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## 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. Comments

Dear Ms. Brown:

Enclosed for electronic filing in the above referenced matter are the Comments of CSX Transportation, Inc. ("CSXT").

Thank you for your assistance.

Respectfully submitted,

  
William P. Byrne

Enclosure

cc:

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David Prohovsky, Esq.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707

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DEMURRAGE LIABILITY

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COMMENTS OF CSX TRANSPORTATION, INC.

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August 24, 2012

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707

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DEMURRAGE LIABILITY

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COMMENTS OF  
CSX TRANSPORTATION, INC.

**INTRODUCTION**

CSX Transportation, Inc. ("CSXT") respectfully submits these Comments in response to the Notice of Proposed Rulemaking ("NPR") served May 7, 2012 by the Surface Transportation Board (the "Board"). CSXT supports the comments filed by the Association of American Railroads ("AAR Comments"), and commends the Board for its efforts aimed at bringing clarification and resolution to the current *Novolog-Groves* circuit split. CSXT files these additional comments to further expound upon a possible resolution to the circuit split.

"[T]he existing system for handling demurrage liability works well, except for the narrow conflict between *Novolog* and *Groves*." NPR at 10. This statement by the Board provides the guiding principle from which CSXT's comments follow. What concerns CSXT is the Board's further statement that it intends to "depart from the historical focus on the bill of lading as the main document used to determine demurrage liability." NPR at 11. CSXT respectfully submits that a departure from the bill of lading would not bring uniformity to the law, would disregard a governing statute (49 U.S.C. § 10743), would disrupt current practice where it is working well and

cause disunity among the courts where there currently is none. CSXT recommends a solution that is tailored to the narrow issue presented by *Groves* – one that would not create a "material difference in terms of commercial outcomes" that the Board seeks to avoid. NPR at 16.

In Part I, CSXT respectfully requests the Board to recognize that *Novolog* and *Groves* are divided only on the narrow issue of what notice is required in law for an intermediary named in a bill of lading as a consignee to be held liable for the purpose of demurrage. Such a narrow issue is best addressed by an equally narrow solution that does not disrupt or interfere with clearly established existing law.

In Part II, CSXT proposes a rule that precisely targets and resolves the *Novolog-Groves* split without departing from nor disturbing Section 10743, current custom and practice, and a century of precedent that the Board recognizes works well in all circumstances other than the narrow conflict represented by *Groves*.

In Part III, CSXT provides comments that are offered only if the Board elects to go beyond the precise issue described in Part I and the similarly precise solution proposed in Part II. In particular, CSXT respectfully submits doing so would create confusion and division where none exist today - the Third, Fourth, Seventh and Eleventh Circuits are all joined in recognizing that Section 10743 does indeed apply to demurrage. It would also disregard the definitions in Title 49, the references to demurrage, lien and lawful charge as used in the Uniform Bill of Lading, as well as the longstanding custom and practice currently followed by rail carriers, consignors, consignees, and intermediaries alike.

Finally, in Part IV, in the event the Board does not reconsider its departure from the precedent for the reasons described in Part III, CSXT proposes certain limitations that the Board's proposed new rule should include.

## I. THE GROVES CONFLICT IS A NARROW ONE, AND REQUIRES AN EQUALLY NARROW SOLUTION

The gap in the current regulatory and statutory framework revealed in *Groves* is an extremely narrow one. It only pertains to intermediaries - a limited *subset* of the overall group of demurrage-paying entities. Of that subset, only a *portion* is ever identified on the bill of lading as the "consignee." Of that portion, only a *relatively smaller number* have ever alleged to have an issue with being wrongfully identified as a consignee. Many intermediaries identified as a consignee have no issue with paying demurrage, and their respective liability under CSXT's relevant demurrage publication, rules or tariff is well understood.

