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Surface Transportation Board
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Re: Advance Notice of Proposed Rulemaking dated December 3, 2010.

Dear Sir or Madame

This letter is intended to be a comment upon the Surface Transportation Board (Board or STB)'s Advance Notice of Proposed Rulemaking (ANPR) discussing proposed changes to the rules governing demurrage. The ANPR correctly observes that demurrage serves a dual role of compensating car owners for the use of their equipment and encouraging prompt return of rail cars into the transportation network. The ANPR also correctly notes that this latter goal ensures the smooth functioning of the rail system.

The ANPR appears to assume that rail car recipients—shippers at origin, warehousemen, transloaders, consignees, and the like at destination—are the primary cause of demurrage. Thus, it describes demurrage as “charges for holding railroad-owned rail freight cars. . .beyond a specified amount of time” (ANPR, p. 2) and states that the warehouseman is “in the best position” to minimize demurrage (ANPR, p. 8). This view has a certain appeal if the investigation into the demurrage is limited to the handling of the rail cars after delivery. However, a broader look shows that demurrage can accrue from multiple causes, not all of which are attributable to the entity “holding” the rail car. While the warehouseman certainly has a role to play in the accumulation of demurrage, it is overly simplified to say that it needs to either release the case in a timely manner or send them elsewhere if its facility is overloaded.

The first factor is the total volume of rail freight sent to the warehouseman's facility. This factor is largely controlled by the shipper, especially where it knows the warehouseman's capacity and can—to an extent—regulate the flow of traffic to that facility. The ANPR expresses a concern that the warehouseman may reap financial gain by taking on as many cars as possible without regard to its capacity. However, to do so poses a very real risk that the warehouseman will be unable to service its customer in a

timely manner and may subject the customer to outsized demurrage claims. In short, it is bad for the warehouseman's business to let cars stack up unnecessarily.

The second factor is the pace at which the carrier will deliver rail cars to the warehouseman. For example, Savannah Re-Load has a customer that dispatches five rail cars a day, knowing that Savannah Re-Load's facility can handle five cars at once. However, very rarely does the carrier deliver five cars per day. This occurs because the carrier often finds it inefficient to deliver cars at the same pace with which it receives them. Thus, the carrier saves money by "bunching" these cars at one point and then delivering them en masse to the warehouseman. As a result, even where the shipper sends a volume appropriate for the warehouseman's facility, the warehouseman may become overwhelmed by the large block of cars delivered at once and demurrage may accrue.

The third factor is the carrier's willingness to make switches. Typically, the carrier which services Savannah Re-Load will make, at most, one switch per day, five days per week. It generally takes Savannah Re-Load one hour per car to unload railcars. Therefore, there is plenty of time each day to unload two or more switches worth of cars. Ostensibly, the switch permits the warehouseman to unload a fresh batch of rail cars and release them in time for the next switch. However, when the switches are performed irregularly, demurrage accrues. Moreover, the carrier may be in a position to perform more than one switch per day, further reducing the likelihood that demurrage will accrue.

The fourth factor is the rate at which the warehouseman unloads the freight. This is the only factor the warehouseman can truly control. The ANPR indicates that the warehouseman can turn away freight where its facility is at capacity. This is true, however, it is often not a realistic option. It would be an odd result for the warehouseman to turn away business where, for example, the facility is overwhelmed only due to the carrier's bunching. That would penalize the warehouseman for the carrier's actions. Additionally, the shipper might, for whatever reason, choose to temporarily overload the warehouseman even at the risk of incurring demurrage. In such a situation, it would seem odd to hold the warehouseman liable for the shipper's intentional acts. Lastly, refusing delivery and forcing the shipper to reroute the shipment to a different warehouseman (which in turn would further delay unloading) could actually extend the time until the rail car is unloaded and released to the carrier.

As it currently stands, the system does not incentivize efficiency because it overlooks—and does not address—the role that shippers and carriers play in causing demurrage. By way of example, the carrier makes an economic choice to save money by bunching rail cars, and then demands demurrage from the warehouseman when demurrage results from that bunching. The carrier is rewarded twice (once for the savings associated with bunching and again when it collects demurrage) and thus, perversely, has an incentive to permit demurrage to accrue. Meanwhile, the warehouseman who cannot prevent the demurrage is penalized. Under the current system, the warehouseman, assuming it is liable under the *Novolog* decision, must either

pay demurrage or refuse the freight (which not only forces it to forego business but could irreparably damage its business relationships with its customers).

