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

January 24, 2011

Re: Docket Number EP 707  
Demurrage Liability

Dear Surface Transportation Board:

I am writing on behalf of the International Association of Refrigerated Warehouses (IARW) in response to the Surface Transportation Board's Docket Number EP 707 regarding Demurrage Liability. The issue of demurrage liability is of critical importance to the public refrigerated warehouse operators who are members of the IARW and we welcome the opportunity to provide the Board with our comments.

As an overall general comment, 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. Allowing rail carriers to recover demurrage charges against public warehouse operators simply because they receive goods for their customers will put the warehouse operators in a potentially adversarial relationship with their customers if, as is often the case, the warehouse operator's actions were not the cause of the demurrage charges. For example, if a customer ships more cars to a warehouse operator than they agreed the warehouse operator could unload in a day, demurrage may be incurred and the public warehouse operator would, under the scheme proposed by the STB, be liable to the rail carrier as the receiver of the goods. Since the demurrage charges in this example are attributable to the actions of the customer, it should be required to reimburse the warehouse operator. Most customers will refuse to do so voluntarily, since the warehouse operator has little leverage to require reimbursement, which will cause problems with the warehouse operator customer relationship. The rail carrier is in a far superior position to require the warehouse customer, the shipper or consignee on the bill of lading (BOL), to pay the demurrage charges.

When considering any changes to demurrage liability regulations, it is important to recognize that the relationships between and among the impacted parties are governed by contracts and those contracts must be given effect. With respect to shipments into and out of public warehouses, the shipper (usually the owner of the goods) contracts with the rail carrier to transport the goods. That transportation relationship is governed by the terms of the contract of carriage, usually a bill of lading and any rail carrier tariff that may be applicable. Usually the consignee on shipments to public warehouses is the

shipper, although sometimes the consignee will be the shipper's customer who purchased the goods from the shipper. In either event, on shipments into the warehouse, the public warehouse should, by contract between the warehouse operator and its customer, be identified only as the "in care of party". The railroad can address the shipper's and consignee's responsibility for, among other things, demurrage charges in its agreement with the shipper and can collect any demurrage charges applicable to the individual shipments, whether at point of origin or destination against the shipper or the consignee whatever the cause of the demurrage other than due to an act of the rail carrier.

The relationship between the public warehouse operator and its customer (the shipper and/or consignee) is governed by a contract as well. Often that contract is a non-negotiable warehouse receipt. The public warehouse operator and its customer can also address their respective responsibilities for demurrage charges in the storage agreement. In fact, the standard terms and conditions for storage approved by the IARW for its members addresses the circumstances under which the warehouse will be liable to the customer for demurrage charges. Therefore, if the shipper or consignee becomes liable to the rail carrier for demurrage charges under the contract of carriage due to the actions of the public warehouse operator, the shipper or consignee will have a remedy against the public warehouse operator under the terms of the storage agreement between the public warehouse operator and the shipper/consignee.

The docket published by the STB suggests that liability should be imposed on the warehouse operator for demurrage simply as the receiver of the shipment regardless of how the warehouse operator was designated on the bill of lading (BOL). Demurrage charges are by case law part of the transportation charge and under case law transportation charges are recoverable against the consignor, the consignee, the owner of the property or others by statute or contract. To the extent the warehouse operator is the "in care of party" on the BOL, it would have no liability to the railroad for demurrage charges as the consignor, consignee, owner or by statute or contract. The STB proposal appears to seek to change this framework and impose liability on the warehouse operator simply as the recipient of the goods. To the extent that the warehouse operator is identified as the consignee on the BOL without its knowledge or agreement, the possible rule would impose liability on the warehouse operator despite the fact that the better reasoned, recent court decisions addressing this issue, *Norfolk S.Ry. v. Groves* 586 F3d 1273 (11<sup>th</sup> Cir. 2009) and *Illinois Cent. R.R. v. South Tec Dev. Warehouse, Inc.* 337 F3d 813 (7<sup>th</sup> Cir. 2003), refused to do so.

The Surface Transportation Board states, at page 4 of 8 of the Notice of Proposed Rulemaking, that it is not certain that the provisions of 49 U.S.C. §10743(b) should be interpreted to apply to demurrage. Based upon case law that includes demurrage as a transportation cost (*Groves*), it appears that the STB's uncertainty is not justified. Therefore, any warehouse operator who complies with the requirements of 49 U.S.C. §10743(b) should have no liability to the railroad for demurrage charges.

In the event that a rail carrier wants the right to go directly against the public warehouse operator to recover demurrage charges, it can enter into an actual placement or similar agreement with the public warehouse operator which would specify exactly when the free time commences and when the public warehouse operator would be liable to the rail carrier for demurrage charges. This upfront type of agreement would be a fairer and more predictable arrangement for both parties than the scenario proposed by the STB docket.

With regard to the specific questions posed by the STB, the IARW offers the following responses for consideration:

- Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?

