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March 7, 2011

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
MAR 7 2011  
Part of  
Public Record

Re: Ex Parte No. 707 – Demurrage Liability – CSX Transportation, Inc. Comments

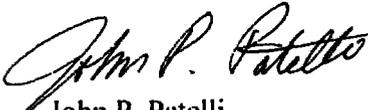
Dear Ms. Brown:

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

CSXT also supports and adopts the Comments of the Association of American Railroads filed today in this proceeding.

CSXT is e-filing this notice. Thank you for your assistance.

Respectfully submitted,

  
John P. Patelli

Enclosure

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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March 7, 2011

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.**

CSX Transportation, Inc. ("CSXT") respectfully submits these comments in response to the Surface Transportation Board's Advance Notice of Proposed Rulemaking served December 6, 2010 ("ANPR"), and the Board's January 20, 2011 decision granting a six-week extension to the procedural schedule. CSXT endorses the comments filed by the Association of American Railroads ("AAR Comments") and files separately only to comment on the Board's request for information pertaining to the electronic bill of lading and related systems that are particular to CSXT. The Board requested further insight on (1) the electronic bill of lading and the underlying systems that rail carriers have in place to support it, and (2) whether the electronic bill of lading adequately provides a party with notice of its designated status thereunder. CSXT addresses each of these topics in turn.

**I. The Electronic Bill of Lading and ShipCSX**

In the ANPR, the Board requested information about the processing of paperwork attending a shipment of property and how affected parties receive notice of the status they are assigned in the bill of lading. To properly address this question, it is necessary to begin by describing how the shipper/consignor creates and submits a bill of lading to CSXT and how

affected parties in the transportation chain are able to use CSXT's interactive website, ShipCSX, to become aware of, monitor, and trace a shipment from origin to destination

To request the service of rail transportation, the shipper/consignor must submit a bill of lading to the rail carrier. In almost all cases, the bill of lading is submitted to CSXT using Electronic Data Interchange ("EDI")<sup>1</sup> The bill of lading transmission occurs in one of two ways, either through (1) a mainframe-to-mainframe EDI link (often used by large customers), or (2) the ShipCSX interactive website<sup>2</sup> In either case, the shipper must enter information into certain fields, including the shipper/consignor, consignee, railcar, origin, destination, date of shipment, and commodity.

Any party along the chain of transportation (e.g., consignor, in care of party, warehouseman, consignee, etc.) may register as a user of ShipCSX. Having done so, the registered user may at any time check on the status of a shipment, including the time of departure, the location of a shipment enroute, and the estimated time of delivery The registered user may also establish personalized enroute reports that can be emailed to the user as frequently as six times per day. For example, an enroute report tracing a particular shipment could include departure time, constructive placement at a serving yard, actual placement at destination, and the time when a car is released back to the rail carrier<sup>3</sup>

Importantly, a receiver may establish enroute reports that identify all shipments to be delivered to the receiver's facility for which it is designated in the bill of lading as the consignee or the "in care of party" From such a report, the receiver is able to determine whether it has

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<sup>1</sup> There are still rare instances when the bill of lading is submitted by fax.

<sup>2</sup> ShipCSX is accessible at <http://shipcsx.com/public/cc/shipcsxpublic/Main>

<sup>3</sup> Even without establishing an enroute report, ShipCSX automatically transmits an email notification to the receiver (whether it be the consignee or an "in care of party") upon constructive placement of the car in a serving yard, so long as the receiver is registered with ShipCSX and has not turned off that notification flag. Constructive placement is the only event that triggers such an automatic email notification

consignee or “in care of” status well before the shipment ever arrives at the receiver’s facility. If the receiver notices an error on the bill of lading, the receiver has the ability to take corrective action in advance of the shipments’ arrival. In fact, the report can be tailored to provide notification to the receiver shortly after newly created transportation waybill data<sup>4</sup> has been established. Thus, it is possible that a receiver could learn of its status—as consignee or “in care of” --even before the car has departed the point of origin.<sup>5</sup>

For the purpose of tracking demurrage, a party is able to subscribe to a daily summary demurrage report that details the current month’s estimated charges, accrued days, and demurrage credits.

