

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 759

DEMURRAGE BILLING REQUIREMENTS

COMMENTS OF THE ASSOCIATION OF AMERICAN
RAILROADS

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The Association of American Railroads files these comments in response to the Notice of Proposed Rulemaking issued by the Surface Transportation Board on October 7, 2019, in the above-captioned proceeding.¹ The NPRM proposes to, *inter alia*, repeal a significant aspect of 49 C.F.R. Part 1333 (“Demurrage Regulations”), imposing an inconsistent prescriptive requirement that a Class I carrier shift the liability for demurrage from the warehouseman to the shipper if the shipper and warehouseman “agree” to that arrangement and have notified the railroad of that arrangement, without recourse to the warehouseman if the shipper fails to pay the rail carrier. The AAR respectfully submits these comments to request that the Board withdraw the proposal because: (1) it is inconsistent with its holding in *Demurrage Liability*, EP 707 (STB served April 11, 2014) and eliminates precisely the certainty that the Demurrage Regulations were providing, so that the rail carriers could carry out the national transportation policy expressed in 49 U.S.C. § 10746; and (2) railroads would be unable to enforce any agreement

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 and sound policy in matters pertaining to demurrage.

between the receiver and shipper due to the lack of privity of contract, and thus would be potentially unable to enforce or collect demurrage charges.²

I. THE BOARD’S DECISION IN EP 707 CLEARLY PLACED DEMURRAGE LIABILITY ON THE PARTY THAT RECEIVES RAIL CARS

The Board’s decision in EP 707 clearly held that third parties, like warehouses, are liable for demurrage, if they accept and hold rail cars contrary to the terms of a carrier’s tariff and had notice of the terms of that tariff. That decision was the result of several rounds of notice and comment rulemaking. In 2010, the Board initiated a proceeding to address a specific area of controversy related to demurrage. In an ANPRM issued on December 6, 2010, the Board noted that,

[a]n important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other “intermediate” stops in the transportation chain before reaching their ultimate destination. Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery, the issue was more complicated for warehousemen, who typically are not “owners” of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped. And what became the most important “other basis” was whether the warehouseman was shown as the consignee on the bill of lading.³

The Board reviewed the approaches taken by the Eleventh Circuit in *Groves*⁴ and the Third Circuit in *Novolog*⁵ to resolve the issue of liability when a warehouseman accepts rail cars and holds them too long and is named as consignee in the bill of lading, but asserts either that it did

² “A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—(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.

³ *Demurrage Liability*, EP 707, slip op. at 3 (STB served Dec. 6, 2010) (internal citations omitted).

⁴ *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009).

⁵ *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007).

not know of its consignee status or that it affirmatively asked the shipper not to name it consignee. The Board expressed dissatisfaction with aspects of each approach and asked for public comment on several issues, including a possible rule that “would place liability for demurrage on the receiver of the rail cars, regardless of the designations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability.”⁶

The Board received comments from several parties, including AAR.⁷ After reviewing the comments received in response to the ANPRM, the Board issued an NPRM on May 7, 2012, in which the agency announced proposed rules whereby any person receiving rail cars who detains the cars beyond the free time may be held liable for demurrage if the carrier has provided the person actual notice of the demurrage tariff. The Board concluded in Final Rules that third parties may be subject to demurrage even if they are not named in the bill of lading as a shipper, consignor, or consignee, so long as they have actual notice of the tariff provision that expressly applies to third parties.

The Board stated that:

[t]he rationales behind these new demurrage rules, however, are generally applicable to all receivers. First, we stated in the NPR that, “[b]ecause warehousemen and other third-party receivers are often not signatories to the bill of lading, we do not believe that the bill of lading should be the contract that establishes demurrage liability.” NPR at 12. This rationale is equally applicable to other receivers (i.e., consignees) of rail cars, as it is the shipper (i.e., consignor) who creates the bill of lading prior to providing it to the rail carrier. Thus, we continue to believe that the bill of lading should not be the contract that establishes demurrage liability, regardless of whether the receiver is a warehousemen or other consignee.⁸

⁶ *Demurrage Liability*, EP 707, slip op. at 6 (STB served Dec. 6, 2010).

⁷ See AAR Comments, EP 707, *Demurrage Liability* (filed Mar. 7, 2011) at 7-23 (arguing that the Board should adopt the rule in *Novolog* and noting that “the *Novolog* and *Groves* court actually agreed on most of the fundamental principles that govern the application of the demurrage system to the named consignee in a bill of lading. The AAR believes that the Board should not disturb those principles.”).

⁸ *Demurrage Liability*, EP 707, slip op. at 14 (STB served Apr. 11, 2014).

