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**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
	)	

**REPLY COMMENTS OF
KINDER MORGAN TERMINALS**

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Dated: December 6, 2019

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DEMURRAGE BILLING REQUIREMENTS	)))))	Docket No. EP 759

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

SUMMARY

Through its *Policy Statement Proposal* and its *Demurrage Billing NPRM*, the Board seeks to provide guidance and protective rules to help end unreasonable and abusive practices by railroads with respect to demurrage and help restore fairness and balance in demurrage assessments.¹ A broad spectrum of shippers and receivers, including Kinder Morgan, submitted opening comments in these proceedings. These

¹ These proposals came about after the Board received over 90 pre-hearing submissions and heard from 50 witnesses during two days of hearings in Docket No. EP 754, *Oversight Hearing on Demurrage & Accessorial Charges*, on May 22-23, 2019 (“*Oversight Hearing*”). It also received 36 post-hearing comments from stakeholders.

non-railroad stakeholders agree that the Board’s proposals are necessary to protect the public from unreasonable railroad practices and to end misinterpretations of the law that have led carriers to assess substantial amounts of improper demurrage and related charges. The non-railroad stakeholders generally request that the Board adopt its proposals, with additional clarifications and compliance mechanisms.

The major railroads and railroad trade associations also presented opening comments.² Almost all of the railroads either support or do not take exception with most parts of the Board’s *Policy Statement Proposal*. Nevertheless, at least one major railroad stridently contends that the proposed common sense policy statement is “fundamentally flawed” and would “stifle innovation in the industry,” and that the proceeding should be terminated,³ and a few others criticize the Board’s pronouncement that railroads should not assess demurrage for circumstances outside a shipper/receiver’s reasonable control.⁴

² The railroads and their trade associations that filed comments in both EP 757 and EP 759 were the Association of American Railroads (“AAR”); the American Short Line and Regional Railroads (“Shortlines”); Canadian Pacific Railway Company (and its United States subsidiaries) (“CP”); CSX Transportation Inc. (“CSXT”); Kansas City Southern Railway Company (“KCS”); and Union Pacific Railroad Company (“UP”). BNSF Railway Company (“BNSF”) filed opening comments only in EP 757, and Canadian National Railway Company (“CN”) and Norfolk Southern Railway Company (“NS”) filed opening comments only in EP 759.

³ *Policy Statement Proposal*, CP Op. Comments at 6-7, 15.

⁴ Kinder Morgan previously informed the Board that it is a party to an ongoing demurrage dispute with CN. See *Ill. Cent. R.R. v. Kinder Morgan Liquids Terminals, LLC*, No. 16-cv-8044 (N.D. Ill. Nov. 3, 2016). As part of its Opening Comments in *Demurrage Billing NPRM*, CN makes a number of gratuitous statements about Kinder Morgan and the litigation and purports to present its own version of the facts involved in the case, but its Comments are riddled with errors, omissions, and distortions, including that Kinder Morgan refuses to pay any demurrage. *Id.* at 14. Kinder Morgan does not believe that it is productive or necessary to address CN’s gross factual misstatements in

While some railroads express no issues about the proposed *Demurrage Billing NPRM* invoicing requirements, others insist that providing reasonable supporting information establishing that charges are accurate, valid, and warranted is unnecessary. Several railroads also object to requiring invoices to be sent to the shipper where the shipper agrees to be billed, contending that this would violate the Board's 2014 decision in *Demurrage Liability*, Docket No. EP 707 (STB served Apr. 11, 2014) ("*Demurrage Liability*"), that they assert, incorrectly, created a whole new strict liability regime on receivers, and receivers only.

Despite some railroads opposing parts of the Board's proposals, none provide any compelling justification to revise the proposals or the clarifications and compliance mechanisms requested by Kinder Morgan in its Opening Comments. The Board's proposals to ensure that demurrage charges are accurate and warranted are plainly reasonable and necessary, as is its proposal to require that invoices be sent to shippers upon the agreement of receivers and shippers, which is clearly needed to end gridlock and promote reasonable discussion and commercial resolution among stakeholders.

Kinder Morgan therefore respectfully requests that the Board reject the railroads' opposition, and adopt the proposals as soon as possible, together with the modest clarifications and compliance mechanisms requested by Kinder Morgan in its Opening Comments.

these Reply Comments. Its failure to address any matter should not be viewed as acquiescence to CN's, or any other party's, stated facts or position.

