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Surface Transportation Board
Attn: STB Ex Parte No. 707
395 E Street, S.W.
Washington, DC 20423-0001

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May 20, 2011

Re: Docket Number EP 707
Reply Comments Regarding Demurrage Liability

Dear Surface Transportation Board:

On behalf of the International Association of Refrigerated Warehouses (the "IARW.") I submit the following as Reply Comments in STB Ex Parte No. 707 regarding when, if at all, it is proper for railroads to recover demurrage charges against public warehouse operators.

The issue of demurrage liability is of great interest to the public refrigerated warehouse industry. The IARW represents 210 Warehouse Member Companies currently operating in the United States. These 210 member companies account for 668 public refrigerated warehouse facilities consisting of more than 2.8 billion cubic feet of temperature-controlled space. Approximately 80% of the 668 facilities provide rail services, most limiting their activities to receiving their customers' goods by rail only.

As stated in our comments submitted on January 24, 2011, the IARW does not believe that additional regulations are necessary regarding demurrage liability. Issues of demurrage can, and in practice already are, effectively addressed through contracts between rail carriers and their customers and by an actual placement and other agreements between rail carriers and the public warehouse operators.

We appreciate the opportunity to provide the reply comments below that address points raised during the initial comment period.

The Board's Mandate To Promote The Efficient Utilization Of Rail Equipment Can Be Accomplished Without Rejecting Or Modifying The Groves Analysis And Basic, Longstanding Contract Law Principles Regarding The Responsibility For Demurrage Charges.

- The Appellate Court's Holding In Groves And Contract Principles Do Not Place The Railroads At A Disadvantage Or Conflict With The STB'S Goals Of Ensuring Efficient Utilization Of Railroad Equipment Or Promoting Policies That Compensate Railroads For The Use Of Railroad Equipment By Third Parties.**

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Railroads should not be allowed to recover demurrage charges against entities with whom they have no contract. The Eleventh Circuit Court of Appeals ruling in *Norfolk Southern Ry. v. Groves*, 586 F.3d 1273 (2009) upheld a basic, long-standing rule of law; no one should be allowed to make another a party to a contract without that party's knowledge and consent.

It is not necessary to reject or modify the *Groves* holding to foster the STB's goals of efficient use of rail equipment and adequately compensating railroads for the services and equipment they provide. The Appellate Court in *Groves* has not disturbed the rule of law that the entities that hire the railroads are primarily responsible for all transportation charges. Therefore, railroads remain free to pursue the shippers, the parties with whom the railroads contract for services, for any demurrage charges due. Further, the shippers have the right to pursue the parties they believe are responsible for the shippers having to pay the demurrage charges to the railroads. The railroads thus remain entitled to compensation from the shippers based upon accepted contract law principles and the shippers are free, also under contract law principles, to recover from other parties, including warehouse operators, they believe are responsible for demurrage charges. The STB's goals therefore are still accomplished without disturbing or rejecting the *Groves* holding or contract law principles.

2) The Railroads Seek to Impose Additional Responsibilities on Improperly Named Consignees That Are Not Contemplated By 49 U.S.C. §10743

The railroads seek to have the STB interpret and apply 49 U.S.C. §10743 in a manner that is inappropriate and beyond the plain language of the statute. While most of the responding railroads agree that 49 U.S.C. §10743 applies to demurrage charges, they appear to assert that the statute requires the agent-consignee to not only notify the railroad of its agent status but also, in all cases, to provide the railroad with the name and address of the shipment's beneficial owner.

The STB is required to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993).

49 U.S.C. §10743 provides, in pertinent part, as follows:

(a)(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property--

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor, or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of lading or contract under which the property was transported. The beneficial owner is liable for all rates when the property is reconsigned or diverted by an agent but is refused or abandoned at its ultimate destination if the agent gave the rail carrier in the reconsignment or diversion order a notice of agency and the name and address of the beneficial owner. A consignee giving the rail carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates.

Contrary to the railroads' position, agent-consignees are not required, in all instances to provide the railroad with the name and address of the beneficial owner of the goods. The plain language of the statute only states that the agent is required to identify the beneficial owner of a shipment where the shipment is diverted or reconsigned.

3. The Railroads' Requests That They Be Relieved Of All Responsibility To Advise Warehouse Operators That The Railroads Intend To Hold The Warehouse Operators Responsible For Demurrage Charges Should Be Rejected.

One of the problems experienced by warehouse operators in their dealings with railroads is that the warehouse operators generally first find out the railroads are assessing demurrage charges against the warehouse operators long after the fact when they are presented with demurrage invoices of thousands of dollars and threats by the railroad to cease deliveries if the demurrage invoices are not paid immediately.

