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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 757

POLICY STATEMENT ON DEMURRAGE AND
ACCESSORIAL RULES AND CHARGES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

On October 7, 2019, the Surface Transportation Board served a proposed policy statement as guidance to the public on “certain principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges” in future cases, and solicited public comment. *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, (STB served Oct. 7, 2019) (“*Draft Policy Statement*”). AAR, on behalf of its freight railroad members, submits these comments due to inconsistencies between portions of the Board’s guidance and well-established law concerning demurrage.¹

The *Draft Policy Statement* expressly recognizes at the outset that, as a longstanding matter of law and regulation, “demurrage is a charge that ***both compensates*** rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (i.e., ‘free time’) for loading and unloading ***and serves as a penalty for undue car detention to encourage*** the efficient use of rail cars in the rail network.” *Id.* at 2 (emphasis added). The statute directs rail carriers to compute demurrage charges “in a way that fulfills the national needs related to:

¹ The freight railroad members of AAR account for the vast majority of North American freight railroad traffic, mileage, employees, and revenue. As such, the AAR has a strong interest in the proper application of law to issues related to demurrage.

(1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property.” 49 U.S.C. § 10746. And the Board’s regulations expressly define demurrage as having *both* functions: compensation *and* incentive. 49 C.F.R. § 1333.1.²

Because demurrage charges are intended to both incentivize shippers *and* compensate carriers, both the ICC and the Board have held for more than a century that a shipper is required to pay demurrage charges unless the railroad is at fault for causing the delay or detention, even if the shipper itself is not at fault. *See, e.g., Drummond & S.W. Ry. v. Chi., St. P. M. & O. Ry. Co.*, 21 I.C.C. 567, 568 (1911) (requiring shipper to pay demurrage charges even when heavy rains rendered tracks unsafe, making it impossible for the complainant, a logging railroad, to haul cars to interchange with line-haul carriers); *Chrysler Corp. v. N.Y. Cent. R.R. Co.*, 234 I.C.C. 755, 758 (1939) (stating that “[d]emurrage may properly be assessed where the detention occurs through no fault of the shipper, even though the cause of the detention is beyond the shipper’s control.”); *Foreston Coal Int’l, Inc. v. Baltimore & Ohio R.R. Co.*, 349 I.C.C. 495, 500-01 (1975) (rejecting complainants’ argument that “because delays in loading resulting in demurrage were incurred without fault on their part and they could not, therefore, improve car utilization in conformance with the purpose of the Car Service Order, application of the increased demurrage to complainants’ traffic is unjust and unreasonable”); *Intercontinental Mfg. Co. – Pet. for Declaratory Order – Demurrage Charges on Bomb Casings*, 357 I.C.C. 300, 303 (1978) (customer responsible for “ordinary economic vagaries and risks of doing business”); *Portland &*

² The dual purposes of compensation and incentive, and their history, are explained in AAR’s Comments in *Oversight Hearing on Demurrage and Accessorial Charges*, EP 757 (filed June 6, 2019).

Western R.R., Inc. – Petition For Declaratory Order – RK Storage & Warehousing, Inc., STB Finance Docket No. 35406 (STB served July 26, 2011).

As the ICC explained, “[u]nder the demurrage tariffs shippers are chargeable with demurrage for any detention of equipment which is not due to the fault of the carrier, except as otherwise expressly provided. This is true even if the detention is beyond the shippers’ control. We have frequently found that demurrage was properly assessed against the shipper where detention occurred through no fault of the carrier, even though the shipper was not at fault, as in the case of nonarrival of an expected vessel.” *Am. Smelting & Refining Co. v. Director Gen., As Agent, Baltimore & Ohio R.R. Co.*, 69 I.C.C. 229, 232 (1922) (emphasis added). Even where congestion is caused by third parties forwarding larger shipments (or too many railcars) than could be loaded (or received) by the customer, the customer is still liable for demurrage. *See Apex Tire & Rubber Co. v. N.Y., New Haven & Hartford R.R. Co.*, 277 I.C.C. 1, 2-4 (1950).

