

BEFORE THE
SURFACE TRANSPORTATION BOARD

232862

Ex Parte No. 707

ENTERED
Office of Proceedings
August 24, 2012
Part of
Public Record

DEMURRAGE LIABILITY

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

GAYLA L. THAL
LOUISE A. RINN
MARY ANN KILGORE
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

*Attorneys for Union Pacific
Railroad Company*

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Union Pacific Railroad Company (“UP”) respectfully submits these comments in response to the Surface Transportation Board’s Notice of Proposed Rulemaking served May 7, 2012 (“NPRM”). In the NPRM, the Board proposed rules providing that any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond a specified period of time may be held liable for demurrage if that person has actual notice of the terms of the demurrage tariff providing for such liability prior to the carrier’s placement of the rail cars.

UP appreciates the Board’s efforts to provide clarity for the industry on the issue of demurrage liability, and UP commends the Board for proposing rules that place the responsibility for detaining rail assets on the party in the best position to expedite the movement of rail cars. UP believes that Part 1333 is intended to provide an alternative legal basis for collecting demurrage,¹ and UP supports the Board’s proposed rules in this regard as consistent with the

¹ Under well-established legal principles, the bill of lading provides a legal basis for assessing demurrage on the consignor at origin and on the consignee at destination. *See CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 254-55 (3d Cir. 2007), *cert. denied*, 552 U.S. 1183 (2008) (“*Novolog*”); *Norfolk S. Ry. v. Groves*, 586 F.3d 1273, 1277-78 (11th Cir. 2009), *cert. denied* 131 S. Ct. 993 (2011) (“*Groves*”); *Middle Atl. Conference v. United States*, 353 F. Supp. 109, 1118 (D.D.C. 1972) (3-judge court). Parties in this proceeding previously noted and the Board recognized that the existing system for handling demurrage liability works well except for the (continued...)

traditional goals of demurrage. In addition to supporting the Board's proposed rules in Part 1333, these comments seek clarification on (i) the demurrage tariff notification requirement and (ii) the agency status notification requirement.

I. UP supports the proposed rules in Part 1333 as furthering the traditional goals of demurrage.

The Board has repeatedly recognized that demurrage is an important tool in ensuring the smooth functioning of the rail system,² and the principle underlying demurrage is straightforward. When a shipper or receiver detains a railroad-owned rail car, it deprives the railroad of an asset – the use of that rail car.³ Furthermore, when a privately-owned rail car waits idly on the railroad's tracks because the receiver cannot accept the car, the receiver not only deprives the railroad of the use of that track, but it also impedes the flow of cars to other customers.⁴ Demurrage thus serves two purposes: (1) it compensates a railroad for use of its assets (rail cars or rail facilities) and (2) it encourages the efficient use of rail assets for the benefit of all rail customers. NPRM at 2.⁵

narrow conflict between *Novolog* and *Groves*. NPRM at 10. Consequently, UP does not believe the Board intended to disrupt the existing legal basis for collecting demurrage under the bill of lading because that would introduce uncertainty into area of law that is well-settled.

² See NPRM at 2; Advance Notice of Proposed Rulemaking, Ex Parte No. 707 (STB served Dec. 6, 2010) at 1.

³ See *R.R. Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102 (STB served July 20, 2010) at 4. See also *N. Am. Freight Car Ass'n v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 6-8, *aff'd sub nom. N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008).

⁴ *Id.*

⁵ UP does not believe that the Board intended to limit the definition of demurrage in Section 1333.1 to railroad-owned rail cars because demurrage can accrue on privately-owned cars held on railroad property. See cases cited in *supra* note 4. Cars held in constructive placement reduce car utilization and delay the distribution of cars to other customers.

The Board's proposed rules in Part 1333 are entirely consistent with the two goals of demurrage. By placing liability for demurrage on parties who are responsible for undue car detention and who are in the best position to expedite the movement of the rail cars they receive, Part 1333 ensures that the railroad whose assets are consumed will be compensated and provides a direct financial incentive for all parties participating in the transportation network to use rail assets efficiently. If a party detaining rail cars could disavow responsibility for demurrage "by simply saying that it does not know about (or that it chooses not to consent to) the consignee status assigned by the shipper," the traditional goals of demurrage would be defeated. NPRM at 11. Railroads would be uncompensated and, more importantly, parties would not be incentivized to use rail assets efficiently.