In summary, ShipCSX allows any affected party (consignor/shipper, “in care of” party, consignee, warehouseman/intermediary, etc.) to (1) view the real-time location of a shipment, (2) receive enroute reports that allow the user to determine bill of lading status for inbound/outbound shipments, (3) receive enroute reports that update the user as to whether any number of pre-selected events have occurred (including actual placement and constructive placement), and (4) receive a summary demurrage report that details user demurrage liability.

## **II. Whether the Electronic Bill of Lading Adequately Provides a Party With Notice of its Bill of Lading Designation**

The bill of lading has always provided--and continues to provide--adequate notification to the consignee that it is liable for demurrage. The electronic nature of today’s bill of lading and the related railroad systems such as ShipCSX provide parties along the transportation chain

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<sup>4</sup> The railroad generates the transportation waybill shortly after it receives the information contained in the bill of lading.

<sup>5</sup> The CSX website contains additional information related to ShipCSX (*see, e.g.*, <http://www.csx.com/index.cfm/customers/tools/shipcsx/>). CSX representatives are available by phone to address any questions related to ShipCSX, including the set-up of enroute reports (1-877-ShipCSX (1-877-744-7279), option 2).

with the ability to learn of, monitor, and trace shipments at an earlier junction and with more frequency than ever before. As a result, it is less than credible for any party named as consignee along the transportation chain (warehousemen/intermediary or otherwise) to claim that they have no means of knowing their *de facto* status reflected in the bill of lading in advance of receiving a shipment or receiving a demurrage bill

In the event the warehouseman disagrees with its designated status of consignee, the warehouseman has the rights it has always enjoyed, namely the right to reject the freight, and the right to enter into agreements under which shippers/consignors indemnify them for erroneous designations in the bill of lading.

When the shipper/consignor incorrectly identifies the warehouseman as a consignee (instead of an "in care of party"), it is the communication link between those two business partners that is failing. Yet, it is too often the railroad that is left holding the bag for the unpaid demurrage. In this instance, it is up to the warehouseman to reach out to the shipper/consignor, revisit the terms of its agreement with the shipper/consignor if need be, and advise that its designation as consignee is unacceptable. Simply deciding to not pay demurrage, however, is not an option.

It bears reminding that while the rail carrier provides the above described e-tools to the benefit of parties along the transportation chain, the carrier's role is nonetheless fundamentally limited to what it has always been: a railroad hauling freight from origin to destination pursuant to the shipping instructions provided by the shipper/consignor. The rail carrier has never--and will never--be in a position to know the intricacies of the unique commercial relationship that exists between the shipper/consignor and the receiver, nor the division of responsibility that each has agreed to.

It would be misguided, therefore, for the Board to place any separate legal obligation upon the rail carrier to provide affirmative notice of liability pursuant to the terms of the bill of lading. As the Board itself has pointed out, the commercial relationship exists between the *shipper* and the *warehouseman*, and “it should not be the carrier’s responsibility to investigate whether the relationship described in the bill of lading accurately reflects the *de facto* status of the parties.” ANPR at 5 (citing *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007))

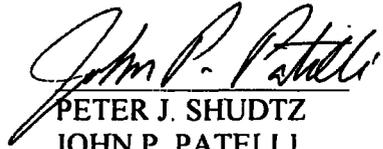
### **III. Conclusion**

In accord with the AAR, CSXT respectfully requests the Board to endorse the *Novolog* rule that a named consignee is subject to liability for demurrage upon acceptance of the freight, notwithstanding any claim that the consignee did not assent to, or lacked notice of, its status. It is important for receivers to understand that they have a minimum affirmative duty to ascertain (and take action to correct if necessary) its *de facto* status in the bill of lading. The Board’s endorsement of *Novolog* would make clear to receivers that they may not seek safe harbour by acting willfully blind to their designation in the bill of lading. By taking this action, the Board would be providing needed guidance to the many courts across the nation that are not already bound by either *Novolog* or *Groves*.

As for courts bound by the *Groves* rule that a named consignee is not subject to liability unless it agreed to be named as consignee, or at least had notice that it was named as consignee, CSXT, in accord with the AAR, respectfully requests the Board to clarify that a receiver under *Groves* still has a minimum affirmative duty to ascertain its own *de facto* status in the bill of lading. So long as the named consignee has an opportunity to learn of its status in advance of

delivery—either from the consignor, railroad, or otherwise—it should be considered to have received the requisite notice under *Ciroves*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John P. Patelli", written over a horizontal line.

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