The railroads argue that the warehouse operators have the ability to access the railroads' websites to determine their status vis-à-vis the shipments. This is unrealistic. The railroads should not be allowed to place the burden on the warehouse operators to determine how they have been identified on shippers' bills of lading and whether the railroads intend to hold the warehouse operators responsible for demurrage charges.

The railroads concede that the bills of lading are prepared by the shippers and presented to the railroads. The railroads similarly concede that they generally do not provide warehouse operators with copies of the original bills of lading but generally only provide them with emailed waybills containing only such information as the railroads deem necessary.

There is presently no requirement that waybills provided to the warehouse operators by railroads accurately list the parties as they are listed on the original bills of lading prepared by the shippers. Yet, despite the fact that the railroads have the original bills of lading prepared by the shippers, the railroads nonetheless want to place a burden on the warehouse operators to play detective and ferret out information as to the manner, if at all, the warehouse operator is identified on the shipper's bill of lading prior to delivery, regardless of when the railroads provide notice of impending delivery. Accordingly, while we believe that any additional regulations regarding demurrage liability are unnecessary, if the STB decides to implement any such regulations, at a minimum, the STB should require the railroads to provide the warehouse operators with a copy of the original bills of lading prepared by the shippers

sufficiently in advance of placement to allow the warehouse operators to take appropriate action to protect themselves from demurrage charge liability.

4. The Possibility That Warehouse Operators May Be Able To Negotiate Demurrage Charge Responsibility Provisions In Their Agreements With Their Customers Is Not Relevant To The Issue Of Responsibility to the Railroads For Demurrage Charges.

The fact that the warehouses may be able to negotiate contracts with their customers regarding the party to be ultimately responsible for demurrage charges has no relevance to the issue whether public warehouse operators should be liable to the railroads for payment of demurrage charges. Similarly, the railroads' argument that they are not privy to the terms and conditions of the agreements between the warehouse operators and their customers and therefore are unable to discern the relationship between the shippers and the warehouses is not relevant.

The railroads have the right, as a matter of law to assess demurrage charges against the shipper, who is known to them and with whom the railroads have contracts. Therefore, the railroads are in a much better position to contractually recover demurrage charges against their customers, the shippers. As we pointed out above, if the shipper is liable for the demurrage charges due to some act/omission of the public warehouse operator, the shipper can address that by contract as well.

5. Railroad Delivery And Pickup Practices And Demurrage Rules Do Not Promote Efficiency But Rather Promote Extra Business Expense And Are Unreasonable.

The IARW refers the Board to the Response of Savannah Reload in this matter regarding railroad delivery and pick up practices. IARW has heard the same opinions expressed by its own members regarding the railroads "bunching" of railcars and delivery of railcars at times and in numbers that virtually ensure that the railroads will be able to enhance revenue through demurrage charges. The railroads attempt to deflect criticism of their practices by improperly blaming the warehouses for having inadequate staff and insufficient facilities to properly accept, load and/or unload railcars in a timely manner.

Warehouse operators have virtually no say as to when the railroads deliver railcars to their facility and/or how many railcars the railroads will deliver at any one time. Most IARW members maintain sufficient staff on hand to receive and release freight Mondays through Fridays. Many only operate one shift, usually meaning warehouse operations end before 6 p.m. each day. There is nothing however that prevents the railroads from intentionally arranging the delivery of railcars on weekends, holidays and at other times when the warehouse is not capable of loading or unloading freight. Nonetheless as a general rule, the demurrage period countdown begins when the railroads determine it will. For a warehouse that operates one shift Monday through Fridays, a delivery of a railcar on Friday night on or after 7 p.m. guarantees that demurrage charges will accrue since rail free time, as a rule, is two days for unloading.

As stated above, IARW believes no new demurrage regulations are necessary. If, however, the STB decides to implement any new demurrage regulations, a regulation requiring demurrage to commence only after reasonable notice to the warehouse operator and actual placement would conform the practices of the railroad to the practices of the general business community. Additionally a prohibition on delivering more cars than a warehouse operator can reasonably handle at any given time would also be consistent with the practices of the general business community.

Conclusion

Accordingly, for the reasons stated herein and the reasons set forth in the Response of Savannah reload in this matter, as well as the reasons stated in our January 24, 2011 Response, additional regulations regarding demurrage are not necessary.

Please let us know if you have any questions about our comments, or if we can be of any further assistance. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "J. William Hudson".

J. William Hudson
President and CEO
International Association of Refrigerated Warehouses