Nw. Pac. R. Co. v. Burchwell Co.*, 349 F.2d 497 (5th Cir. 1965), the court reviewed the legislative history of a predecessor of Section 10743 and described that most of what is now Section 10743(a) was originally added to the Interstate Commerce Act ("ICA") in 1927 (as Section 3(2) of the ICA) ostensibly to codify the decision of the New York Court of Appeals in *N.Y. Cent. R.R. Co. v. Ross Lumber Co.*, 137 N.E. 324 (N.Y. 1922). In the *Ross Lumber* case, the court held that a consignee that diverts a shipment is liable for the freight charges notwithstanding the diversion, and stated in dictum that a party could escape liability through agency. Thereafter, in *Wabash Ry. v. Horn*, 40 F.2d 905 (7th Cir. 1930), a case involving a consignor that had consigned the goods to itself as consignee and later reconsigned the goods to another who reconsigned to a third consignee, the Seventh Circuit followed *Ross Lumber* and held the second consignee was liable for the freight charges where it was named as consignee in a new bill of lading after reconsignment and the railroad was never informed of the third consignee's status as beneficial owner of the goods. Then, in 1939, in *N.Y. Cent. R.R. Co. v. Transamerican Petroleum Corp.*, 108 F.2d 994 (7th Cir. 1940), the Seventh Circuit declined to follow *Ross Lumber* or *Horn*, finding that the consignee was not liable following reconsignment. After the *Transamerican* case, in 1940, Congress again amended the ICA ostensibly to address the consignor to consignor scenario described in *Wabash Ry.* by revising the ICA in what became sections 3(2) and 3(3) of title 49 (and ultimately Section 10743 (a) and (b)) to make clear that in a consignor to consignor scenario, the liability of the ultimate consignee to whom the shipment is diverted will parallel the liability of the consignee in Section 10743(a), including the ability to avoid that liability by providing accurate notice of its agency status and the name of the beneficial owner.

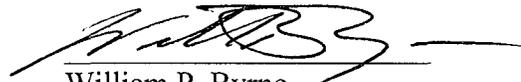
While only subsection (b) of Section 10743 explicitly excludes prepaid shipments, both subsections of Section 10743 are focused on the liability of a consignee, and the relief to be afforded to agents from such liability, under a freight collect bill of lading. The Board's comment in the NPR that Section 10743(a) does not apply to a shipment where the same parties are the consignor and the consignee (NPR at 16) is correct, but it does not recognize that once the goods have been re-consigned, the same party is no longer both the consignor and the consignee and Section 10743(a) would apply to the shipment according to its terms. Thus, demurrage is treated the same whether the bill is freight collect or freight prepaid under the tandem coverage of Sections 10743(a) and 10743(b).

The similar language in the Uniform Bill of Lading supports this conclusion. The "prepayment" section of the Uniform Bill of Lading allows a credit for the amount of "charges" acknowledged in the Uniform Bill of Lading. Lawful charges in excess of that amount remain payable. Thus, the prepaid nature of a bill of lading, by statute or contract, does not extinguish liability for demurrage or other lawful charges not yet collected, it merely avoids a statutory or contractual obligation resulting in a double payment for charges the carrier has acknowledged as previously paid.

## CONCLUSION

The issue facing the Board is narrow. "[T]he existing system for handling demurrage liability works well, except for the narrow conflict between *Novolog* and *Groves*." NPR at 10. If any rule is necessary, CSXT's proposal provides the narrow solution needed, while avoiding the new problems that may arise from a rule in which the scope extends beyond the problem it was intended to solve.

Respectfully submitted,



William P. Byrne

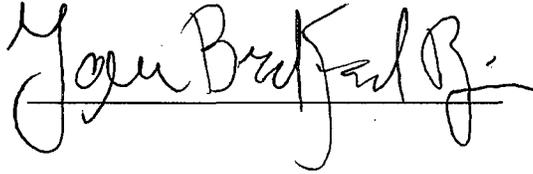
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202  
Peter J. Shutz, Esq.  
Paul R. Hitchcock, Esq.  
John P. Patelli, Esq.  
Mark Hoffmann, Esq.  
David Prohovsky, Esq.

Holland & Knight LLP  
50 N. Laura Street  
Suite 3900  
Jacksonville, FL 32202  
William P. Byrne  
Jameson B. Rice

*Attorneys for CSX Transportation, Inc.*

**CERTIFICATE OF SERVICE**

I, Jameson B. Rice, certify that on this date a copy of the Reply Comments of CSX Transportation, Inc. in response to Notice of Proposed Rulemaking, filed on September 21, 2012, was served by first-class mail, postage prepaid, on all parties of record.

A handwritten signature in black ink, appearing to read "Jameson B. Rice". The signature is written in a cursive style and is positioned above a horizontal line.

Dated: September 21, 2012