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Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Demurrage Liability*, STB Docket No. EP 707

Dear Ms. Brown:

In accordance with the procedural schedule set forth in the June 13, 2012 order issued in the above-referenced proceeding, enclosed are the Reply Comments of The Kansas City Southern Railway Company. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosure

cc: W. James Wochner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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**Attorneys for The Kansas City Southern
Railway Company**

Dated: September 21, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

Pursuant to the procedural schedule set forth in the June 13, 2012 Director's order issued in this docket, The Kansas City Southern Railway Company ("KCSR") hereby offers its reply comments in response to the opening round of comments filed in this proceeding.

The Board is to be applauded for taking the initiative to address a legal loophole that in certain circumstances permits intermediaries (such as freight terminal operators and warehousemen) handling railroad-transported cargo to avoid demurrage responsibility. KCSR heartily endorses the driving consideration behind this rulemaking proceeding, but, although KCSR supports the Board's overall goal, KCSR believes that certain changes and clarifications are needed. For this reason, KCSR joins in the comments of the Association of American Railroads ("AAR"). In particular, KCSR supports the notion set forth in AAR's comments that in closing the demurrage loophole, the Board needs to firmly establish the principle that any entity that has control over railroad cars – regardless of whether that entity is listed on the bill of lading or is the agent of another party – should be held responsible for demurrage charges stemming from its own actions.

KCSR, AAR, and others do not agree with the Board's proposal to allow a party handling rail cars to attempt to shift demurrage liability from itself to another party merely by asserting

that it is an agent of that party. In keeping with the recommendations of several commenters recognizing that third-party intermediaries may seek to avoid demurrage liability by asserting that they are the shipper's agent, KCSR believes the final rules should leave out the so-called "agency exception."¹

AAR, Norfolk Southern Railway Company ("NSR"), Minnesota Commercial Railway, Canadian Pacific Railway Company, the National Industrial Transportation League ("NITL"), and Union Pacific Railroad Company all expressed concern with respect to the perils and complications that would arise from an open-ended agency exception. KCSR shares those concerns. AAR, for example, observed that the exception to third-party demurrage liability would create "case-by-case" controversies over the scope of the agency relationship, and present logistical challenges to warehouses that intend to provide railroads with notice of agency status.² Also, NITL warned that third-party railroad car receivers must be barred from shifting (or attempting to shift) demurrage liability to their client shippers without the shipper's consent³ or else the system would result in more confusion, not less – a point that appears to have been embraced uniformly by the railroad commenters. NSR pointed out that, simply because one party claims to be the agent of another, such a bald, unsupported claim does not create an

¹ Third-party intermediaries participating in this proceeding have seized upon the agency exception. They expect the exception to be interpreted liberally, so that any third-party receiver of a railroad car can cloak itself in the agency mantle, even if it is not an agent in the legal sense, and regardless of whether the agency relationship extends to the intermediary's car-handling. The International Liquid Terminals Association ("ILTA"), for example, has indicated that third parties will categorically assert an agency relationship with shippers, while Kinder Morgan Terminals ("KMT") has essentially argued for an automatic opt-out for any intermediary that asserts "blanket" agency status. See ILTA Comments at 3; KMT Comments at 13-15.

² See AAR Comments at 10.

³ See NITL Comments at 3-6.

enforceable cause of action for demurrage against the alleged principal.⁴ The Board seems to presume that agency status, or at least the notification by the third-party of its alleged agency status, would be sufficient to impose demurrage responsibility on the shipper. Yet, this is not clear. Others have provided similar comments as to how and why the Board's proposed agency notification process simply creates more problems than it solves.

KCSR agrees with these and other assessments of the proposed "agency exception" part of the proposed rules. Rather than fostering responsible car-handling, the Board's agency exception, if not eliminated or modified, would encourage buck-passing and finger-pointing by third-party intermediaries and invite disputes over a third party's asserted agency status and debate over the scope of a purported agency relationship – all of which would make demurrage collection all the more vexing for rail carriers and shippers.

The better course of action, and the one that is in keeping with the general objective of the rulemaking, would be for the Board to remove the proposed agency exception altogether. If the Board elects nonetheless to retain the agency exception in some fashion (which NITL described in its opening comments as a "fatally flawed" approach), the Board should at least modify its approach by eliminating the potential for third-party abuse and uncertainty that will doubtless emerge from an open-ended intermediary opt-out. There must be a way to ensure that *all* parties involved with a shipment understand whether a third party receiver of railroad cars is responsible for demurrage charges..

KCSR suggests that one way to eliminate the potential for abuse and uncertainty that would arise if the Board retained the agency exception is to not only require the third party to notify the carrier of the third party's claimed agency status, but also to require that third party to

⁴ See NSR Comments at 15-18.

provide a statement from its principal acknowledging the principal's responsibility for demurrage. Having a third-party simply claim to be an agent and disavow responsibility for demurrage, as the Board's proposed rule would seem to allow intermediaries to do, is not enough to ensure that all parties have a clear understanding of the parties' responsibilities. The shipper must consent to this arrangement, and the railroad must be assured in writing that there is indeed a mutual, consensual agreement between the shipper and the third party regarding demurrage. Only in this way can all parties gain a mutual understanding about whether or not a third-party intermediary is acting for the benefit of the shipper, and establish that the shipper is to be held liable for demurrage charges incurred as a result of the intermediary's actions.

One possible approach would be for the shipper to provide a clear, concise, and unqualified statement of acceptance of liability for demurrage incurred by a specifically-identified third party in handling the shipper's shipments. A simple written statement to the railroad, such as the following would serve that purpose:

[Shipper name], hereby acknowledges that it is responsible to [named rail carrier] for any and all demurrage charges properly assessed on railroad cars consigned to it at [name of intermediary or specific location of intermediary facility].

This statement could then be submitted by the third-party as part of its notice to the carrier. Indeed, such a clear, concise statement of shipper responsibility for demurrage charges incurred by a third party would largely correct the "fatal flaw" in the Board's proposed agency exception, and it would better assure that the railroad, shipper, and third party intermediary are all on the same page.

In the end, KCSR applauds the Board's efforts to bring clarity and resolution to the various approaches to demurrage claims, but it believes some aspects of the Board's proposal need modification and clarification – mainly those aspects dealing with the so-called "agency

exception rule.” As suggested by AAR and others, KCSR believes it would be better if the Board were simply to drop the agency exception as unnecessary for the reasons advanced in the numerous opening comments. However, if the Board retains this part of the proposal, then KCSR supports a modification of that requirement to also require some form of confirmation from the shipper that it accepts the designation of principal for purposes of demurrage and that it will be responsible for demurrage payments. Such a modification of the agency exception would eliminate much of the mischief that would result from third parties unilaterally asserting “blanket” agency status for shippers.

Respectfully submitted,

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Attorneys for The Kansas City Southern
Railway Company

Dated: September 21, 2012

CERTIFICATE OF SERVICE

I have this day served a copy of the Reply Comments of The Kansas City Southern Railway Company upon all parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: September 21, 2012



William A. Mullins
Robert A. Wimbish
Attorney for The Kansas City Southern
Railway Company