

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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POLICY STATEMENT ON	)	
DEMURRAGE AND ACCESSORIAL	)	
RULES AND CHARGES	)	
	)	
DEMURRAGE BILLING	)	Docket No. EP 759
REQUIREMENTS	)	
	)	
	)	

**COMMENTS OF
KINDER MORGAN TERMINALS**

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Dated: November 6, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL RULES AND CHARGES	))) Docket No. EP 757))
DEMURRAGE BILLING REQUIREMENTS	)) Docket No. EP 759))

**COMMENTS OF
KINDER MORGAN TERMINALS**

Kinder Morgan Terminals (“Kinder Morgan”) respectfully submits these Comments in response to the Surface Transportation Board’s (“Board”) Notices served on October 7, 2019 in STB Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges* (“*Demurrage Policy Statement Proposal*”) and STB Docket No. EP 759, *Demurrage Billing Requirements* (“*Demurrage Billing NPRM*”).

SUMMARY

Kinder Morgan strongly supports the Board’s continuing efforts through its *Demurrage Policy Statement Proposal* and its *Demurrage Billing NPRM* to correct misinterpretations of the law and end abusive practices by railroads with respect to the collection of demurrage charges that have effectively thwarted reasonable commercial resolution among stakeholders. Kinder Morgan particularly supports the Board’s proposal requiring invoices to be sent directly to shippers where the shipper agrees to be billed and the Board’s pronouncement that demurrage assessments should not be made

for events outside the reasonable control of the receiver. Kinder Morgan respectfully requests that the Board adopt its proposals as soon as possible, together with a few modest clarifications and compliance mechanisms, including that the Board (1) provide more clarity on reasonable railcar unloading “free time” for both railroad- and shipper-provided railcars, and on removing unreasonable demurrage credit expiration restrictions, (2) require railroads to promptly revise their tariffs to comply with the Board’s Policy Statement and to specifically incorporate the Policy Statement into their tariffs, and (3) require railroads to promptly provide, upon request, all pertinent supporting information establishing that invoiced charges are accurate, valid, and warranted.

IDENTITY AND INTEREST

Kinder Morgan Terminals is one of four business segments of Kinder Morgan, Inc., one of the largest energy infrastructure companies in North America. The terminals business segment includes 157 terminals in the United States and Canada that transload and store refined petroleum products, crude oil, ethanol, chemicals, and various other liquid and bulk commodity products. Kinder Morgan contracts with over 4,700 customers in North America for the receipt, storage, and transload of commodities, many of which are shipped and received by rail. Kinder Morgan provides transload and storage services for customers, but does not own the product or railcars, or initiate the shipments of loaded cars or receipts of empty cars. It is our customers who are the contract and common carrier shippers of the commodities delivered by the railroads to the terminals

and who are responsible for arranging the transportation, tendering the shipments, and, in combination with the involved railroad(s), directing deliveries.

Kinder Morgan fully participated in the Board’s Docket No. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges* (“*Demurrage Oversight Hearing*”) held late last spring. As stated in our Written Testimony (filed May 8, 2019), our oral testimony (presented May 22, 2019), and our Supplemental Comments (filed June 6, 2019), there is a pressing need for the Board to take concrete steps to restore balance to railroad demurrage programs. Kinder Morgan has a strong interest in this issue and is grateful for the Board’s commitment and ongoing initiatives to help restore fairness and balance in demurrage and correct misinterpretations of the law that have led carriers to assess substantial amounts of improper charges on receivers.

A. The Board’s Affirmation of the Railroads’ Misapplication of the *Demurrage Liability* Decision

A focus of Kinder Morgan’s *Demurrage Oversight Hearing* testimony was on the Board’s 2014 decision in *Demurrage Liability*, Docket No. EP 707 (STB served Apr. 11, 2014) (“*Demurrage Liability*”). That decision addressed a narrow court conflict on whether demurrage liability should rest strictly on the bill of lading, and attempted to create more certainty by “adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading.” *Demurrage Liability* at 15. As Kinder Morgan explained in its *Demurrage Oversight Hearing* Written Testimony, the railroads have not treated the *Demurrage Liability* decision as a narrow clarification, but have instead weaponized it in seeking to collect massive new demurrage assessments against Kinder Morgan, arguing

that the decision somehow created and imposed a whole new strict liability regime on receivers, and receivers only.

