

228592



Law Department
Louis P. Warchot
Senior Vice President-Law
and General Counsel

January 6, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Advance Notice of Proposed Rulemaking served December 6, 2010 in the above proceeding, initial comments of interested parties are currently due January 24, 2011 and reply comments are due February 23, 2011. By the attached filing, please find the Motion of the Association of American Railroads ("AAR") to Extend Procedural Schedule for Filing of Comments in the above proceeding. Pursuant to the AAR's request, initial comments would be due on March 7, 2011; reply comments would be due April 6, 2011.

As noted in the attached Motion, the AAR is authorized to state that the National Grain and Feed Association, which intends to participate in this proceeding, also supports a six-week extension of the procedural schedule as requested by the AAR.

Respectfully submitted,

Louis P. Warchot
Attorney for the Association of
American Railroads

Attachment

cc: Andrew P. Goldstein
Counsel for National Grain and Feed
Association
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, DC 20006

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

MOTION OF THE
ASSOCIATION OF AMERICAN RAILROADS
TO EXTEND PROCEDURAL SCHEDULE FOR FILING OF COMMENTS

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of
American Railroads*

January 6, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

MOTION OF THE
ASSOCIATION OF AMERICAN RAILROADS
TO EXTEND PROCEDURAL SCHEDULE FOR FILING OF COMMENTS

In an Advance Notice of Proposed Rulemaking (ANPR) served December 6, 2010, the Board instituted a proceeding regarding demurrage, *i.e.*, charges for holding rail cars. The agency's stated intent "is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers." ANPR at 1.

The Board's ANPR arises out of the recently-divided case law in the federal courts of appeals on the issue of a consignee's liability (particularly as applies to warehousemen, transloaders, or other third-party freight recipients who are not "beneficial owners" of the goods shipped) for demurrage where the named consignee claims not to have assented to being named consignee on the bill of lading.¹ In the ANPR, the STB noted that current commercial and electronic billing practices may have overtaken prior STB and court decisions on the demurrage

¹ Compare *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) ("*Groves*"), *pet. for cert. pending*, No. 09-1212 (filed Apr. 6, 2010) (non-assenting warehouseman named as consignee found not liable for demurrage), with *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) ("*Novolog*") (transloader named as consignee found liable for demurrage unless, pursuant to 49 U.S.C. § 10743 (a), it notifies the carrier in writing in advance of delivery that it is acting only as agent and identifies the principal party liable for demurrage charges). See ANPR at 2, n. 2.

liability issue and should be revisited by the Board. The Board also found that neither *Groves* nor *Novolog* may be the best solution to the liability issue and “institut[ed] this proceeding in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.” ANPR at 2. The Board accordingly requested public comment on several legal and factual matters to assist the Board in resolving the “third-party car receiver” demurrage liability issue through a rulemaking or policy decision.

Pursuant to the ANPR, initial comments are currently due January 24, 2011; reply comments are due February 23, 2011.

The Association of American Railroads (“AAR”), on behalf of its members, respectfully requests that the Board extend the procedural time schedule for the filing of comments in this proceeding for an additional period of six weeks. The AAR agrees with the Board that demurrage “is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system” (ANPR at 1) and believes it essential that nationwide uniformity be restored to the rules for determining demurrage liability. The AAR, however, believes that the six-week extension of the procedural schedule is necessary and warranted in this proceeding to allow the railroad industry adequate time to fully evaluate the Board’s legal and policy considerations and requests for information as set forth in the ANPR.

In support of its request to extend the procedural schedule, the AAR notes that the demurrage liability issues raised by the Board in the ANPR—both from a legal and policy perspective -- are broad and potentially embrace all aspects of existing law governing liability for demurrage of intermediary parties named as consignees (or consignors) in the bill of lading

(ANPR at 5-6). Moreover, the seven issues upon which the Board specifically sought comment (ANPR at 6-7) require a thorough examination by the industry and/or individual rail carriers of their current electronic bill of lading processes and demurrage accounting and billing procedures as well as the implications for such processes and procedures under the various potential legal scenarios raised by the Board for determining demurrage liability of named consignees (and consignor). Given the wide scope and importance of the legal and policy issues raised in the ANPR, the AAR and its members need additional time to the current January 24, 2011 due date for comments to adequately address them and to determine what issues can be most appropriately (or usefully) addressed on an industry-wide basis and what issues would most appropriately (or usefully) be addressed by individual carriers themselves.

The AAR further notes that the process of analyzing the issues set forth in the ANPR and coordinating an industry response (to the extent appropriate or useful) has also been complicated by the intervening December 2010 holiday period, which resulted in a loss of time for the industry to collect information and exchange preliminary views on relevant issues because of the unavailability of knowledgeable industry personnel.

For the reasons explained above, the AAR respectfully requests a six-week extension of the procedural schedule for filing comments in the above proceeding. Pursuant to the AAR's request, initial comments would be due on March 7, 2011; reply comments would be due April 6, 2011.

The AAR is authorized to state that the National Grain and Feed Association, which intends to participate in this proceeding, also supports a six-week extension of the procedural schedule as requested by the AAR.

Respectfully submitted,



Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of
American Railroads*

January 6, 2011