The conflict presented by *Groves* does not concern the liability of a consignee for demurrage under Section 10743.<sup>1</sup> Rather, the *Groves* conflict only concerns the focused question of whether some form of affirmative notice from the rail carrier is required in law for an intermediary named in a bill of lading as a consignee to be held liable under the Bill of Lading and Section 10743. CSXT suggests that on this question *Novolog* was correct; no particular notice is required.<sup>2</sup> Still, *Groves* is the law in the Eleventh Circuit and the Board is right to address how uniformity can be returned to the law.

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<sup>1</sup> *CSX Transp. Co. v Novolog Bucks Cnty.*, 502 F.3d 247, 257 (3rd Cir. 2007) ("We thus hold that that demurrage rates are "rates for transportation" under Section 10743."); *Norfolk S. Ry. Co. v Groves*, 586 F.3d 1273, 1278 (11th Cir. 2009) ("Demurrage is considered part of transportation charge); *see also* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 59:24 (4th ed. 2012) (citing *Groves*).

<sup>2</sup> *See Novolog*, 502 F. 3d at 262 ("For these reasons we hold that an 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); Association of American Railroads Comments dated March 7, 2011 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.)

CSXT requests the Board to mend the proverbial tear represented by *Groves* without altering the fabric of existing demurrage law that all consignors, consignees, intermediaries, rail carriers, and judicial bodies alike currently rely upon. A resolution to the *Groves* conflict need only address the isolated issue of notice and should not 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.

The Board should clarify demurrage liability by endorsing the *Novolog* approach as the preferred and recommended approach, while simultaneously providing clarification for any jurisdiction requiring railroad notification (such as the Eleventh Circuit today). It can do so by instructing that a rail carrier's written or email notification to the consignee intermediary of an electronic link to the rail carrier's demurrage publication, rule, or tariff satisfies the *Groves* notice requirement. In the event that the Board considers that such clarification to existing law can only be achieved through the issuance of a new rule,<sup>3</sup> CSXT proposes that the rule in Part II provides a way to do so without disturbing existing law, while providing assistance and clarification as to what constitutes "notice" in any jurisdiction requiring it.

## **II. CSXT PROPOSES A RULE THAT IS LIMITED AND PRECISELY TARGETED AT RESOLVING THE GROVES CONFLICT**

CSXT proposes a rule that would apply to any intermediary named as a consignee in a bill of lading that receives written or electronic notice of the rail carrier's demurrage publication, rules or tariff. Such intermediary would thereafter be liable for demurrage anytime it accepts a rail car, whether it be empty or loaded, either at origin or destination, from that rail carrier. A rail carrier's provision of an electronic link to its demurrage publication, rules or tariff would satisfy the

notification requirement.<sup>4</sup> Finally, CSXT suggests that the rule include a preamble to the following effect: *"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."*

CSXT submits that such a rule would be consistent with Section 10743, the Uniform Bill of Lading, and current case law. It also would not disturb an intermediary's current ability to assert agency under Section 10743, which CSXT recommends is effectuated today either by the designation of "in care of" on the bill of lading, or by separate written notice to the carrier.

This approach achieves the goal of affirming today's demurrage practice where it is working, where the law is well-recognized and where there is insufficient evidence showing a need for change, while still recommending a practical way of resolving the Groves conflict where it exists.

### **III. AN INTERPRETATION OF SECTION 10743 THAT DOES NOT INCLUDE DEMURRAGE WOULD CAUSE DIVISION AMONG THE FEDERAL COURTS, DISRUPT THE LARGER STATUTORY AND REGULATORY FRAMEWORK, AND INTERFERE WITH LONGSTANDING CUSTOM AND PRACTICE**

#### **a. Severing Demurrage From Section 10743 Would Cause Confusion And Division With The Third, Fourth, Seventh, And Eleventh Circuits.**

Section 10743, as it applies to a principal consignee (i.e., not an agent), that has accepted the goods, imposes liability upon that consignee for all financial obligations under the bill of

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<sup>3</sup> The Board's final decision in this proceeding and a corresponding declaration the next time the Board confronts the relevant issue may also bring sufficient clarity to the *Groves* conflict, without the necessity of a new rule.