Further, the railroads have generally refused to include all necessary supply chain participants in discussions regarding demurrage. In the limited instances where carriers have consented to discussion with other participants, they still generally insist that the receivers serve as the guarantor of all demurrage invoices, which has effectively blocked any reasonable discussion and possible resolution of disputes. The unfortunate result has been *increased* uncertainty, disagreement, and litigation among stakeholders on demurrage responsibility, especially because the Board's *Demurrage Liability* decision enables carriers to seek demurrage from a party with which it does not otherwise have a business relationship, thereby removing the market incentive for railroads to resolve demurrage disputes reasonably.

1. The Board's *Demurrage Policy Statement Proposal* and *Demurrage Billing NPRM* Properly Affirm That Any Demurrage Assessments Must Be Warranted

As part of its *Demurrage Policy Statement Proposal*, the Board correctly affirms that the *Demurrage Liability* decision *did not* establish a strict liability regime on receivers such as Kinder Morgan as one or more railroads have claimed, and specifically, that “[t]he rule adopted in Docket No. EP 707 does not require rail carriers to bill warehousemen.” *Demurrage Policy Statement Proposal* at 20. The Board's *Demurrage Billing NPRM* further affirms that its *Demurrage Liability* decision narrowly clarified that “the identification of a party in the bill of lading no longer controls; as the Board

explained, it was ‘adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading.’” *Demurrage Billing NPRM* at 4 (quoting *Demurrage Liability* at 15).

While it should be self-evident that a conduct-based test is not a strict liability test, some rail carriers still contend otherwise. However, as the Board correctly affirms, demurrage should only be invoiced to responsible parties where the invoiced party is shown to be responsible for the demurrage, and thus, “[t]he Board . . . expects rail carriers to bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage.” *Demurrage Policy Statement Proposal* at 17.

Kinder Morgan agrees with this interpretation and affirmation of the Board’s existing rules and law.

2. The Board’s *Demurrage Policy Statement Proposal* and *Demurrage Billing NPRM* Properly Affirm That Demurrage May Be Billed Directly to the Shipper, and the Receiver May Not Be Held as the Guarantor of Any Such Unpaid Assessments

In its *Demurrage Policy Statement Proposal*, the Board correctly affirms that while demurrage *may* be billed to receivers where warranted, railroads are not required to do so. *Id.* at 20. The Board disagrees with the interpretation of some railroads that they are required under the Board’s rules to collect demurrage from receivers, and receivers only. “The Board notes, in particular, that the rule adopted in Docket No. EP 707 states, in permissive terms, that parties who receive cars ‘*may* be held liable for demurrage,’ *see* 49 C.F.R. § 1333.3 (emphasis added).” *Id.* The Board further states that “the Board’s rules at part 1333, adopted in *Demurrage Liability Final Rule*, EP

707, reflect the view that demurrage charges should be borne by the party responsible for the delay, which, in some cases, may be the shipper rather than the warehouseman, as the Board was informed during the EP 754 proceeding.” *Demurrage Billing NPRM* at 11. As such, the Board makes clear that “[t]he rule adopted in Docket No. EP 707 does not . . . preclude a rail carrier from sending demurrage bills directly to the shipper.” *Demurrage Policy Statement Proposal* at 20.

Further, the Board affirms that when billings are sent to shippers, its *Demurrage Liability* rules “do[] [not] preclude a rail carrier from . . . looking to the shipper as the responsible party for any unpaid assessments.” *Id.* The Board clarifies that carrier attempts to assign receivers responsibility as guarantors for unpaid demurrage invoices are unlawful, because “[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.” *Demurrage Billing NPRM*, at 11 n.16. As such, the Board clarifies and affirms that “[w]hen an invoice is sent to the shipper rather than the warehouseman, the railroad may not require the warehouseman to guarantee payment.” *Id.* at 11.

