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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 757

POLICY STATEMENT ON DEMURRAGE AND
ACCESSORIAL RULES AND CHARGES

EX PARTE NO. 759

DEMURRAGE BILLING REQUIREMENTS

EX PARTE NO. 760

EXCLUSION OF DEMURRAGE REGULATION FROM
CERTAIN CLASS EXEMPTIONS

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Pursuant to the decisions served on October 7, 2019, by the Surface Transportation Board (“STB” or “Board”) in these proceedings, the Association of American Railroads (“AAR”) submits these reply comments. AAR filed separate opening comments in each docket on November 6, 2019.

EP 757

In EP 757, AAR submitted comments in response to inconsistencies between portions of the draft policy statement and well-established law concerning demurrage. The draft policy statement expressly recognized at the outset that, as a longstanding matter of law and regulation, demurrage charges have dual purposes to both: (1) compensate 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; and (2) incentivize the efficient use of rail cars in the rail network. However, the guidance document then ignored the compensation aspect of demurrage and appeared to contradict both agency and court precedent that held 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. Because a policy statement cannot be used to change the law, AAR argued that, if the Board proceeds to issue a policy statement, the draft policy statement should 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.”¹

Shipper comments embraced the attempt to change the law and were untroubled by the potential for misuse of policy guidance. Indeed, shipper comments sought to cement such a change into regulation through various means. For example, the Western Coal Traffic League (“WCTL”) stated that “[t]he railroads should be required to incorporate the Policy Statement as part of their tariffs for demurrage and accessorial charges.”² Similarly, the National Mining Association (“NMA”) wrote that it “believes that railroad tariffs should contain specific language that sets forth, to the maximum extent possible, when a rail shipper is excused from paying accessorial or demurrage charges because it is either not the cause of the action triggering the charge or the railroad is at fault.”³ These requests run directly counter to the Board’s conclusions to not make binding determinations in the policy statement, to avoid promoting uniformity across rail carriers’ demurrage and accessorial rules and charges, and to instead

¹ *Foreston Coal Int’l, Inc. v. Baltimore & Ohio R.R. Co.*, 349 I.C.C. 495, 500 (1975).

² WCTL Comments at 8.

³ NMA Comments at 2.

recognize that there may be different ways to implement and administer reasonable rules and charges and to consider all facts and arguments presented in individual demurrage disputes.⁴ Moreover, such an action would be far beyond the appropriate scope of a policy statement and, would likely violate 49 U.S.C. § 10704(a)(1), which requires that the Board conduct a full hearing regarding the reasonableness of a particular railroad rule or practice before prescribing a specific rule, or practice to be followed.⁵

EP 759

In EP 759, the AAR comments noted that the NPRM in that proceeding proposed to in essence repeal a significant aspect of 49 CFR Part 1333 (“Demurrage Regulations”), imposing a 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 comments argued that the Board should 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 protection that the Demurrage Regulations were providing rail carriers, so that the rail carriers could carry out the national transportation policy expressed in 49 U.S.C. § 10746; and (2) due to the lack of privity of contract, a railroad would be unable to enforce any agreement between the receiver and shipper and, thus, potentially unable to enforce or collect demurrage charges.

⁴ *Policy Statement on Demurrage and Accessorial Charges*, EP 757, slip op. at 3-4 (STB served Oct. 7, 2019).

⁵ AAR does not concede that adoption of such a requirement would be lawful, regardless of the process used.

Warehousemen filed comments in support of the Board's proposal to require a Class I carrier to shift the liability for demurrage from the warehouseman to the shipper if the shipper and warehouseman "agree" to that arrangement and have notified the carrier of that arrangement. However, none of these warehousemen addressed the fact that the Class I carrier would lack the privity of contract necessary to pursue shippers in court if they fail to pay the carrier. Further, as International Liquid Terminals Association points out in its comments, the contractual arrangement between the warehouseman and the shipper may specify that demurrage liability between them depends on an analysis of whether the shipper or the warehouseman was the one responsible for causing the demurrage liability to accrue.⁶ It is unclear how such a contractual arrangement would be treated under the Board's proposed rule, which illustrates why it is unwise to insert the carrier into the contractual arrangement between the warehouseman and the shipper. The carrier should pursue the warehouseman, allowing the warehouseman and shipper to sort out their differences.

EP 760

The AAR comments in EP 760 did not object to the proposed clarifying edits to 49 C.F.R. § 1039.11 and § 1039.14. However, AAR argued that the NPRM fails to provide a legally-supported rationale for the reregulation of demurrage for certain agricultural commodities. The AAR comments noted that the NPRM did not grapple with the first two Rail Transportation Policy ("RTP") factors that favor market forces over governmental regulation and that the NPRM lacks any analysis of railroad market power over the relevant commodities. As a result, AAR argued that the Board must, at a minimum withdraw the current proposal and issue a revised NPRM that makes the requisite findings. The better course for the agency would be to

⁶ International Liquid Terminals Association Comments at 2-3.

continue to rely on parties' ability to seek to revoke the exemption in specific cases when warranted.