<sup>4</sup> CSXT proposes that no further obligation should be upon the rail carrier to provide notice of changes to its demurrage publication, rules or tariff since the intermediary would thereafter know the electronic source of the carrier's demurrage publication. To the extent the Board feels some form of updating is necessary, CSXT submits that so long as the rail carrier-provided electronic link serves as a valid source for the carrier's demurrage publication, or the carrier provides a method for the intermediary to learn of any updates to the publication, the rail carrier should not be required to thereafter provide anything more to the intermediary. In CSXT's case, its ShipCSX website provides the intermediary with an opportunity to subscribe and receive any future publication, rules, or tariff updates.

lading, whether denominated as a rate or a charge<sup>5</sup> or an accessorial, at or after delivery, or otherwise, provided the obligation arises under the contract of carriage.<sup>6</sup> Section 10743 only allows a named consignee to avoid liability for "additional charges" where it is an agent and has complied with the requirements of Section 10743.<sup>7</sup> In addition to *Novolog* and *Groves*, in *Davis*, the United States Court of Appeals for the Fourth Circuit has also affirmatively stated that demurrage is a transportation charge.<sup>8</sup> Similarly, in *Illinois Central Railroad v. South Tec Development Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003), presented with a factual scenario similar to *Groves*, the Seventh Circuit also applied Section 10743 to demurrage.<sup>9</sup> Indeed, in the Petition for Declaratory Order that arose in *South Tec Development Warehouse, Inc., and R.R. Donnelley & Sons Company—Petition For Declaratory Order—Illinois Central Railroad Company*,

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<sup>5</sup> See 49 U.S.C. § 10102(7) ("rate" means a rate or charge for transportation); see also *Novolog*, 502 F.3d at 256 n.8 (3<sup>rd</sup> Cir. 2007) ("There is no substantive difference between the terms 'transportation charges' and 'rates for transportation' in the statute. See Historical and Revision Notes to 49 U.S.C. § 10744 (1982) ('[t]he word 'rates' is substituted for 'charges' for consistency in view of the definition of 'rate' in section 10102 of the revised title').").

<sup>6</sup> See *Novolog*, 502 F.3d at 255-56 (3<sup>rd</sup> Cir. 2007) ("[T]he consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision) (citing *Louisville & Nashville Ry. Co. v. Cent. Iron & Coal Co.*, 265 U.S. 59, 70, 44 S.Ct. 441, 68 L.Ed. 900 (1924) ('[I]f a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later'); *Erie R. Co. v. Waite*, 62 Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); *Gage v. Morse*, 12 Allen 410, 90 Am. Dec. 155, 1866 WL 6378 (Mass.1866) ('[i]f the consignee will take the goods, he adopts the contract').").

<sup>7</sup> 49 U.S.C. § 10743(a) provides:

(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

<sup>8</sup> See *Davis v. Timmonsville Oil Co.*, 285 F. 470, 474 (4th Cir. 1922) ("Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage.").

<sup>9</sup> As noted by the Board in the NPR at 4, n.11 *South Tec* approached a *Groves*-like result, but remanded the issue to the district court which ultimately dismissed the case upon settlement by the parties. *Ill. Cent. R. v. S. Tec Dev. Warehouse, Inc.*, No. 97 C 5720, dkt. no. 64, (N.D. Ill. Dec. 12, 2003) (unpublished).

STB Docket No. 42050 (STB served November 18, 2000) the Board used language that echoed Section 10743 with respect to liability for demurrage:

Moreover, IC points out that South-Tec was not just a storage-in-transit point essential to the transportation, but was in fact identified on the bills of lading as the consignee of the shipments to its Kankakee warehouse. In those circumstances, once South-Tec accepted the shipments, it (or Donnelley, if South-Tec was acting as Donnelley's agent) became liable for the demurrage charges.

*Id.* (emphasis added).

