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Before the  
**SURFACE TRANSPORTATION BOARD**

**Demurrage Liability**

**Docket No. EP 707**

**COMMENTS OF  
INTERNATIONAL LIQUID TERMINALS ASSOCIATION**

The International Liquid Terminals Association (ILTA) is submitting these comments in the above-referenced proceeding pursuant to the notice published by the Surface Transportation Board (the Board) on May 10, 2012, in the *Federal Register* (77 Fed. Reg. 27384-86). ILTA is an international trade association that represents 80 commercial operators of aboveground storage terminals serving various modes of bulk liquid transportation, including tank trucks, rail cars, pipelines and marine vessels. These companies handle a wide range of liquid commodities, including refined petroleum products, crude oil, chemicals, renewable fuels, fertilizers, vegetable oils and other food grade materials. Customers who store products at these terminals include oil producers, chemical manufacturers, product manufacturers, food growers and producers, utilities, airlines and other transportation companies, commodity brokers, government agencies, and the U.S. military. In addition, ILTA includes in its membership more than 350 companies that are suppliers of products and services to the bulk liquid storage industry.

Seventy-three ILTA terminal members operate more than 600 facilities in the U.S. Fifty-two of these companies have terminals with rail car loading/unloading operations. Virtually all of these terminals provide “for-hire” storage and handling services to customers who own the stored products. These customers often are the rail shippers who deal directly with the carriers pursuant to contracts or tariffs.

ILTA opposes the proposed rule. In our view, there are sound reasons for maintaining the longstanding commercial practice that shippers are responsible for demurrage costs incurred on their behalf. Also, the rule would have costly adverse consequences for bulk liquid terminals and rail carriers if it were implemented. It would virtually guarantee constant disputes and endless litigation on the question of whether “actual” notice had been provided to one or both of the parties to a demurrage liability claim. Rather than improve a carrier’s ability to assess and collect demurrage charges, the rule would simply add a new regulatory burden for rail carriers and terminals that ultimately would serve no useful purpose. In addition, it is ILTA’s position that the Board has failed to provide a factual basis for the proposed rule, and it has offered no compelling reason for a new regulatory policy that imposes presumptive demurrage liability on terminals.

**I. Shippers Should Be Responsible for Demurrage, Not Third-Party Intermediaries.**

Third-party bulk liquid storage terminals neither direct rail receipts or shipments at their facilities nor initiate them. Rather, it is the product shipper, either as the product owner or as an agent acting directly on behalf of the product owner, who directs the transportation activity and should be responsible for demurrage accrued in the movement of product under his control.

The shipper maintains a contractual relationship with the rail carrier that governs the terms of the transportation service. Terminals, warehousemen and other third-party intermediaries are not direct parties to this relationship, which is precisely why they are referred to as third parties. The shipper also maintains a separate contractual relationship with the terminal, either directly or through secondary

agreements. Since the terminal has no direct relationship with the rail carrier, the loading or unloading of a product is simply a service that the terminal operator provides for its customer. This terminal customer is most commonly the product owner at the time of delivery. The customer may also be the product shipper, or the customer may have a separate, direct contractual relationship with the shipper. It is well established within the industry that when product arrives at a terminal, it has been “delivered” to the product owner rather than the facility, which is simply acting on the product owner’s behalf.

As the party who pays the carrier to move the cars, the shipper is fundamentally responsible for incurred expenses associated with the movement of product to or from a terminal according to agreed-upon terms, including demurrage liability. The shipper has a clear stake in the carrier’s effective handling of cars. Thus, the shipper is in the best position to determine the legitimacy of a demurrage charge and who should be responsible for the costs.

If a 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. For instance, if a mechanical failure at a loading rack causes an excessive delay, service contract terms would provide for a demurrage reimbursement by the terminal. Alternatively, a shipper may schedule delivery of multiple rail cars containing a volume of product exceeding the available space in a storage customer’s tanks. In this case, it would be the shipper who would be directly responsible, and liable, for incurred demurrage charges. In some circumstances, a carrier could fail to retrieve cars at an appointed time, due to rail congestion or for other reasons, and nevertheless assess a demurrage charge. Whether the shipper pays the charge would depend on the terms of the tariff or the contract.

Delays in the unloading of cars at a terminal may also be caused by the “bunching” of cars, a common rail carrier practice. For instance, a carrier may deliver more cars to a terminal than the facility is able to process within the allowed time. The number of delivered cars may exceed the number of loading or offloading spots. Typically, the carrier would be responsible for the extended handling time by the terminal, which has no control over the delay. However, if the shipper’s scheduling has also contributed to the delay, then the tariff terms or the contractual agreement between the shipper and the carrier would determine which party should bear the cost of demurrage.

In summary, terminal companies generally do not control rail car movements into their terminals, nor do they control when the cars are pulled from their terminals. When a terminal receives authorization from a customer to load or unload cars, the carrier will usually determine the actual timing of the car movement from the rail yard to the terminal. Simply accepting delivery of cars at a terminal and handling the loading/unloading process does not constitute control of the cars for the purpose of determining demurrage liability.

## **II. By Failing to Define “Actual Notice,” the Proposed Rule Would Cause Disputes and Litigation.**

A significant deficiency in the proposed rule is the lack of a definition for the “actual notice” that a receiver of rail cars must provide to avoid demurrage liability. The rule requires the receiver to notify the carrier of his agency status and the identity of the principal, but the rule does not specify what would constitute actual notice, nor does it define what would be acceptable as a verification of the receipt of the notice.