The opening comments by other non-railroad participants in this proceeding only amplify the flaws with the Board's proposal to re-regulate. The STB has previously "held that the extent of railroad market power is an *essential* issue in exemption revocation proceedings."⁷ Not only does this proceeding still lack such a requisite showing, but, tellingly, not a single individual shipper of the agricultural commodities subject to potential partial revocation in this proceeding so much as filed opening comments. Far from demonstrating that revocation is "necessary" to effectuate the RTP goals in Section 10101, the docket reveals no evidence of a problem affecting these commodities.

Rather, the bulk of commentary touching on this issue came from unrelated industries that seek to use the Board's unsubstantiated proposal here for partial revocation as a springboard to advance their own unsupported calls for full blown reregulation of other commodities.⁸ These filings demonstrate the importance of the Board continuing to fulfill its statutory obligation to exempt "to the maximum extent possible" in all aspects of its regulation. Any perception that the Board will not fulfill its legal requirements and allow a relaxed (or, here, a non-existent)

⁷ *WTL Rail Corp. Pet. for Decl. Order & Interim Relief; WTL Rail Corp. Pet. for Partial Revocation of Exemption*, EP 230 (Sub-No. 9), slip op. at 3 (STB served Feb. 17, 2006) (emphasis added). See also *Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993) ("[T]he initial inquiry in a reregulation case is whether the carrier has market power."); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-422, at 169 (1995), *reprinted in* 1995 U.S. Code Cong. & Admin. News 850, 853 ("The Conference expects the Board to examine all competitive transportation factors that restrain rail carriers' actions and that affect the market for transportation of the particular commodity or type of service for which revocation has been requested.").

⁸ See, e.g., American Iron and Steel Institute ("AISI") Comments at 5 ("AISI urges the Board to finalize and adopt its Commodity Exemption NPRM promptly."); National Industrial Transportation League Comments at 12 ("The League strongly supports the proposed partial revocation for these commodities and also urges the Board to apply this important principle to the other proposed and requested commodity exemption revocations that are at issue in the Board's EP 704 proceeding").

showing of market power in support of a revocation request will only increase the clamor for further impermissible reregulation of the rail industry.

With respect to the Board’s proposed amendment of 49 C.F.R. § 1039.11 and § 1039.14, AAR disagrees with the request by some commentators to modify the Board’s proposal to read that the exemptions do not apply to the regulation of demurrage, “**and other railroad accessorial programs.**”⁹ As the Board has recently stated, “demurrage” is expressly subject to Board regulation under 49 U.S.C. § 10702 and § 10746, while accessorial charges “are not specifically defined by statute or regulation but are generally understood to include charges *other than* line-haul and *demurrage charges.*”¹⁰ These charges may include programs related to such actions as “diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering one railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions.”¹¹ Accordingly, including reference to accessorial programs would constitute a clear expansion of the Board’s assertion of its jurisdiction beyond demurrage.

Put simply, the prior regulatory and court decisions cited by the Board in support of its clarification of its retention of jurisdiction over demurrage say nothing with respect to accessorial programs, which are unrelated to “car hire”, “car service”, or “car supply.”¹² Accordingly, any revision to the Board’s proposal to expand beyond the term “demurrage” would be contrary to the Board’s stated purpose for its clarification: “to ensure that the

⁹ See, e.g., AISI Comments at 4.

¹⁰ *Oversight Hearing on Demurrage and Accessorial Charges*, EP 754, at 1& n.2 (STB served Apr. 8, 2019) (emphasis added).

¹¹ *Id.*

¹² NPRM at 4.

regulations will be clearly understood consistent with court and agency precedent, not to make a substantive change.”¹³ Such a change would also create new confusion, rather than bringing the clarity desired by the Board. AAR respectfully submits that the Board should retain its initial proposal to clarify that 49 C.F.R. § 1039.11 and § 1039.14 do not apply to the regulation of “demurrage.”

For the reasons set forth above and in the AAR opening comments, the Board should continue to resolve disputes related to demurrage charges on a case-by-case basis according to long-standing precedent, should not partially revoke the exemption for miscellaneous commodities to reregulate demurrage, and should not require railroads to bill shippers for demurrage liability incurred by warehouseman as the receiver of a rail car, when the warehouseman and shipper have “agreed” to such an arrangement.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer', is positioned above the typed name and address.

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¹³ *Id.* at 5.