An announcement by the Board that it intends to interpret Section 10743 as not applying to demurrage would create unnecessary and unhelpful tension in the district courts in the Third, Fourth, Seventh and Eleventh Circuits interpreting Section 10743 who may view *stare decisis* as an impediment to the extension of deference to the Board's interpretation of Section 10743. District courts not bound by *Novolog*, *Davis*, *South Tec*, or *Groves* might afford deference to the Board, which will only enhance a conflict among the circuit courts, invite challenge rather than provide clarity and make it more difficult rather than less difficult for courts to resolve demurrage questions.

**b. The Definition of "Transportation" under Title 49 U.S.C. Section 10102(9), Encompasses Demurrage.**

As the Third Circuit in *Novolog* held:

[W]e need not stray far to discover what the provision means by "rates for transportation," since the statute itself contains a definition section. As used in ICCTA, "transportation" includes":

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. . . .

49 U.S.C. § 10102(9) (emphasis added). There can be little question that railcars — as cars, vehicles, instrumentalities, or equipment related to the movement of property by rail — are encompassed by this definition.

...  
We thus hold that demurrage rates are "rates for transportation" under Section 10743.

*CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 256 (3rd Cir. 2007).<sup>10</sup>

The current, expansive statutory definition of "transportation," and the holding in *Novolog*, are both consistent with the longstanding, historical definition of "transportation" that can be traced back over a century.<sup>11</sup>

In light of the plain, statutory definition of "transportation," and its long history of being expansively applied, the Third Circuit in *Novolog* was right to say there was "little question" on demurrage being included in Section 10743.<sup>12</sup>

**c. The Uniform Bill of Lading Further Evidences the Original Intent of Section 10743 and the Connection Between Demurrage and the Named Consignee.**

For nearly a century, railroads have been required to use, with only minor changes, the prescribed bill of lading (also referred to herein as the "Uniform Bill of Lading"), appearing at 49 C.F.R. § 1035.1, *et. seq.* The Board considered deprescribing the bill of lading in 1991, but after comment, the Board decided to preserve the Uniform Bill of Lading without substantive revisions. As will be explained below, the terms of the Uniform Bill of Lading mirror the terms of Section

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<sup>10</sup> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

<sup>11</sup> The Interstate Commerce Act of 1887 defined transportation only as: "the term 'transportation' shall include all instrumentalities of shipment or carriage." Pub. L. 49-104, 24 Stat. 379. However, the Hepburn Act of 1906 expressly expanded the definition to include services such as those in connection with receipt, delivery, storage, and the handling of property: "[T]he term 'transportation' shall include cars and other vehicles and instruments and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Pub. L. 59-337, 34 Stat. 584.

<sup>12</sup> See *Cleveland C., C., & St. L. Ry. Co. v. Dettlebach*, 239 U.S. 588, 594 (1916) ("From this and other provisions of the Hepburn act [*sic*] it is evident that Congress recognized that... so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like.") (emphasis added). Similarly, in the 1978 recodification of Section 10522 (Exempt Transportation Between Alaska and Other States) the House Report stated:

In clause (2) the words "providing transportation" and "all transportation" are substituted for "operating" and "entire service", respectively, for consistency and because 49:303(a) (19) defines 'transportation' and 'services' as synonymous terms and includes all phases of a carriers operations. The words 'fares, and charges' are omitted as unnecessary in view of the definition of 'rates.'"

10743, inextricably link ownership of the goods to the provisions of the bill of lading and allow a lien on and sale of the goods with the proceeds applicable to demurrage and all other lawful charges. These links challenge the Board's premise that "demurrage charges that arise during the course of transit are not tied to ownership of the goods." NPR at 15. CSXT submits that Section 10743 and the Uniform Bill of Lading have always been intended to be consistent with one another. Any reading of Section 10743 that expressly conflicts with the clear meaning of the Uniform Bill of Lading are counter to the intent of both and would render the Board's regulatory framework internally inconsistent.