Kinder Morgan also agrees with this interpretation and affirmation of the Board’s existing rules and law.

B. The Board's Proposed Policy Statement and Invoicing Rules Should Be Adopted, with Additional Protections and Compliance Mechanisms

1. The Board Should Require Invoices to Be Sent to the Shipper Where the Shipper Agrees to Be Billed

As part of its *Demurrage Oversight Hearing* Written Testimony and Supplemental Comments, Kinder Morgan expressed significant frustration with the railroads' refusal to voluntarily agree, if requested by a shipper and Kinder Morgan, to (i) provide separate invoices for each shipper that controls a railcar on which a demurrage charge is sought to be assessed, and (ii) agree to bill the shipper directly for demurrage, without requiring Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

In its *Demurrage Billing NPRM*, the Board proposes to adopt such a reasonable requirement by revising 49 C.F.R. § 1333.3 to include the following:

(b) If the rail cars are delivered to a third-party intermediary that has reached an agreement with a shipper (or consignee) that the shipper (or consignee) shall be liable for demurrage, then the serving Class I carrier shall, after being notified of the agreement by the shipper, consignee, or third-party intermediary, bill the shipper (or consignee) for demurrage charges without requiring the third-party intermediary to act as a guarantor, unless and until a party to the agreement notifies the serving Class I carrier that the agreement is no longer in force.

Demurrage Billing NPRM at 14.

This requirement is very fair, as it is predicated upon agreement by the shipper and terminal and would help end the gridlock that has prevented reasonable discussion and resolution of individual disputes. As discussed in our *Demurrage*

Oversight Hearing Written Testimony, allowing railroads to sue receivers, thereby forcing receivers to countersue railroads and cross-sue terminal customers (the shippers who are the actual railroad customers), is simply not an effective, efficient, or reasonable means to address the demurrage problem.

2. Demurrage Assessments Should Not Be Made for Events Outside the Reasonable Control of the Receiver

Through its *Demurrage Policy Statement Proposal*, the Board proposes guiding principles on demurrage and accessorial charge assessments. A crucial aspect of the Board's proposed Policy Statement is that railroads should not assess demurrage for "circumstances beyond the . . . receiver's reasonable control." *Demurrage Policy Statement Proposal* at 7, 21. The Board states that "[w]here rail carriers' operating decisions or actions result in bunched deliveries and demurrage charges that are not within the reasonable control of the shipper or receiver to avoid, the purpose of demurrage is not fulfilled." *Id.* at 14. In particular, the Board states that the railroads should reasonably take into account "carrier-caused circumstances," such as missed switches, bunched deliveries, service variabilities, or "[c]hanges in historical practices on which the shipper or receiver has long relied (e.g., regarding switching frequency or delivery methods that deviate from prior arrangements made by the parties)." *Id.* at 12.

Kinder Morgan strongly agrees with these pronouncements. As stressed in Kinder Morgan's *Demurrage Oversight Hearing* Written Testimony, the railroads are aggressively imposing demurrage on receivers in these and other areas without establishing that the receiver has the ability to avoid them, and even where the carrier is

itself at fault. *Demurrage Oversight Hearing*, Kinder Morgan Written Test. at 12-13. As the Board has stressed, “demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets,” nor do such charges further the important goal of mutual accountability by both rail carriers and shippers/receivers. *Demurrage Policy Statement Proposal* at 21.