As UP explained in its earlier comments in this proceeding, UP's demurrage practices are designed to encourage shippers and receivers to improve car utilization and to avoid creating congestion at their loading and unloading facilities as well as at rail yards and terminals, which allows us to maintain a fluid network.⁶ Following the merger with Southern Pacific, UP learned that congestion has system-wide implications and that the number of cars on a network is a leading indicator of congestion.⁷ When congestion occurs on one part of our network, it is not isolated to that immediate area. Rather, congestion on one part of our network constrains our network resources system-wide. Train velocity decreases, transit times increase, our available resources are consumed, and service to our customers ultimately deteriorates. Since excessive car detention can consume other network resources and thereby cause car shortages, the Board

⁶ Comments of Union Pacific Railroad Company, Ex Parte No. 707 (filed Mar. 7, 2011) at 2-3.

⁷ See *Union Pac. Corp. et al. – Control & Merger – Southern Pacific Rail Corp. et al.*, STB Finance Docket No. 32760 (Sub-No. 26) (STB served Dec. 21, 1998) at 6-7 (describing the resulting service crisis).

should consider modifying the end of the last sentence in Section 1333.1 to “encourage the efficient use of rail cars *and* the rail network.” (emphasis added). If parties participating in the transportation network do not have an incentive to use rail assets efficiently, congestion would likely result and our service to other customers would be negatively impacted. 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.

II. The Board should clarify the demurrage tariff notification requirement to ensure that the requirement is reasonable.

Under the proposed rule in Section 1333.3, a carrier must provide actual notice of its demurrage tariff prior to the placement of rail cars before a receiver of those cars can be liable for demurrage. UP understands that the Board’s intent is to require reasonable notice that alerts receivers of rail cars as to their liability for demurrage similar to the reasonable notice requirement for common carrier rates, charges, and service terms.⁸ The use of the term “actual notice” in Section 1333.3, however, could be used to create a new obstacle to payment of demurrage by those receivers who detain cars. UP believes the Board should not use the terminology “actual notice” in Section 1333.3 because “actual notice” is an ambiguous legal term.⁹ UP believes the Board should simply use “notice” instead of “actual notice” to avoid uncertainty and to coincide with the terminology used in 49 C.F.R. § 1300.4. Furthermore, we believe clarification would be helpful in three aspects.

⁸ See NPRM at 12 (quoting *Disclosure, Publ’n, & Notice of Change of Rates & Other Serv. Terms for Rail Common Carriage*, 1 S.T.B. 153, 159 (1996)).

⁹ See *Dusenbery v. United States*, 534 U.S. 161, 170 n.5 (2002).

First, UP urges the Board to clarify that the notice requirement of Section 1333.3 would be satisfied by (1) an electronic notification with a hyperlink to UP's demurrage tariff embedded in the message or (2) a written notification with a link to UP's demurrage tariff disclosed in the message would constitute notice under the proposed rule. The notification requirement cannot be so onerous as to require a carrier to certify service of its entire demurrage tariff or prove that the receiver of the notice actually read and understood the carrier's demurrage tariff. If UP notifies our customers that they are subject to demurrage pursuant to UP's demurrage tariff and provides a way for our customers to access the demurrage tariff provisions (i.e. embedding a hyperlink in the notification or disclosing the link in the notification), UP believes it would satisfy the Board's notice requirement.

Second, UP urges the Board to clarify that the notice requirement of Section 1333.3 would be satisfied if (1) UP provides our customers with one initial notice after the rule becomes effective and (2) UP provides subsequent notices if the demurrage rate increases or if the demurrage tariff otherwise changes. The notification requirement cannot be so onerous as to require a carrier to provide notice of its demurrage tariff to its customers on a shipment-by-shipment basis. Section 1333.3 should be satisfied if the party detaining rail cars receives notice of the applicable demurrage provisions at some time before the cars are placed. Even if UP's systems had the capability, the proposed rule should not require a shipment-by-shipment notification because a customer could avoid liability if it alleged that it did not receive a notice for a particular shipment prior to placement even though the customer knew it would otherwise be subject to demurrage. Receivers of rail cars should not be able to avoid liability for demurrage on such a technicality because that would run counter to the goals of demurrage

discussed above. UP agrees with the Board that once a customer knows the ground rules for demurrage, it should be responsible for managing its demurrage. NPRM at 12.