For example, in 1922, the ICC added to the then existing Section 7 of the Uniform Bill of Lading the following preamble which still exists today:

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property...."<sup>13</sup>

66 I.C.C. 687, 688 (1922) (emphasis added). "Average" refers to a means of computing demurrage on an average basis as opposed to "straight" demurrage. *Capitol Materials Incorporated—Petition For Declaratory Order—Certain Rates And Practices Of Norfolk Southern Railway Company*, NOR 42068 (STB served April 12, 2004).<sup>14</sup>

Similarly, Section 4 of the Uniform Bill of Lading specifically addresses demurrage, and entitles the carrier to sell the goods under certain circumstances and apply the proceeds of any such sale to unpaid demurrage. Section 4 states: "Property not removed by the party entitled to receive it within the free time . . . may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage . . . or at the option of the carrier, may be removed to

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<sup>13</sup> The remainder of the then and still existing sentence provides: "but except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid."

and stored . . . subject to a lien for all freight and other lawful charges, including a reasonable charge for storage." 49 C.F.R. § 1035 app. B, Sec. 4(a) (emphasis added). If the property is sold, "[t]he proceeds of any sale . . . shall be applied by the carrier to the payment of freight, demurrage, storage, and other lawful charges . . ." *Id.* at Sec. 4(e) (emphasis added).<sup>15</sup> This text, and thus the link between demurrage and the ownership of goods, has existed in the bill of lading since 1919. *See In the Matter of Bills of Lading*, 52 I.C.C. 671 (1919).<sup>16</sup>

CSXT believes the Board's premise that "demurrage charges that arise during the course of transit are not tied to ownership of the goods" (NPR at 15) did not fully consider the links to ownership reflected in the parties designated within the bill of lading, nor the almost identical text and parallelism between Section 7 of the Uniform Bill of Lading and Section 10743.

Disregarding the link between the lien on cargo and demurrage under the bill of lading and establishing a rule that makes only the actual receiver liable could have practical considerations. In a closed gate,<sup>17</sup> constructive placement<sup>18</sup> situation it is possible for demurrage to accrue prior to

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<sup>14</sup> "Under an average demurrage agreement, a shipper earns credits for cars that it releases early, before the end of the allowable 'free time' ('free time' generally allows a shipper up to 24 hours for loading and up to 48 hours for unloading a rail car)." *Capitol Materials* at 3.

<sup>15</sup> Carriers across several modes of transportation are entitled to a lien for demurrage. "The general rule is that demurrage is extended freight . . ." *Pa. R. Co. v. Moore-McCormack Lines, Inc.*, 370 F.2d 430 (2d Cir. 1966); *see also* AAR Comments in response to the Advance Notice of Proposed Rulemaking at 21. Furthermore, the lien exists as a right under federal and state law. The Federal Bill of Lading Act grants a lien for demurrage. 49 U.S.C. § 80109. Similarly, Article 7-307 of the Uniform Commercial Code, codified in state law, grants a lien to the carrier of goods.

<sup>16</sup> "In ordinary commercial practice, however, the carrier waives its right to prepayment of charges and looks to the consignee for the same, its claim secured by a lien upon the goods." 52 I.C.C. 671, 721 (1919).

<sup>17</sup> At CSXT, a customer is considered open gate when all cars can be directly placed at the customer's plant on arrival without regard to car initial and number or other placement instructions. If a customer wants to order cars specifically by car initial and number from a nearby CSXT serving yard (often because the customer's track capacity is insufficient to hold all arriving cars), then a customer is considered closed gate. *See CSX, QUICK GUIDE TO MANAGING DEMURRAGE AND PRIVATE STORAGE 7, available at* [http://csx.com/share/wwwcsx\\_mura/assets/File/Customers/Price\\_Lists\\_Tariffs\\_Fuel\\_Surcharge/8100/CSXDemurrageGuide.pdf](http://csx.com/share/wwwcsx_mura/assets/File/Customers/Price_Lists_Tariffs_Fuel_Surcharge/8100/CSXDemurrageGuide.pdf).