Another flaw in the current system is the allocation of the burden of proof where demurrage disputes arise. In every lawsuit, the party demanding payment—the plaintiff—shoulders the burden of proving it is entitled to a judgment in its favor. However, in demurrage cases, the carrier initially acts as both judge and jury. It writes the tariff, calculates the demurrage allegedly due, and then unilaterally determines whether any relief will be granted. If the warehouseman disputes the accuracy of the demurrage claim and this dispute is before the Board, the *warehouseman* shoulders the burden of proving the carrier's tariff is unreasonable. Thus, where the carrier sues for demurrage, the focus of the Board's inquiries is into whether the defendant has shouldered its burden of proof. This flips the traditional lawsuit on its head, allocating the burden of proof on the defendant rather than the plaintiff.

Focusing on the warehouseman's agency places an absurd emphasis on whether the warehouseman complies with technical notification requirements—notice of agency—that have no bearing on delivery or the accrual of demurrage. In other words, the carrier will deliver the freight to the same entity, in the same manner regardless of whether the warehouseman notifies the carrier it is not the consignee. Additionally, this notification has no impact upon the speed with which the rail car is unloaded. It is also an unnecessary technicality: it is obvious that a warehouseman is just that—a warehouseman only. It also overlooks the fact that warehousemen are often not agents for their customers. Several of Savannah Re-Load's customers have, through contract, expressly disclaimed any agency relationship. It may be different if a warehouseman were to contract with the carrier on behalf of an undisclosed principal, but that is not situation with Savannah Re-Load. Lastly, in the briefs filed in the Groves case, Norfolk Southern balked at having to provide any sort of notice that might permit warehousemen to know in advance where they are named as consignee.

The way to truly incentivize each party to the transportation network to work in the most efficient manner is to hold the party which causes the demurrage responsible for it. In the case of the warehouseman, actual placement of railcars on his siding should signal the start of his demurrage liability. This signals the start of the portion of the supply chain in which the warehouseman has actual control over the railcars and could actually cause a delay. Currently, whether the warehouseman was at fault is irrelevant when it comes to collecting demurrage. This rule, of course, is at odds with incentivizing efficiency. However, the Board now has an opportunity to revisit this rule, and revise it in a way most consistent with demurrage's purpose of maximizing efficiency. It certainly does not conflict with demurrage's other goal of compensating car owners for the use of their equipment since it does not reduce the amount of demurrage those owners will receive—unless the car owner causes the demurrage.

The Board articulates a fear that, if not directly liable to the carrier for demurrage, warehousemen will take on as many cars as possible without regard for its capacity. However, the market place will eliminate warehousemen who operate in this manner.

Their inability to unload in a timely manner will result in the warehouse paying demurrage and / or the customer taking their business elsewhere due to the delay in the movement of their cargo through the supply chain. Did the warehouseman solicit too much business or did the shipper send too much freight knowing the warehouseman's capacity? Did the carrier bunch? If so, should the warehouseman have refused the delivery? A jury can decide these issues after considering the facts and circumstance of each lawsuit on a case by case basis.

It may be true that many variables outside a carrier's control may affect delivery and that a carrier may not be reasonably expected to always meet a specific timetable. However, even if bunching occurs through no "fault" of the carriers, the carrier is not penalized under this proposed rule. Instead, it simply cannot profit from it. Just as it is improper to penalize the carrier for variables outside its control, it is equally improper to penalize warehousemen (or their customers) for variables outside *their* control. And, as stated above, refusing to accept the bunched freight is not necessarily the answer. While a jury could find a refusal warranted, an inflexible rule that the warehouseman must always refuse or pay demurrage penalizes the shipper (who must pay additional freight charges) the consignee (whose receipt of its freight may be further delayed) and the warehouseman (who is not only deprived of business but may damage a business relationship with its customer). Refusing delivery also does not increase efficiency as it likely results in yet more delays while the car is rerouted and delivered to a different warehouse.

Were the Board to apportion demurrage based upon responsibility for causing it, the obvious problem arises in how to make this allocation. I would submit that this is the job of the judge and jury. Judges and juries are often called upon to decide these thorny factual issues in litigation. The carriers must already sue in federal court to recover demurrage and the amount of demurrage that actually accrued will almost always be decided by the jury. Therefore, allocating fault imposes no additional burden on the carriers.

The above general rule—that the party who caused the demurrage be responsible for it—will work to promote both the carrier's compensation for the use of its rail car and an efficient use of the nation's rail network.

Sincerely



William S. R. Groves
President