A. Any Demurrage Assessments Must Be Warranted

The Board has clarified as part of its proposals the fundamental principle that demurrage should only be assessed where the invoiced party is shown to be responsible for the demurrage, and where the invoice is accurate. *Policy Statement Proposal* at 17; *Demurrage Billing NPRM* at 10. As Kinder Morgan and other shippers and receivers have demonstrated, such actions are necessary to help address the railroads' aggressive imposition of demurrage without establishing that the receiver/shipper is responsible and has the ability to avoid them, even where the carrier is itself at fault.

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. *Policy Statement Proposal* at 21. 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.” *Id.* at 17. The Board’s *Demurrage Billing NPRM* requires 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.

In their opening comments, all shippers and receivers generally agree with these sound principles. So do many of the railroads. For instance, the Shortlines, representing 1,000 railroads and railroad supply companies, “agree[] that demurrage should not be charged to a rail user if the delay is beyond the reasonable control of that

rail user.”⁵ UP’s newly established Customer Bill of Rights for Accessorial and Demurrage Charges establishes as its first principle that “customers do not and will not incur accessorial and demurrage charges for circumstances beyond their reasonable control.” *Policy Statement Proposal*, UP Op. Comments at 3. Additionally, during the Board’s public hearing, most of the railroads generally admitted that they should not assess demurrage unless they can first establish customer cause.⁶

Nevertheless, AAR and a few individual railroads, including CN, CP, and CSXT, now reverse course and argue that requiring railroads to first establish that charges are accurate and warranted prior to sending invoices is somehow unreasonable and violates “well established law.” Such contentions are clearly erroneous. First, these opposing railroads misconstrue the Board’s proposal and prior law in contending that a specific finding of proximate cause or “fault” is not necessary, largely by pointing to some older, inapplicable caselaw addressing defenses where “average” demurrage was

⁵ *Policy Statement Proposal*, Shortlines Op. Comments at 4. *See also id.*, BNSF Op. Comments at 2 (“We appreciate the Board’s focus on the important statutory purposes served by demurrage, while maintaining the ability of rail carriers to craft and enforce reasonable demurrage programs responsive to those purposes.”); *id.*, KCS Op. Comments at 2 (“KCS thanks the Board for its thoughtful and considered approach in issuing a Policy Statement”).

⁶ *See, e.g., Oversight Hearing*, Transcript at 146-47 (CSXT agrees that demurrage should not be assessed where “charges penalize a shipper who is powerless to avoid or abate the detention” and “do[es] not think it’s reasonable to hold a shipper accountable when they’re powerless”); *id.* at 849-50, 920 (CN testifies that demurrage credits are provided where “the shipper [is] not in control of the circumstances that caused the incident” and that “CN works with [its] customers in individual situations,” including where the customer is not at fault); *id.* at 923-24 (BNSF agrees that “it’s not a strict liability standard in the law or in practice” and testifies that BNSF excuses demurrage where there are force majeure situations, flooding, and “when something’s beyond the control of a shipper”).

applied, or where the charges at issue were designed to cover only the “compensatory” function of demurrage. However, contrary to their new assertions of “no-fault” liability, and as AAR candidly admitted in its *Oversight Hearing* Supplemental Comments, the caselaw actually provides that under “straight” demurrage, “the shipper or receiver was not assessed demurrage [in the event of] severe weather or other circumstances beyond their control,” and even under “average” demurrage, charges were abated where the detention accrued outside of the reasonable control of customers (e.g., in the event of flooding). *Oversight Hearing*, AAR Supp. Comments at 5 (June 6, 2019).

Second, most of the individual railroads submitting testimony and comments on demurrage have emphasized that their demurrage charges are established primarily to incentivize behavior, and are generally not compensatory in nature. Yet even under some of the older caselaw addressing the incentive (i.e., the “penalty”) portion of demurrage, customers were entitled to relief when the cause of demurrage was outside of their control. *See, e.g., Prince Mfg. Co. v. Norfolk & W. Ry.*, 356 I.C.C. 702, 705 (1978) (“[W]hen demurrage charges penalize a shipper who is powerless to avoid or abate the detention of cars because of circumstances beyond its control, they do not accomplish their purpose.”).

