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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 759

DEMURRAGE BILLING REQUIREMENTS

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) appreciates the opportunity to submit reply comments on the notice of proposed rulemaking in the above-captioned proceeding.¹ As CSXT explained in its Opening Comments,² CSXT shares the Board’s goal of ensuring that all customers have adequate information to understand and dispute demurrage charges. CSXT’s Opening Comments show that CSXT is already using state-of-the-art software platforms to give customers robust and clear information to help them mitigate or eliminate demurrage charges and understand the basis of charges that are assessed.³ Indeed, within the last month, CSXT launched a new trip plan tool on ShipCSX called Trip Plan Performance (TPP), which provides unprecedented transparency into CSXT’s delivery performance on every container, trailer, and carload shipped by CSXT at the system, location, and lane level.

CSXT reiterates that the Board should not adopt an inflexible standard dictating specific elements to be included on demurrage invoices. One-size-fits-all regulation would discourage innovative customer service offerings like ShipCSX, and instead require railroads to focus efforts on

¹ *Demurrage Billing Requirements*, Ex Parte No. 759 (served Oct. 4, 2019) (“Notice”). CSXT also joins the reply comments of the Association of American Railroads (“AAR”) in full.

² Comments of CSX Transportation, Inc., *Demurrage Billing Requirements*, Ex Parte No. 759 (filed Nov. 6, 2019) (“CSXT Comments”), at 1.

³ See CSXT Comments at 5-10; *infra* Section I.

ensuring compliance with burdensome paperwork requirements. The hodgepodge of additional items that some commenters request to be added to the new proposed regulations would only make matters worse. If the Board believes that some regulations are needed to ensure that persons receiving demurrage invoices are given adequate information, then it should adopt a standard like that proposed by CN, in which railroads would be required to give recipients access to sufficient information to be able to understand the basis for the charges and to dispute charges believed to be unwarranted, but in which the Board would not itself be regulating the elements of demurrage invoices.⁴

In addition, the Board should not adopt the Notice's proposal to require railroads to be bound by terminal-shipper demurrage billing contracts to which railroads are not parties. None of the opening comments provide any reason to revisit the basic factual conclusion that the Board reached in Ex Parte 707: that terminals receiving railcars are in the best position in the supply chain to minimize railcar delays, and thus that they are appropriately responsible for demurrage when they have notice of their potential liability.⁵ The terminal interests who criticize this approach are repeating the exact arguments that the Board considered and rejected in Ex Parte 707, without providing concrete evidence of why the Board's conclusions were wrong. Moreover, the proposal that railroads be bound by contracts to which they are not parties and which they would not even be allowed to see presents serious practical problems, including in circumstances where terminals and their customers cannot agree about which of them caused a particular demurrage charge.

I. The Board Should Propose a Flexible Standard for Demurrage Billing, And Should Not Micromanage the Contents of Demurrage Invoices.

As CSXT explained on Opening, the Board should promote flexible market solutions for

⁴ See Opening Comments on Behalf of CN, *Demurrage Billing Requirements*, Ex Parte No. 759 (filed Nov. 6, 2019) ("CN Comments"), at 9-10.

⁵ *Demurrage Liability*, Ex Parte 707, at 8 (Apr. 9, 2014) ("EP 707").

providing rail customers with information about the basis for demurrage charges. Prescribing specific paperwork requirements for demurrage invoices is not wise policy, and the record does not justify such a re-regulatory step.

In the first place, there is no evidence of any systemic problem with demurrage invoicing that would warrant the creation of a new set of top-down regulations to be imposed on every demurrage invoice that Class I railroads issue. CSXT and other railroads already provide shippers with tools to reduce demurrage in the first instance and to understand the charges that do occur. For example, ShipCSX is a sophisticated software platform that CSXT developed to empower its customers (including warehouses/receivers) to manage their supply chains and understand the basis for charges.⁶ CSXT is committed to providing extensive and transparent information to its customers about their shipments, and CSXT provides this information via electronic tools that enable its customers to evaluate the basis for demurrage charges and to challenge charges they believe to be unwarranted. Further, CSXT offers training on all of its ShipCSX tools to ensure that customers understand the resources available and can utilize them effectively. CSXT's E-Solutions team provides customer-specific web-based sessions tailored to individual needs, including in-depth instruction on ShipCSX's demurrage and pipeline management features.

As mentioned previously, CSXT recently launched TPP, a tool that enables customers to measure how well CSXT is complying with the trip schedules it generates for each shipment. CSXT is the first railroad (Class I or otherwise) to publish its performance to schedule, and the transparency afforded by TPP demonstrates CSXT's absolute confidence in its service product. Customers using the tool will stay informed about trip plan performance at the system, location, and lane level for every container, trailer, and carload moved by CSXT. Each trip plan is an end-to-end, to-the-minute

⁶ See CSXT Comments at 5-10.

customer commitment based on the original estimated time of notification of shipment arrival at the destination or the estimated time of interchange with another carrier. A shipment's trip plan is created based on CSXT train schedules, terminal handling standards, terminal hours of operation, and the intermodal reservation system. TPP will support customer shipment planning decisions and enable more transparent conversations with CSXT Sales and Marketing representatives about service performance. To access TPP, customers simply log in to ShipCSX and click on "Trip Plan Performance" in the Resources menu.

ShipCSX provides data such as original date/time ETA, date and time of interchange, destination station, and railroad service events.⁷ New information is being rolled out with each ShipCSX release, and CSXT expects to make additional enhancements in the future. In short, CSXT has and continues to make significant investment in its technological tools to provide unprecedented transparency into CSXT's delivery performance. There is virtually no data requested by shippers in this proceeding that CSXT does not provide to customers through one of its various platforms.⁸

The Board's policies should encourage railroads to develop innovative tools like ShipCSX by giving railroads the flexibility to experiment with different ways to give customers information both to assess the validity of demurrage charges and to monitor their shipments and supply chains more effectively.