If a terminal sent notice to a carrier by e-mail or other means, and requested a reply in kind to confirm receipt, there is no assurance that the carrier would cooperate. By sending such a confirmation, the carrier would be acting against its own interest by creating a defense for the terminal against future

claims for demurrage by the carrier. Without such a confirmation, terminals would be unable to demonstrate that actual notice had been provided. This would set the groundwork for litigation. This outcome clearly was anticipated by the Board. In the advance notice of proposed rulemaking in this proceeding, the Board stated, “What constitutes ‘adequate notice’ could be decided on a case-by-case basis either by the Board or the federal courts in collection actions, or it could be established by rule.” Since the proposed rule lacks any specific definition or procedures relating to providing actual notice, the Board appears to have decided to let the parties fight it out in court.

As a regulatory policy matter, this is an unsatisfactory way to deal with anticipated economic disputes among the parties. Such an approach directly contradicts the Board’s stated intent to “promote uniformity” in this area. In the preamble to the proposed rule, the Board also stated that it had been prompted to “assist in providing clarification for the industry.” For both of these objectives, it is highly likely that litigation would produce the opposite result.

### **III. The Proposed Notice Procedure Would Not Lead to an Improved Process for Determining Demurrage Responsibility.**

Although the proposed rule may at first appear to be a practical approach for simplifying demurrage collections, the opportunity afforded terminals to provide notice of their agency status will, in most cases, ensure that no improvement will occur in the rail carriers’ ability to determine demurrage responsibility and then collect demurrage. Terminals would uniformly exercise their right to waive demurrage liability by providing the notice.

Third-party terminals, as a rule, handle products exclusively as agents for their customers who are typically owners of the products. These for-hire services can involve a complex set of relationships. For example, an ethanol broker bundles rail cars of ethanol from multiple manufacturers and sells the ethanol to a petroleum refiner. The broker arranges for rail transport and the refiner directs the cars to a third-party terminal. Prior to delivery, the terminal notifies the rail carrier that it is acting as an agent on behalf of the refiner. At this point, the terminal would no longer be liable for demurrage. Any delays in the offloading of ethanol at the terminal would leave the rail carrier with the same burden of demurrage collection that it faces today without the notice procedure.

In a more simple relationship where the product owner is the shipper, the terminal would send the same agency notification to the carrier. The carrier’s only recourse in collecting any demurrage incurred would be to bill the shipper, regardless of any other circumstances that might otherwise have a bearing on demurrage liability.

### **IV. The Board Has Failed to Provide an Adequate Factual Basis for the Proposed Rule.**

In the notice of the proposed rule, the Board makes clear that the fundamental rationale for the rule is the idea that bulk liquid terminal companies and other third-party intermediaries have sufficient control over the movement of rail cars placed at their terminals to justify holding them presumptively liable for demurrage. Terminals are assumed to control car movements merely because they accept delivery at origin or destination points and then hold the cars for loading or unloading. This assumption is evident from the Board’s statement that warehousemen, by accepting the cars, “are in a position to facilitate or impede car supply.” Another example is the Board’s statement that “the third-party consignee is often the party most directly able to mitigate demurrage.” Therefore, terminals are presumed to be disproportionately liable for any demurrage that is incurred.

The Board's view of the degree of terminal control over rail cars has no factual basis. It does not accurately reflect the reality of rail operations at terminals. As previously stated in these comments, terminals generally do not regulate the volume of cars delivered to terminals, nor do they control the timing or the pace of the deliveries. It is a fact that terminals in most cases simply do not have any significant control over rail car movements at their facilities. The Board has not provided any form of convincing evidence or explanation for its contrary view. It has not cited industry surveys to support its position, nor has it referred to any cases studies. In short, it has offered no factual support whatsoever for the basic rationale that underlies the Board proposal to shift the burden of presumptive demurrage liability to terminals.

Another unfounded assumption in this proceeding relates to the presumed economic benefit that terminals may gain by detaining rail cars beyond the period of free time. In the advance notice of the proposed rule, the Board asserts that "the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car." In comments responding to the advance notice, Norfolk Southern Railway Company states that the "business incentives" of terminals "may cause them to take actions that undercut the prompt unloading and return of cars."

These statements are not correct. The revenue of bulk liquid terminals is derived mostly from volumetric throughput and leased tank capacity. Terminals have a strong financial incentive to load and unload rail cars as quickly as possible to maximize throughput. The notion that terminals have a motive for causing undue detention of cars has no factual basis. Product owners, on the other hand, certainly can have an incentive to expand their storage capacity temporarily through the delayed unloading of a rail car. This disincentive for the efficient handling of cars can best be addressed through the carrier's direct contractual relationship with the product shipper.

Legal responsibility for demurrage should be linked to a set of facts that reveals the actual cause of the delay in returning the cars. The party that causes the delay should be the party that is held liable for payment of the demurrage charge. However, the proposed rule fails to create this nexus. Instead, it detaches demurrage liability from the circumstances causing the delay and relies on the unrelated procedural question of whether the terminal has complied with the notice requirement. A terminal thus could be liable for demurrage due to an administrative error. This is not the way our regulatory system should work.

In conclusion, the proposed rule is based on incorrect and unsubstantiated facts, and the Board has no rational basis for concluding that terminals (and other third-party intermediaries) should be presumptively liable for demurrage. Accordingly, the proposal should be withdrawn.

Respectfully submitted,

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