Federal courts have similarly held that, unless the delay in returning the cars was the fault of the railroad, shippers must pay the demurrage charges, even if the shipper was not at fault. *See N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166, 1173 (D.C. Cir. 2008) (“both this court and the Board have indicated the burden is on a complaining shipper to show that demurrage fees are excessive in a particular instance because of some fault on the railroad’s part”). As the Eleventh Circuit has stated, “demurrage charges are properly assessed even if the cause for the delay is beyond the party’s control, unless the carrier itself is responsible for the delay.” *Norfolk S. Ry. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009); *see also CSX Transp., Inc. v. Meserole St. Recycling*, 618 F. Supp. 2d 753, 771 (W.D. Mich. 2009) (“A rail carrier’s ability to collect demurrage from a shipper does not depend on a finding that the shipper was at fault.”).

Notwithstanding the *Draft Policy Statement*'s initial, and correct, recitation of the governing law, the *Draft Policy Statement* proceeds thereafter to ignore the compensation function of demurrage. The Board instead repeatedly characterizes “the overarching purpose of demurrage” as being only to incentivize the efficient use of rail assets (slip op. 6), and argues from that incorrect premise that demurrage charges “assessed for circumstances beyond the shipper’s or receiver’s reasonable control would, as a general matter, not fulfill the purpose of demurrage.” Slip op. at 7; *see also id.* at 14 (“Where demurrage charges are imposed for circumstances beyond the shipper’s or receiver’s reasonable control, they do not accomplish their purpose to incentivize behavior to encourage efficiency—the stated rationale for and objective of the rail carriers’ demurrage rules and charges—and the purpose of demurrage is not fulfilled.”); *id.* at 21 (“In other words, charges should not be assessed in circumstances beyond the shipper’s or receiver’s reasonable control.”). This novel explanation – that unless a shipper is at fault, the railroad is not entitled to compensation for the costs it incurs due to the delay in accepting or returning the car – is not only inconsistent with the Board’s regulatory definition of demurrage, but it is also contrary to the decades of precedent described above. Such an explanation inverts which party should bear the risk of a delay in accepting or returning a car if *neither* the shipper nor the railroad is at fault. The Board and the courts consistently have found the answer to be the shipper or receiver—as the party benefiting from the use of the car—in order to fulfill the *compensatory* aspect of demurrage.

As authority for its “overriding purpose” declaration, the *Draft Policy Statement* cites the Supreme Court’s statement in *Pennsylvania R.R. v. Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920), that “[t]he purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.” *Draft Policy Statement*, slip op. at 6-7. But only six years

after *Kittanning*, the Supreme Court described demurrage as having two purposes—compensation and efficiency—without suggesting that one purpose was more important than the other. See *Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. Paul Ry. Co.*, 271 U.S. 259, 262 (1926) (“All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention.”). And for the next 90 years, the Supreme Court and other courts have used virtually identical language. See, e.g., *ICC v. Oregon Pac. Industries, Inc.*, 420 U.S. 184, 189-190 (1975) (quoting *Turner, Dennis & Lowry*); *N. Am. Freight Car Ass’n v. STB*, 529 F.3d at 1170 (quoting Board’s statement that BNSF demurrage charges “meet both purposes for which such charges are applied to loaded cars: they compensate the railroad for use of its assets...and they encourage more efficient use of freight cars on its system”); *American Export-Isbrandtsen lines, Inc. v. FMC*, 444 F.2d 824, 835 (D.C. Cir. 1970) (“Detention payments, like demurrage, have a dual purpose. They compensate for the loss of use of equipment and operate as a deterrent against its inefficient use due to unreasonable detention”). By focusing solely on incentives, the *Draft Policy Statement* entirely ignores this second necessary and valid purpose of demurrage.

Simply put, a policy statement cannot be used to change the law. See, e.g., *CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015); *Catabawba County, North Carolina v. EPA*, 571 F.3d 20, 33 (D.C. Cir. 2009); *Consolidated Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316, 323-324 (D.C. Cir. 2003); *Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999); *Professionals and Patients For Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974); see also Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents,

Executive Order No. 13892 (Oct. 9, 2019). Therefore, if the Board proceeds to issue a policy statement, the *Draft Policy Statement* must be revised to reflect the fact that “[t]he law is well settled that assessment of demurrage charges in no way depends upon a finding of shipper or consignee fault.” *Foreston Coal Int’l, Inc. v. Baltimore & Ohio R.R. Co.*, 349 I.C.C. 495, 500 (1975). Even though a policy statement is nonbinding, adoption of the *Draft Policy Statement* as proposed would create confusion and uncertainty, which would likely trigger an increase, rather than decrease, in carrier-shipper demurrage disputes, in contradiction to the Board’s expressed goals. *See Draft Policy Statement* at 3.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer', with a stylized flourish at the end.

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