Rather, the Board determined to “tie demurrage liability to the conduct of the parties directly involved with handling the rail cars,” in order to “advance the goals of § 10746 by permitting the carrier to impose charges on the party best able to get the cars back to the carrier.”⁹ This conduct-based approach aligns the incentives of demurrage policy with the party whose behavior impacts the national rail system.¹⁰

II. THE BOARD’S PROPOSAL WOULD UNDERCUT THE DUAL PURPOSES OF DEMURRAGE

The Board now proposes to require Class I carriers to send demurrage invoices directly to the shipper instead of the warehouseman if the shipper and warehouseman “agree” to such an arrangement and notify the rail carrier of the agreement. However, the proposal then goes much further and would allow shippers and receivers to shift liability by contract amongst themselves, without consent of the party to whom the charges are due. It is this additional step that essentially repeals the core provision of the Demurrage Regulations – that the person who actually receives the car should be responsible for demurrage.

The Board’s proposal would undercut both of the well-understood purposes of demurrage. As explained in the AAR comments filed separately today in EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*, and acknowledged in that draft policy statement, there are two purposes of demurrage: compensation and incentives.

“[D]emurrage is a charge that **both compensates** rail carriers for the expense incurred when rail cars are detailed beyond a specified period of time (i.e., ‘free time’) for loading and unloading

⁹ Notice of Proposed Rulemaking, *Demurrage Liability*, EP 707 (STB served May 7, 2012), *cf.* 49 U.S.C. § 10746.

¹⁰ *See Demurrage Liability*, EP 707, slip op. at 14 (STB served Dec. 6, 2010).

and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.”¹¹ Each one would be frustrated by the NPRM.

A. The Party Receiving the Cars Should Remain Incentivized to Encourage Efficient Use of Rail Cars

If requested by the shipper, railroads may currently bill the shipper for demurrage in place of the warehouseman. But by removing the railroad’s ability to seek recourse from the warehouseman by regulation, the Board proposes to again sever demurrage liability from the party whose behavior controls the efficient use of railcars. The opportunity for abuse of this proposed new regulation comes easily to mind. For example, a warehouseman might offer a shipper a far better deal on other commercial terms in order to get the shipper to agree to accept responsibility for demurrage. Under such a scenario, the warehouseman would be without any incentive to efficiently utilize the cars it received. When demurrage inevitably resulted from the warehouseman’s conduct, the shipper would claim that it is without fault and therefore shouldn’t be liable for demurrage (and indeed, for the reasons explained below, the railroad would have difficulty collecting from such a shipper who is without fault in this scenario). In short, the NPRM would revive the same problem that the Board solved five years ago by promulgating the Demurrage Regulations.

B. The Board’s Proposal Threatens Railroads’ Ability To Collect Compensation for Demurrage

The Board’s proposal would also frustrate the second purpose of demurrage, compensation for the use of railroad assets. Although the NPRM assumes that a railroad will collect from the shipper, a railroad would be left without an effective mechanism to seek

¹¹ *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 2 (STB served Oct. 7, 2019).

compensation. The railroad would have no privity of contract to enforce any agreement between the receiver and shipper with respect to responsibility for demurrage charges. Accordingly, if a shipper refused to pay and there was no guarantee by the warehouseman, the railroad would potentially be without legal recourse, particularly in cases where it is clear that the warehouseman's conduct has caused the demurrage charges to accrue.

Moreover, even if the railroad were made a named third-party beneficiary to the contract between the shipper and the warehouseman, it would not solve the problem, as the railroad would have no say in the terms of any such shipper-warehouseman contractual arrangement, including important terms such as dispute resolution, choice of law and venue, timeframe for enforcement, etc. A railroad would also seemingly have no say if liability was transferred from a Fortune 300 company serving as a warehouseman to a small, financially precarious or insolvent shipper, regardless of the prospects for collection. The railroad's ability to collect demurrage should not depend on the terms of a contract to which it is not a party.

The NPRM seemingly anticipates this problem, but states that, "[t]he shipper is, after all, the party shown on the bill of lading, and indeed the one that was historically responsible for demurrage. The claim that someone else should guarantee that shippers pay their bills is unsound in law and policy."¹² The Board provides no support or justification for its assertion, which is in direct conflict to the express language of the Demurrage Regulations that places liability on the receiver of the rail cars, regardless of the bill of lading.

CONCLUSION

The Board's proposal would appease the complaints of warehousemen that want to escape liability, and would not promote and establish sound transportation policy. The NPRM

¹² NPRM at 11 & n.16.

would undermine both of the recognized purposes of demurrage, by removing the incentive to manage rail cars efficiently from the party actually in control of the equipment and weakening railroads' ability to collect demurrage charges. As such, the proposal giving warehousemen a pathway to eliminate their responsibility to ensure a fluid rail car system should be withdrawn.

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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