Third, the Board’s causation standard is already well-established. Since at least the ICC Termination Act of 1996, the Board has held that it would be an “abuse of market power” to subject customers to “unreasonable charges for detention that they did not cause.” *Exemption of Demurrage from Regulation*, Docket No. EP 462 (STB served Mar. 29, 1996), 1996 WL 140179, at *3. Additionally, fifteen years ago, the Board

placed stakeholders on further notice that, “[i]n light of the technological advances that have been made with respect to railroad operations in recent years,” railroads needed “to reconsider some of their longstanding demurrage practices under which delivering railroads charge their customers demurrage regardless of the reasons for delays.” *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk S. Ry.*, Docket No. 42068, slip op. at 2 (STB served Apr. 12, 2004).

Finally, the Board’s 2014 decision in *Demurrage Liability* sought to create more certainty and eliminate any remaining doubt, by formally “adopting a conduct-based approach” to demurrage. *Id.* at 15. In this respect, as part of its *Policy Statement Proposal*, the Board correctly affirms that the *Demurrage Liability* decision *did not* establish a strict liability regime, including on receivers such as Kinder Morgan, as several railroads continue to claim. *Policy Statement Proposal* at 20.

The Board’s proposal to require demurrage assessments to be warranted is reasonable and fully justified, especially in light of some of the railroads’ insistence that the Board’s *Demurrage Liability* decision created a new strict liability regime on receivers, and receivers only, much different from the narrow clarification and fault-based system actually adopted by the Board. The Board has the full legal authority to adopt its proposals, and nothing in the Board’s *Policy Statement Proposal* or its *Demurrage Billing NPRM* would change settled law or depart from any clear prior policy with respect to the requirement that customers must be the causal force of demurrage.

B. Any Demurrage Assessments Must Be Accurate and Verifiable

The accuracy and verification component of the Board's proposals is just as important as the causation portion. As the Board confirms in its *Demurrage Billing NPRM*, "if railroad billing practices effectively preclude the warehouseman from knowing which rail cars were involved or otherwise determining the cause for the demurrage charge, the responsible party may not be incentivized to modify its actions, and the demurrage charges may not achieve their purpose." *Id.* at 9.

In their opening comments, many shippers and receivers agree with Kinder Morgan and the Board that the current practices of carriers in sending computer-generated invoices and requiring customers to dispute charges within limited time frames, without sufficient information for the customer to be able to determine whether it was responsible for the delay, are "deeply troubl[ing]." *Policy Statement Proposal* at 16. In order to ensure that demurrage charges "are accurate and warranted, consistent with the purpose of demurrage," (*id.* at 17) Kinder Morgan has requested that the Board clarify that carriers shall promptly provide all pertinent supporting information upon request from the invoiced party. This includes information showing the fault of the invoiced party and not that of the railroad, upstream carriers, missed switches, bunching, untimely or variable service, or other events or circumstances outside the invoiced party's reasonable control.

While several individual railroads, including NS, BNSF, and KCS, do not oppose the Board's proposals that reasonable supporting information be provided to properly validate invoices, several other railroads abruptly contend that the Board's

proposed new requirements are unduly burdensome and should be dropped. *See, e.g., Demurrage Billing NPRM*, CN Op. Comments at 2 (asserting that the Board’s proposal to provide accurate invoices “is a re-regulatory decision” and instead, “the Board [should] continue to rely on market forces to incentivize a railroad to provide better customer service”); *id.*, CSXT Op. Comments at 3 (contending that the proposals “would turn the clock back to long-rejected policies . . . that prescribed inefficient nationwide practices”). However, the provision of such reasonable supporting information to verify charges is a common-sense and standard business practice in virtually all industries. It is also the very information the railroads have informed the Board that they can easily compile, review, and assess *prior* to invoicing. For example, CN testified to the Board that “[w]e have – for every single switch or service failure, we have somebody that looks at the impacts, and makes a determination of whether it is related to a customer-caused issue or a CN or rail-way caused issue.” *Oversight Hearing*, Transcript at 928-29.

There is also substantial need for this information. As it previously testified, it is Kinder Morgan’s experience that railroads generally do not conduct any meaningful investigations prior to sending invoices to ensure charges are accurate and warranted, and even in instances where a causal investigation is conducted, the information is not shared with Kinder Morgan. The railroads generally see little reason to do so, claiming they have an affirmative duty to assess and collect demurrage solely on the receiver, no duty to collect demurrage charges from the shipper, consignee, or any responsible party other than the receiver, and no duty to abate demurrage where there is third-party fault or even railroad fault. Also, railroads contend that receivers such as

Kinder Morgan already have full visibility and control over the volume and timing of railroad deliveries and can therefore fully control and abate demurrage, but such assertions are completely unfounded, as Kinder Morgan has previously explained to the Board.

