

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 707

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DEMURRAGE LIABILITY

COMMENTS OF BNSF RAILWAY COMPANY

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BNSF Railway Company (“BNSF”) joins the comments of the Association of American Railroads (“AAR”) regarding the Surface Transportation Board’s (“Board”) proposed new rule set forth in its May 7, 2012 Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding. BNSF also respectfully submits the following separate comments on its own behalf in response to certain aspects of the NPRM.

As stated in the NPRM, the primary issue before the Board in this proceeding is “who should bear liability when an intermediary that accepts rail cars and detains them too long is named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee?” NPRM, slip op. at 4. To address this question, the Board proposed a new rule providing that “[a]ny 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.” *Id.* at 20 (Appendix A, 49 C.F.R. § 1333.3).

BNSF supports the Board's efforts to ensure its demurrage policies account for "current statutory provisions and commercial practices"¹ and believes that a rule that "tie[s] demurrage liability to the conduct of the parties directly involved with handling the rail cars"² is appropriate. 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 cars. *See, e.g., N. Am. Freight Car Ass'n v. BNSF Ry.*, NOR 42060 (Sub-No. 1) (served Jan. 26, 2007), slip op. at 8. These goals apply equally to rail-owned equipment held beyond free time and privately-owned equipment held on railroad property awaiting disposition to the receiver. Indeed, the Board previously recognized that storing private rail cars "imposes costs on the railroad, including the loss of system fluidity and the opportunity cost associated with using track for long-term car storage that instead could be used to facilitate the efficient movement of freight." *Id.* at 6. Under the proposed rule, the railroad is compensated for the use of its assets and the party physically handling the rail car is incentivized to use those assets efficiently. The proposed rule is also consistent with BNSF's commercial practices, as described in BNSF's March 7, 2011 comments previously filed in this proceeding, which are summarized in the NPRM.

In the NPRM, the Board described the genesis of its efforts as resolving the narrow conflict between the Eleventh Circuit and Third Circuit over the application of demurrage charges to warehousemen or other third-party intermediaries. NPRM, slip op. at 4. BNSF believes the Board's proposed rule resolves this conflict well by making clear that liability for demurrage charges accrues to the physical receiver of the car, regardless of its status as

¹ NPR at 5.

² NPR at 13.

consignor, consignee or otherwise. As the Board recognized, except in this narrow circumstance, the system for allocating demurrage liability otherwise functions well, with the consignor and consignee being responsible for origin and destination demurrage charges, respectively. *Id.* at 10. As described in BNSF's March 7, 2011 comments, on the vast majority of shipments on BNSF that incur demurrage or storage charges, the issue of a party's responsibility at law for such charges simply does not arise. In light of this, BNSF believes the Board's intention was not to replace the traditional means of allocating demurrage liability through the bill of lading, but to supplement existing law by providing for demurrage liability outside of the bill of lading through the process described in the proposed rule. BNSF requests that the Board clarify its intention in this regard.

Conclusion

BNSF believes that a rule holding the physical handler of rail cars responsible for demurrage charges is appropriate and consistent with the goals of demurrage. BNSF respectfully requests that the Board clarify the scope of the proposed rule with respect to existing law. BNSF appreciates the Board's efforts in the proceeding and its consideration of these comments.

Respectfully submitted,

A handwritten signature in cursive script, reading "Peter M. Lee", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that I have this 24th day of August, 2012 served a copy of the foregoing Comments of BNSF Railway Company by first class mail, postage prepaid, on all parties of record in this proceeding.



Keith Decker