⁷ CSXT notes that ShipCSX shows real time data by default, since its primary purpose is to help customers monitor their supply chain and shipments on a real-time basis. However, customers can sign up for historical ShipCSX data reports, which they can download or save for use in reviewing information on prior service.

⁸ One potential narrow exception arises in the unique context of system car orders at open gate facilities, when customers order more system cars than their facility can accept. (For example, a customer that ordered 19 system cars when its facility only had space for 11 cars would be assessed charges for the 9 system cars that could not be delivered.). In these circumstances, charges are tied to the customer's specific car order number rather than to a specific system car, and thus it would be technically impossible to provide data requested by the Institute of Scrap Recycling Industries such as car numbers or car arrival date and time. Comments of the Institute of Scrap Recycling Industries, *Demurrage Billing Requirements*, Ex Parte No. 759 (filed Nov. 6, 2019), at 9-10.

Instead of encouraging such innovation, however, the Board's proposed rules would require railroads to expend significant resources to ensure compliance with a mandated line-by-line invoice information protocol. The Board should not return to the kind of one-size-fits-all demurrage paperwork regulations that the ICC long ago abandoned for being inconsistent with Congress's purpose.⁹ The Board should abandon the proposed invoice requirements.

If the Board nonetheless determines that it wishes to impose some minimum requirements for demurrage invoices, it should adopt a flexible standard rather than prescribing particular categories of information that need to be included. A standard like that proposed by CN in its Opening Comments would be a workable, flexible standard:

Class I carriers shall ensure that recipients of demurrage invoices have access to sufficient information to be able to understand the basis for the charges and to dispute charges believed to be unwarranted. This information can be provided either on or with the demurrage invoice or through another electronic means, including through a software platform or portal.¹⁰

One essential element of any rule that the Board adopts would be to make clear that railroads can use software platforms like ShipCSX to provide required information to shippers. As discussed above, ShipCSX already does this in a sophisticated, real-time way. But if the Board were to hold that providing information through software platforms was insufficient and that railroads instead must attach all information to the invoice itself, CSXT would have to undertake a massive, wasteful software redesign to consolidate information so that it can be provided with the invoice itself. CSXT notes in this regard that the Notice's estimate of 40 hours per railroad to implement its proposed

⁹ See CSXT Comments at 3-4; *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail, Carriers of Property*, Ex Parte No. 285, 47 Fed. Reg. 58273 (1982) (holding that agency should move away from demurrage rules that "generate needless paperwork and negate the efficiencies provided by the use of computers. The kind of recordkeeping required by these rules is clearly expensive, cumbersome, and unnecessary, and no longer serves to protect the public interest.").

¹⁰ CN Comments at 10.

billing changes is a substantial understatement of the time that would actually be required.

CSXT estimates that it would need nine months to implement that redesign—a redesign that would provide customers with no better information than they have today and that would take time and resources away from development of more useful customer tools. The Board should make clear that railroads are not required to take these steps, and that use of software tools to communicate would satisfy any additional billing requirement that the Board puts in place.

II. The Board Should Abandon Its Proposal to Allow Direct Billing by Agreement without Railroad Consent.

As CSXT explained in its comments, the Board’s proposal to allow direct billing by agreement without railroad consent is not consistent with the law or purpose of demurrage, and it would constitute a one-sided regulatory change that would: (1) improperly interject rail carriers into private demurrage disputes between shippers and receivers and (2) allow receivers to escape liability for the delays they cause.¹¹ Some commenters in favor of the proposal have emphasized their dislike of the rules the Board adopted in Ex Parte 707, claiming that EP 707 has been “weaponized” to result in a “new strict liability on receivers”¹² and has resulted in “all types of costly problems” and “unintended consequences.”¹³

But there is no evidence to support those claims. Terminal or warehousemen receivers do not have “strict liability”—they are entitled to the same defenses as other railcar receivers, and can never be made to pay demurrage attributable to the serving railroad’s fault. Nor is there any evidence of “unintended consequences”—the Board in Ex Parte 707 very deliberately chose to make railcar

¹¹ CSXT Comments at 11.

¹² Kinder Morgan Opening Comments, *Demurrage Billing Requirements*, Ex Parte No. 759 (filed Nov. 6, 2019), at 3-4.

¹³ Comments of Daniel R. Elliot, *Demurrage Billing Requirements*, Ex Parte No. 759 (filed Nov. 6, 2019), at 1-2.

receivers responsible for demurrage charges, because of the Board's conclusion that receivers were "in the best position to expedite the movement of those cars." *Demurrage Liability*, Ex Parte 707, at 10 (May 3, 2012). The fact that the terminal interests who opposed ever being liable for demurrage at the time Ex Parte 707 was being decided still oppose it today is not evidence of any changed circumstances.

As CSXT explained on Opening, it is willing to consider mutually agreed upon contracts with receivers that include the willing participation of the receiver's customer, but CSXT objects to being forced to alter demurrage arrangements due to contracts to which it is not a party. CSXT Comments at 12. It is hard to think of any legal context where a party can be legally bound by a contract that it did not sign and which it is not even given the right to see. For the reasons CSXT provided on Opening, the Board should not go down this path, and instead can reaffirm that it encourages mutual contracts that are consistent with the basic purposes of demurrage.

III. Conclusion

For the foregoing reasons, the Board should withdraw the Notice or, in the alternative, consider the rationales and alternative actions set forth herein.

Respectfully submitted,

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