Third, UP urges the Board to clarify that receivers of rail cars cannot avoid demurrage liability merely because they renamed or restructured their company and the carrier did not provide an additional notice to the renamed or restructured company. Our notification capabilities are only as good as the information that our customers provide, and we have encountered situations where we have not received accurate or updated information from our customers in a timely manner. For example, a warehouseman operated through different entities over a period of several years, and the entities were all affiliated and operating from the same address. Although some of the entities were later dissolved, the warehouseman continued to accept rail cars that were consigned to the dissolved entities. The warehouseman did not inform UP of the dissolutions until after UP sought to collect demurrage that had accrued on the accounts of the dissolved entities. As this example demonstrates, UP may not be informed when companies change names or are restructured into new companies, and receivers of rail cars should not be able to avoid demurrage liability merely because they renamed or restructured their company. Once again, as long as the receivers previously had notice of the demurrage ground rules, they should be responsible for managing their demurrage.

III. If the Board adopts the proposed agency exception in Section 1333.3, the rule should clarify when a receiver of rail cars must provide notice to the carrier of its agency status.

Under the proposed rule in Section 1333.3, if a receiver of rail cars is acting as an agent for another party, the receiver-agent can disclaim liability for demurrage by notifying the carrier of its agency status and by identifying its principal. While UP is not convinced that this agency exception is warranted or consistent with the traditional goals of demurrage, UP requests that the

Board clarify when a receiver of rail cars must notify the carrier of its agency status and provide the identify of its principal.

The proposed rule is clear that a carrier must provide actual notice of its demurrage tariff to the receiver of rail cars before placement of those cars, but the proposed rule is silent as to when the receiver-agent must notify the carrier. If the Board protects the receiver-agent by allowing it to disclaim liability for demurrage, the Board should protect the interests of the carriers as well. If an agent indentifies a principal, a carrier needs adequate time to verify with the principal that it is accepting responsibility for demurrage. If a carrier is not provided adequate time to verify with the identified principal, the carrier may be caught in the middle between the agent and the principal if the principal denies responsibility for the demurrage that subsequently accrues. Therefore, if a receiver of rail cars is acting as an agent, the receiver-agent should be required to notify the carrier promptly after the transportation begins so that the carrier has adequate time to verify responsibility for demurrage liability with the identified principal before any demurrage can accrue. If notification promptly after the transportation begins is not feasible, the receiver-agent – at the very least – should be required to notify the carrier before the rail cars are delivered.

UP also urges the Board to clarify that a blanket disclaimer from a receiver of rail cars that it is always an agent and can never be responsible for demurrage would not satisfy the agency notification requirement. Whether a principal-agent relationship exists and the scope of agency authority depends on the specific agreement between the parties, and whether a particular receiver of rail cars is in fact an agent may differ for particular types of movements (e.g. the legal relationship may vary depending on the particular shipper or the type of freight). A blanket notice stating that a receiver of rail cars is always an agent may not reflect the actual legal

relationship for all future carloads, and such blanket notice certainly does not identify the principal for all future carloads. UP is not suggesting that a receiver-agent should be required to provide an agency notification on a shipment-by-shipment basis. However, the Board should require some level of specificity for the agency notification requirement so that carriers can verify with the identified principal that the principal is accepting responsibility for demurrage.

IV. Conclusion

UP appreciates the Board's efforts in furthering the goals of demurrage by placing responsibility for detaining rail assets on the party in the best position to expedite the movement of the rail cars they receive. UP believes that the proposed rules are entirely consistent with the goals of demurrage, but UP seeks clarification on the demurrage tariff notification requirement and the agency status notification requirement.

Respectfully submitted,



GAYLA L. THAL
LOUISE A. RINN
MARY ANN KILGORE
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

*Attorneys for Union Pacific
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