Based on the contract issues discussed above, the intermediaries (public warehouse operators) should not be liable to the rail carriers for demurrage charges unless they enter into separate written agreements with the rail carriers and then only in accordance with the terms of the written agreement. Absent a separate written agreement between the public warehouse operator and the rail carrier, the shipper or consignee should be liable to the railroad for the demurrage charges if they are parties to the transportation contract and the charges are not attributable to the actions of the rail carrier. If the public warehouse operator is ultimately responsible for the shipper or consignee incurring those demurrage charges, the warehouse operator should be liable under its contract with the shipper or consignee to reimburse the shipper or the consignee for those demurrage charges. It is critical to maintain the integrity of the contracts between and among the parties and not impose liability for the payment of demurrage charges to the rail carrier on the public warehouse operator who is not a party to the bill of lading.

- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.

The paperwork attending a shipment generally is the bill of lading (BOL). Generally the warehouse operator does not receive a copy of the BOL until after the rail car is dropped, if at all. Unless the warehouse operator has undertaken some affirmative obligation to pay the transportation charges or has agreed to be the consignee, it should only be listed as the "in care of party" on the BOL and should have no liability for demurrage charges.

- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status *vis a vis* demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

A warehouse operator can best be made aware of its status *vis a vis* demurrage liability through contracts with its customer or by contract with the rail carrier such as an actual placement agreement. The actual placement of a freight car on the track of the shipper or receiver does not constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being

incurred. There are many open issues such as whether constructive placement applies, whether the warehouse operator received timely notice that the car was actually placed and when free time commenced. Free time, the period of time that the warehouse operator has to unload or load a rail car before demurrage will be charged should commence only upon the warehouse operator's first working day after actual placement of the rail car.

Constructive placement, where the railroad notifies the warehouse that the rail car is ready for actual placement, has been the source of many abuses. Free time to unload or load the rail car commences on the day of the constructive placement (notice to the warehouse operator). Some rail carriers will intentionally delay notifying the warehouse of the constructive placement until after close of business on Friday when the warehouse does not work weekends thereby depriving the warehouse of two or more days of free time and making it more likely that demurrage will be assessed. Constructive placement should be eliminated except in very limited circumstances.

- Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

Public warehouse operators receive goods that are transported to their warehouses for storage and other warehouse services for their customers as agents for their customers for the receipt of those goods. As long as the customer is identified on the BOL as the consignee, as it should be under the storage agreement between the public warehouse operator and the customer, it would be an agent for a disclosed principal and not liable for any transportation charges including demurrage charges. In arranging outbound shipments of customer goods from the warehouse, the public warehouse operator generally acts as a shipper's agent and therefore should have no liability for transportation charges including demurrage charges. At a minimum, the rail carrier will know of the agent status of the public warehouse operator if the operator notifies the rail carrier in accordance with the provisions of § 10743 or by some other method.

- Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?

Case law includes demurrage as a transportation cost (Groves). Therefore § 10743 should be read to apply to demurrage charges. To the extent that there is any doubt, the STB should affirmatively state that transportation costs include demurrage charges. Agency principals should apply even if § 10743 did not. It is up to the shipper, consignee or the public warehouse operator to notify the carrier of the limited agency relationship of the public warehouse operator for purposes of receiving the goods at the warehouse and arranging outbound shipping of the goods. This need not be on a shipment by shipment basis but can be done on a blanket basis, pursuant to a notice in accordance with § 10743 or by some other means, especially since public warehouse operators rarely have any beneficial interest in the goods shipped to or from the warehouse.

- If § 10743 is applicable, would the Groves analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

Yes, the Groves analysis should apply. Liability for demurrage should be a matter of contract and not an obligation imposed by regulation. Applying Groves should not affect industry practice. The rail carrier has its contract (the BOL) with the shipper and consignee and is entitled to collect its charges, including demurrage. Alternatively, the rail carrier can enter into a separate agreement with the public warehouse operator, such as an actual placement agreement, under which the rail carrier and the public warehouse operator agree when the free time commences and when demurrage is chargeable.

- Because 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, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

This question implies that public warehouse operators are abusing the system and not returning cars when they should for their own gain. There are many reasons why the public warehouse operator may not be able to unload the rail cars within the free time. Some reasons are attributable to the rail carriers such as bunching, creative constructive placement and limited switching of the cars from the warehouse. Other reasons are attributable to the shippers and consignees in shipping more goods in a short period of time than was agreed upon with the public warehouse operator or not properly preparing the goods for rail shipment resulting in damage that takes more time to unload. If the car is not unloaded or loaded within the free time for any reason other than the rail carrier's fault, the rail carrier should be able to recover demurrage against the shipper or consignee who is a party to the transportation contract, the BOL. A claim of unjust enrichment against the public warehouse operator is not likely to be successful unless the public warehouse operator intentionally was using the car for overflow storage, which we believe is unlikely to occur.

In conclusion, the IARW believes that additional regulations regarding demurrage liability are not necessary. The use of contracts between impacted parties can, and do, provide the needed mechanisms to address demurrage in a fair and predictable way.

The IARW stands ready to work with the STB as it further examines the issue of demurrage liability. 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,



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