Accordingly, Kinder Morgan's request that the Board amend its proposed rules to require railroads to 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, is immensely reasonable. Again, it is consistent with the practices the railroads have generally contended they already conduct in the regular course of business. 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.

Such additional steps are necessary to meet the Board's goals of transparency and facilitating effective private negotiations and problem solving between rail carriers and receivers. As correctly stated by the Board in its *Policy Statement Proposal*, "[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.

C. It Is Reasonable and Necessary to Allow Demurrage to Be Billed Directly to the Shipper, Without Requiring the Receiver to Be the Guarantor of Any Unpaid Assessments

No railroad appears to seriously disagree with the Board that railroads are *not* required under the Board's rules to collect demurrage from receivers or that "[t]he rule adopted in Docket No. EP 707 does not . . . preclude a rail carrier from sending demurrage bills directly to the shipper." *Id.* at 20. Additionally, no railroad appears to seriously dispute that when invoices are sent to shippers, the *Demurrage Liability* rules "do[] [not] preclude a rail carrier from . . . looking to the shipper as the responsible party for any unpaid assessments." *Id.* However, several railroads still appear to strongly disagree with the Board's proposal to allow receivers and shippers to agree to enable the shipper (or consignee) to be billed for demurrage and that "[w]hen an invoice is sent to the shipper rather than the warehouseman, the railroad may not require the warehouseman to guarantee payment." *Demurrage Billing NPRM* at 11.

As Kinder Morgan has testified, in the limited instances where carriers have consented to discussion with other participants over demurrage charges, 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. CN blithely asserts that "[t]he NPRM appears aimed at solving a problem that does not need a regulatory solution: that a railroad supposedly refuses to agree to reasonable direct billing arrangements." *Demurrage Billing NPRM*, CN Op. Comments at 10. However, the record is clear that neither CN nor any other Class I railroad has been willing to voluntarily invoice shippers directly, without requiring Kinder Morgan as the receiver to

serve as the guarantor of any unpaid amounts. *See Demurrage Billing NPRM* at 7.⁷ The Board's proposal would be unnecessary *if* the railroads were willing to enter into reasonable invoicing agreements with shippers and receivers without requiring guarantees by receivers,⁸ however, in the face of the railroads' intransigence, the Board's proposal is essential.

As discussed in Kinder Morgan's *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. The Board's proposal to authorize an agreement by the shipper and terminal to control the invoicing will help end the gridlock that has prevented reasonable discussion and resolution of individual disputes.

The AAR feebly contends that the Board's proposal "essentially repeals the core provision of the Demurrage Regulations – that the person who actually receives the car should be responsible for demurrage" and further asserts that the proposal "is in direct

⁷ In an attempt to mislead the Board, CN contends that "[i]n agreements shifting demurrage payment liability from a terminal to a third party, CN reserves all rights it may have to pursue collection from the terminal if the third party disputes or does not pay CN's demurrage invoices." *Demurrage Billing NPRM*, CN Op. Comments at 19. However, CN grossly misstates its actual position, which the Board correctly recognizes is not a simple reservation of right, but rather, a *requirement* that Kinder Morgan be the guarantor of payment as a condition to entering into any such agreements. *Demurrage Billing NPRM* at 7.

⁸ Kinder Morgan has recently worked out limited arrangements with one Class I railroad to establish direct billing of shippers and has not had any issues arise with such arrangements, but it has been wholly unsuccessful elsewhere.

conflict to the express language of the Demurrage Regulations that places liability on the receiver of the rail cars.” *Demurrage Billing NPRM*, AAR Op. Comments at 4, 6. *See also id.*, CN Op. Comments at 17 (“the regulations effectively forbid bills to nonreceivers”). However, as the Board has confirmed, the *Demurrage Liability* decision only addressed a narrow court conflict on whether liability should rest strictly on the bill of lading, sought to create more certainty by “adopting a conduct-based approach to demurrage,” and did not create a whole new strict liability regime on receivers. *Demurrage Liability* at 15.

The objecting railroads also contend that it would be unfair to allow railroads to be strangers to contracts between receivers and shippers over demurrage invoicing and responsibility. *See Demurrage Billing NPRM*, CN Op. Comments at 16-17. However, Kinder Morgan has attempted to enter into reasonable three-party contracts with railroads, but, as explained, the railroads have all refused to enter into such arrangements absent the condition that the receiver be the guarantor of all railroad demurrage assessments.