3. Carriers Should Provide Reasonable Free Time/Credits

The Board states that it is “troubled by the adverse impacts of reductions in free time to rail users” from the traditional period of at least 48 hours of free time (or two credit days) to unload railcars. *Id.* at 11. It expresses similar concerns about carrier practices that provide no credit days for private cars, especially where tariff rules “do not have reasonable rules and practices for dealing with, among other things, variability in service and carrier-caused bunching.” *Id.* As Kinder Morgan has discussed, however, the carriers omit or provide limited provisions in their tariffs providing for credits for such service variabilities, bunching, missed switches, shipper facility capacity constraints, or other factors outside the direct control of the receiver:

The unbalanced aspect of these demurrage tariff provisions further demonstrate that they are designed not to ensure the prompt return of equipment to service, but to augment carrier revenues. Railroads are seeking to collect charges at individual locations where longstanding local operating protocols and arrangements have been established to help ensure the efficient delivery and return of railcars and without the assessment of demurrage; where historic traffic levels have not changed; and where the carrier knows that

assessments will have no improvement on the efficient use of assets or the provision of rail service.

Demurrage Oversight Hearing, Kinder Morgan Written Test. at 16.

Also, there is no legitimate justification for the railroads' practices of differentiating free time for railroad cars versus private rail cars. To address these issues, Kinder Morgan respectfully submits the Board should declare that, unless such reasonable rules and practices for dealing with such service matters are fully accounted for as part of a railroad's demurrage tariff, 48 hours of free time for railcar unloading is the minimum amount of free time that shall be provided for *both* railroad- or shipper-provided railcars.

Further, Kinder Morgan agrees with the Board that the railroads have arbitrary and unfair policies of demurrage credit expiration, whereby credits expire at the end of each month, if not sooner. *Demurrage Policy Statement Proposal* at 18.

Demurrage debit charges do not "expire" until paid, and credits should also not expire until used. Kinder Morgan agrees that customers should be "afforded a reasonable opportunity to make use of the credits in question, before any expiration date imposed by the rail carrier." *Id.* While the Board states that its "concerns would be allayed if shippers and receivers were compensated for the value of unused credits at the end of each month, rather than the credits merely expiring," *id.*, respectfully, that statement is illusory, as the carriers do not compensate receivers for unused credits. Kinder Morgan respectfully submits that the Board should offer more clarity on this subject and definitively declare that unless the railroad provides for appropriate compensation for

credits, any such demurrage credit expiration restrictions shall be deemed presumptively unreasonable.

4. The Board Should Adopt Enhanced Carrier Compliance Mechanisms

The Board states that its proposed Policy Statement is designed to provide stakeholders with guiding principles, without making “binding determinations.” *Id.* at 3. While Kinder Morgan appreciates that the Board is not seeking or “promoting complete uniformity across rail carriers’ demurrage and accessorial rules and charges,” *id.*, it has concerns that the proposed Policy Statement lacks any meaningful enforcement or compliance mechanism. The Board states that its Policy Statement can be used by parties in individual proceedings and by the Board “[w]hen adjudicating specific cases.” *Id.* at 4. However, as the Board knows, very few such cases are brought to the Board for resolution, and, respectfully, it is unreasonable to allow railroads to continue to collect detention charges where such collections violate the Policy Statement, unless and until a shipper files and succeeds in a lengthy unreasonable practice complaint before the Board.

To ensure reasonable compliance, Kinder Morgan respectfully submits that the Board should require railroads to (1) implement appropriate changes to their tariffs in compliance with the Board’s Policy Statement within a reasonable period of time (*e.g.*, 60 days), and (2) specifically incorporate into their demurrage and accessorial tariffs the Board’s Policy Statement. Such actions will still leave it to the individual carriers to implement independent conforming changes in compliance with the Board’s general policy guidance as appropriate, while ensuring that receivers and shippers are promptly

afforded the full benefit of the Board's general guidance and principles in seeking to resolve any disputes that may arise.

5. The Board Should Adopt Improved Invoicing and Demurrage Charge Verification Procedures

As part of its *Demurrage Oversight Hearing* Written Testimony, Kinder Morgan expressed significant concerns about unreasonable carrier invoicing and dispute resolution practices:

The carrier tariffs . . . lack provisions to reasonably address and resolve disputes. The railroads send numerous pages of computer-generated invoices each month. The invoices are not separated by railroad customer, and in fact do not identify the individual shippers associated with the shipment, significantly impeding Kinder Morgan's ability to orderly review and attempt to pass through charges to our responsible customers. Reviewing each of the numerous line items for billing and car errors imposes significant costs and burdens on receivers for tariff compliance, review, and objection. Moreover, to adequately review the invoices, a party receiving the bills needs additional train movement and other traffic data which the railroads do not make public.