<sup>18</sup> *Capitol Materials Incorporated—Petition For Declaratory Order—Certain Rates And Practices Of Norfolk Southern Railway Company*, NOR 42068 (STB served April 9, 2004) stated:

There are two kinds of placement in the rail industry — actual placement and constructive placement. Actual placement occurs when the railroad actually places a rail car in a position previously designated by the shipper. Actual placement starts the 48-hour period in which the shipper must unload the car before demurrage starts to accrue. . . . Constructive placement occurs when a railroad car cannot be actually placed

the actual delivery of the rail cars (i.e., the rail care is held at a nearby CSXT serving yard awaiting instruction from the receiver to bring the cars into the receiver's facility). Under the Board's proposed rule, an "in care of" warehouseman that had received the notice proposed by the Board would be liable for that demurrage. If the warehouseman does not pay, and as a result, a rail carrier holds the goods or exercises a lien under the bill of lading pending payment of demurrage, a consignee, likely the beneficial owner of the goods, would be impacted by that action. Conceivably, the consignee might attempt to challenge the carrier's action alleging that the Board's departure from the bill of lading and Section 10743 has excused the consignee from liability for demurrage and shifted that liability to the warehouseman for its delay in detaining the cars, allegedly severing the rail carrier's authority over the consignee's goods.<sup>19</sup>

It follows that in removing the association of demurrage with the contract of carriage and the beneficial owner of the goods, other pieces of the current regulatory framework, such as the longstanding right of a rail carrier to apply the proceeds of any sale of goods subject to the carrier's lien by the carrier for the payment of demurrage, are undermined, and have the potential of creating a "material difference in terms of commercial outcomes." NPR at 16.

**d. Any Attempt to Sever Demurrage from Section 10743 Would Have an Unnecessarily Broad Effect on Current Demurrage Practice.**

Today, the law relies on the designations in the bill of lading for the purpose of demurrage in at least two ways. First, a named consignee is liable.<sup>20</sup> And second, if the intermediary is named an "in care of" party, it is not liable — it is an agent. The Board's new rule that departs from

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at the shipper's facility because of a condition attributable to the shipper (such as no room on tracks in the shipper's facility) and the railroad holds the car (either at its destination or at another available point) and then sends notice of the hold to the shipper.

<sup>19</sup> CSXT does not agree with this conclusion, but that would not prevent a consignee from raising the argument.

<sup>20</sup> Although in a *Groves*-like jurisdiction the named consignee must also have notice.

today's reliance on the bill of lading would cloud with uncertainty two clear ways in which liability and agency are currently indicated.

CSXT submits that the Board should affirmatively state that any new rule to be codified as 49 C.F.R. § 1333.1 *et. seq.*, does not alter, modify or amend the traditional reliance on the bill of lading or any other contract, including specifically the carrier's right to a lien for demurrage.

Absent such clarification, the introduction of ambiguity regarding the carrier's right to payment of demurrage charges, under the bill of lading and Section 10743, would affect the entire breadth of today's demurrage practices, rather than the narrow circumstance presented by *Groves*:

For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail freight system by creating disincentives against delays, railways must be able to assess them effectively and without being mired in disputes. Section 10743 is designed to ensure just that. The simple rule that the named consignee becomes liable for demurrage charges upon acceptance of the freight unless it timely notifies the carrier of an agency relationship allows railroads to rely on the bills of lading and avoid wasteful attempts to recover from the wrong parties. For their part, recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.

*Novolog*, 502 F.3d at 259. (emphasis added).

#### **IV. IF THE BOARD ADOPTS THE PROPOSED RULE AS IT CURRENTLY EXISTS IN THE NPR, IT SHOULD INCLUDE CERTAIN LIMITATIONS**

In the prior sections of these Comments, CSXT has identified the issue and proposed a solution that does not disrupt Section 10743 or current case law. If the Board elects not to so limit its approach, and insists upon the proposed rule as set forth in its NPR, CSXT respectfully objects to such an approach, but nonetheless recommends the Board to include at least the limitations set forth below.