Additionally, the railroads already have direct relationships with their shippers. It is shippers, and not receivers such as Kinder Morgan,⁹ that have a business relationship with the railroads, and the Board’s *Demurrage Liability* decision does not “forbid” shippers from receiving invoices. Kinder Morgan’s customers are the contract

⁹ 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.

and common carrier shippers of the commodities delivered by the railroads to the terminals and are responsible for arranging the transportation, tendering the shipments, and, in combination with the involved railroad(s), directing deliveries. It is also Kinder Morgan's customers and the railroads, and not Kinder Morgan, who are parties to the bill of lading.¹⁰

The Board's direct billing proposal is very fair and necessary to address the 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.

Several railroads ask the Board to reconstruct its proposed rule to mandate unworkable and onerous new conditions on receivers, or at least only allow railroads to *voluntarily* enter into contracts to allow direct shipper billing, presumably conditioned on receivers guaranteeing payment. *See, e.g., Demurrage Billing NPRM*, CN Op.

¹⁰ CP argues that providing a shipper with shipment data for demurrage assessments might somehow violate 49 U.S.C. § 11904, which addresses the unlawful disclosure of information to persons other than shippers or consignees, and that "it may not even know the identity of the shippers" or have privity of contract with them. *Demurrage Billing NPRM*, CP Op. Comments at 8. CP's arguments on right of access to shipment data and privity of contracts are confusing and appear upside-down. Shippers clearly have full right of access to their own shipment data and Kinder Morgan does not. Additionally, shippers and railroads are parties to contracts or common carrier tariff arrangements for the shipments, and each are parties to the bill of lading. In contrast, Kinder Morgan is a receiver with no contractual or other formal business relationship with railroads, and is not a party to the bill of lading.

Comments at 20.¹¹ Such a “solution” to effectively codify the status quo, or establish blatantly excessive new conditions on any such agreements, is doomed for failure, is clearly inadequate, and completely fails to address the problem of railroads refusing to enter into reasonable arrangements with receivers over invoicing.

Notwithstanding some railroads’ vigorous opposition, there is absolutely no need for such onerous preconditions to demurrage invoicing of shippers. To the contrary, if the railroads directly billed their shippers, at the direction of the shipper and receiver as proposed by the Board, they would simply be engaging in arrangements that they have traditionally and customarily adopted and encouraged, without issue, for many decades. For example, at least up and until the Board’s *Demurrage Liability* decision, railroads freely entered into such billing arrangements, and *without* any requirement of shipper consent. As BNSF has testified, prior to *Demurrage Liability*, its usual practice was to first provide a loader/receiver notice of demurrage through electronic communications. “It is then understood between the carrier and the loader/unloader that if the loader/unloader does not wish to accept financial responsibility for origin/destination demurrage, it will so notify BNSF and inform BNSF of the party to be so responsible. Accordingly, the unloader, including any warehouseman handling a shipment on behalf of another party, has the early opportunity to accept or to decline responsibility for

¹¹ CP goes so far as to ask the Board, in addition to making the receiver a guarantor, to force receivers to agree take responsibility for demurrage even where they are not at fault, or where demurrage is caused by third parties; agree to not to dispute charges where backup shipment information is withheld; consent to railroad-imposed credit terms; and first obtain the consent of shippers for railroads to provide shipper access to their own traffic information. *Id.*, CP Op. Comments at 9.

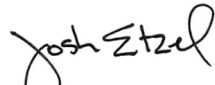
subsequently accrued demurrage.” *Demurrage Liability*, BNSF Supp. Comments at 3 (Mar. 7, 2011).

As previously confirmed by the Board, under such simple billing arrangements, “the issue of party responsibility is rarely an issue.” *Demurrage Liability* at 9 (STB served May 3, 2012). Such uncontroversial arrangements served the test of time, and as BNSF has attested, did not present any of the complications or difficulties that some of the railroads are now speculating. Respectfully, it would be unfair and inequitable to disallow shippers and receivers to enter into the similar arrangements that have traditionally been granted freely without problem or incident.

CONCLUSION

Kinder Morgan appreciates the opportunity to submit these Reply Comments. It respectfully requests the Board to reject the railroads’ unreasonable objections and adopt its *Policy Statement Proposal* and its *Demurrage Billing NPRM*, with the reasonable modifications Kinder Morgan has requested, as soon as possible to help restore fairness and balance to railroads’ demurrage programs.

Respectfully submitted,



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Dated: December 6, 2019