Demurrage Oversight Hearing, Kinder Morgan Written Test. at 17-18.

The Board states in its *Demurrage Policy Statement Proposal* that it is “deeply troubled” by such practices, and that “[i]f rail carrier practices effectively preclude a rail user from determining what happened, then the user would not be able to determine whether it was responsible for the delay; the responsible party would not be incentivized to modify its behavior; and the demurrage charges would not achieve their purpose.” *Id.* at 16.

In response, the Board's *Demurrage Billing NPRM* seeks to first establish supplemental rules at 49 C.F.R. § 1333.4(b), requiring each Class I railroad to take "appropriate action to ensure that the demurrage charges are accurate and warranted" prior to sending demurrage invoices. *See Demurrage Billing NPRM* at 15. Second, the Board seeks to establish additional supplemental rules at 49 C.F.R. § 1333.4(a) requiring carriers to provide the following information with each demurrage invoice:

- (1) The unique identifying information (e.g., reporting marks and number) of each car involved;
- (2) The following information, where applicable:
 - (i) The date the waybill was created;
 - (ii) The status of each car as loaded or empty;
 - (iii) The commodity being shipped (if the car is loaded);
 - (iv) The identity of the shipper, consignee, and/or care-of party, as applicable; and
 - (v) The origin station and state of the shipment;
- (3) The dates and times of:
 - (i) actual placement of each car,
 - (ii) constructive placement of each car (if applicable and different from actual placement),
 - (iii) notification of constructive placement to the shipper or third-party intermediary (if applicable); and
 - (iv) release of each car; and
- (4) The number of credits and debits attributable to each car (if applicable).

Id. at 14-15.

Kinder Morgan strongly supports these changes as a means to help improve carrier accountability and the validity and accuracy in carrier invoicing. However, Kinder Morgan is concerned that these provisions are insufficient alone to ensure that demurrage invoices are actually accurate and warranted. As stressed in our *Demurrage Oversight Hearing Written Testimony*, it is Kinder Morgan's experience that, while the

carriers profess to conduct such investigations prior to sending invoices to ensure the invoices are accurate and warranted, in most instances, no such review or investigation is actually taken. Also, railroad claims that receivers such as Kinder Morgan have full visibility and control over the volume and timing of railroad deliveries are unfounded.

Kinder Morgan respectfully submits that to meet the Board's goals of transparency and facilitating effective private negotiations and problem solving between rail carriers and receivers, more is required to ensure that demurrage charges are legitimate and warranted. In particular, Kinder Morgan submits that the Board should further amend its proposed rules to provide that, upon request from the invoiced party, the invoicing railroad shall promptly provide all pertinent supporting information establishing that the charges are accurate, valid, and warranted and are not attributable, in whole or in part, to the carrier, other third-party participants in the supply chain, or other factors outside the control of the receiver. This would include train and car records and information showing the detention to be the fault of the invoiced party, and not caused by the railroad, upstream carriers, missed switches, bunching, untimely or variable service, failure to meet individual trip plans or daily service windows, or other events or circumstances outside the invoiced party's reasonable control.

If a receiver requests such information and the railroad cannot supply sufficient information demonstrating that the purported delays relating to receiving, unloading, and returning of equipment are the sole fault of the receiver, then the charges should be deemed invalid and rescinded.

CONCLUSION

Kinder Morgan appreciates the opportunity to submit these Comments, and respectfully requests the Board to adopt its proposed Policy Statement and rules with the above reasonable modifications as soon as possible to help restore fairness and balance to railroads' demurrage programs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Josh Etzel", written in a cursive style.

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Dated: November 6, 2019