First, if the Board implements a new rule rendering all receivers (as opposed to just the consignee under Section 10743) liable upon affirmative notification on the part of the railroad,

such notification should be satisfied by written or electronic notice of the carrier's demurrage publication, rules, or tariff, as previously described herein.

Second, the proposed rule's agency exception will only re-open the same type of alleged confusion the Board is attempting to resolve in this proceeding. The Board's statement that "indeed, the third-party consignee is often the party most directly able to mitigate demurrage"<sup>21</sup> is inconsistent with the proposed rule's agency exception. If, however, the Board insisted on creating an agency exception for all receivers (as opposed to the statutory agency for the named consignee as provided in Section 10743), it must be clearly defined.

To avoid causing a rail carrier to make "wasteful attempts to recover [demurrage charges] from the wrong parties,"<sup>22</sup> the Board should include the additional agency related text found in Section 10743 (a)<sup>23</sup> and (b),<sup>24</sup> as well as Section 7 of the Board's prescribed Uniform Bill of Lading<sup>25</sup> that makes a purported agent that gives erroneous information to a carrier liable for the sums owed to the carrier. For example, the following text modifies the Section 10743 language to address the intermediary scenario:

"If the [intermediary] provides the delivering carrier erroneous information as to who the [principal] is, such [intermediary] shall himself be liable for such [demurrage], notwithstanding the foregoing provisions of this [rule] and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made."

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<sup>21</sup> NPR at 15.

<sup>22</sup> NPR at 11 (citing *Novolog*, 502 F.2d at 258-59).

<sup>23</sup> "A consignee giving the rail carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates."

<sup>24</sup> "A Shipper, consignor, or party to whom delivery is made that gives the delivering rail carrier erroneous information about the identity of the beneficial owner, is liable for the additional rates regardless of the bill of lading or contract under which the property was transported."

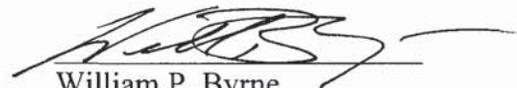
<sup>25</sup> "If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. . . . If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges."

Third, the declaration of agency should satisfy one of the following conditions: (1) the intermediary was named as the "in care of party" on the bill of lading; or (2) the intermediary sent an affirmative notice to the carrier by email or letter to a carrier designated address prior to delivery that (a) certifies the principal has agreed to its status as principal and its obligation to pay demurrage, and (b) provides the principal's appropriate business name and address, as well as the appropriate personal contact that includes the contact's name, phone number, email address, and physical address.

## CONCLUSION

The *Groves* conflict does not justify departing from a century of jurisprudence.<sup>26</sup> To the extent a jurisdiction requires that a railroad provide prior notice of its demurrage publication, or tariff to an intermediary named in the bill of lading as a consignee in order to give effect to designation, a simple email or letter to the intermediary with a link to the railroad's demurrage publication, rules, or tariff should suffice. CSXT respectfully encourages the Board to fit the proposed rule to the narrow circumstances presented in *Groves* and refrain from altering, modifying, or amending the otherwise well working statutory and regulatory structure now in effect.

Respectfully submitted,



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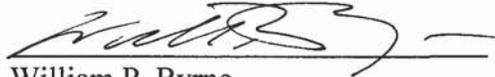
*Attorneys for CSX Transportation, Inc.*

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<sup>26</sup> Recall that the Board elected not to proceed with the deprecation of the Uniform Bill of Lading in 1991 and could similarly elect here not to proceed with the announced departure from the bill of lading or Section 10743.

**CERTIFICATE OF SERVICE**

I, William P. Byrne, certify that on this date a copy of the Comments of CSX Transportation, Inc. in response to Notice of Proposed Rulemaking, filed on August 24, 2012, was served by first-class mail, postage prepaid, on all parties of record.

  
William P. Byrne

Dated: August 24, 2012