



ASSOCIATION OF AMERICAN RAILROADS

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Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served on May 7, 2012, attached please find the Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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DEMURRAGE LIABILITY

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Introduction

In a Notice of Proposed Rulemaking (“NPR”) served on May 7, 2012, the Surface Transportation Board (“STB” or “Board”) proposed to adopt a new rule related to demurrage, *i.e.*, charges for holding rail cars. The rule would state that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond “free time” provided in the carrier’s governing tariff will generally be responsible for paying demurrage, if that person has actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. The proposed rule would excuse such a party from liability for demurrage charges where it is acting as agent for the owner of the freight and supplies the railroad with actual notice of that status. The Board also clarified that it intends to construe the provisions of 49 U.S.C. § 10743, *Liability for Payment of Rates*, as applying to carriers’ line-haul rates, but not to carriers’ charges for demurrage. The Board requested comments on its proposal.

The Association of American Railroads (“AAR”), on behalf of its member freight railroads, hereby submits its comments in response to the May 7, 2012 NPR. The AAR generally supports the essence of the proposed rules as consistent with both the requirements of 49 U.S.C. § 10746, *Demurrage Charges*, and the traditional goals of demurrage. However, the AAR believes that the proposal is unclear in several important respects and asks the Board to clarify the following issues in the final rule. First, AAR asks the Board to reconsider requiring the notion of “actual notice,” or, at a minimum, clarify what would constitute actual notice under its proposed rule. Second, the AAR believes that the proposed agency exception is unnecessary in light of the Board’s interpretation of Section 10743 as not applying to demurrage charges. Indeed, the agency exception would undermine the Board’s efforts here to clarify which parties should be liable for demurrage. Finally, the AAR asks the Board to clarify the scope of the proposed rule.

Background

In an Advance Notice of Proposed Rulemaking (“ANPR”) served on December 6, 2010, the Board instituted this proceeding with the stated intent “to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.” ANPR at 1. Traditionally, the bill of lading has governed which parties should be responsible for demurrage charges.¹ The Board’s ANPR arose out of recently-divided case law in the federal courts of appeals on the issue of whether a warehouseman (or other party that is not the beneficial owner of freight being shipped) is subject to liability for demurrage if it is named as consignee in the bill of lading and accepts

¹ See, e.g., *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C. 1972) (three-judge panel).

rail cars, but later claims it did not know of, or did not assent to, consignee status.² Specifically, in *Novolog*, the Third Circuit held that a named consignee is subject to liability for demurrage unless it complies with the consignee-agent provisions of 49 U.S.C. § 10743(a)(1). In *Groves*, the Eleventh Circuit held that a named consignee was not subject to liability unless it agreed to be named as consignee, or at least had notice that it was being named as consignee. The Board accordingly requested public comment on several legal and factual matters to assist the Board in resolving the “third-party car receiver” demurrage liability issue through a rulemaking or policy decision.

The AAR filed comments in response to the ANPR on March 7, 2011 and reply comments on May 20, 2011.³ The AAR noted in its comments that demurrage plays an essential role in ensuring the efficiency and smooth functioning of the national rail system by facilitating the efficient utilization of rail cars. This importance to the national system makes it essential that there exist national uniformity and clarity in the law governing demurrage. The AAR noted 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.

² Compare *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) (“*Groves*”), cert. denied ___ S. Ct. ___ (Jan. 18, 2011) (non-assenting warehouseman named as consignee found not liable for demurrage), with *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007), cert. denied, 128 S. Ct. 1240 (2008) (“*Novolog*”) (transloader named as consignee found liable for demurrage unless, pursuant to 49 U.S.C. § 10743(a), it notifies the carrier in writing in advance of delivery that it is acting only as agent and identifies the principal party liable for demurrage charges). See ANPR at 2 n.3.

³ AAR members BNSF Railway Company, Canadian Pacific Railway, CSX Transportation, Inc., Norfolk Southern Railway Company and Union Pacific Railroad Company also filed comments and replies in this proceeding.

In the NPR, the Board now proposes a method to fill the loophole created by the *Groves* decision.⁴ The Board's proposed rule would allow any party that accepts rail cars, whether designated as a consignor, consignee, or otherwise, to be subject to demurrage liability in accordance with the terms of a railroad's demurrage tariff if that party had actual notice of the demurrage tariff. The Board also states that it would no longer construe Section 10743 to apply to demurrage charges, but nonetheless, proposes to excuse a warehouseman "if [the railroad] receives actual notice that the warehouseman is acting as an agent for another party." The Board's proposal would allow parties to alter their relationships by contract.

Discussion

I. The proposed rule generally meets the goals of demurrage

The AAR generally supports the Board's efforts to meet its stated goal of ensuring that the agency's policies account for current statutory provisions and commercial practices with respect to demurrage. *See* NPR at 5. The idea that the entity that has control of rail cars should be liable for demurrage is appropriate. Any party receiving rail cars does so voluntarily and pursuant to its own business interest and has an obligation to know the rules applicable to its business – including its decision to participate in the rail transportation system – and should be aware that it cannot hold those cars indefinitely without some charge. A carrier's tariff spells out the applicable terms of demurrage, including the "free time." If a party holds rail cars beyond the free time, then it cannot be reasonably said to be unaware of its potential liability for demurrage.

⁴ The AAR believes the Board intended its proposal to close the loophole that permits intermediaries to avoid liability based on its designation in the bill of lading simply by denying that it knew of its designation.

The essence of the proposed rule would meet the statutory goals of 49 U.S.C. § 10746 that require railroads to establish rules related to demurrage charges that fulfill 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.” The proposed rules also meet the related traditional goals of demurrage to provide for compensation for use of railroad property and an incentive to release rail cars quickly to improve car utilization. As the Board has noted, “demurrage charges serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or the loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient.”⁵ That is, “[a]ll demurrage charges have a double purpose. One is to secure compensation for the car and the track it occupies. The other is to promote efficiency by providing a deterrent against detention.”⁶ The Board’s focus on the party with control over the rail car is consistent with these goals. Timely release of cars aids in network fluidity, ultimately benefiting railroad customers. Accordingly, a proposal that recognizes the existing liability for demurrage based on designation in the bill of lading and the intermediaries’ actual handling of rail cars advances the statutory and traditional purposes of demurrage.

II. The Board should determine that actual notice is not needed. But if the Board decides that actual notice by railroads is necessary, it should clarify what constitutes actual notice

AAR respectfully requests the Board consider several issues regarding actual notice. First, the AAR urges the Board to abandon the actual notice requirement because

⁵ *North America Freight Car Assoc. v. BNSF Ry.*, NOR 42060 (Sub-No. 1)(served Jan. 26, 2007).

⁶ *Turner Lumber Co. v. C.M. & Dt. P. Ry.*, 271 U.S. 259, 262 (1926).

it is unnecessary and could create uncertainty. The proposed rule appears to share the concerns of the *Groves* court that a third-party named consignee be given notice before demurrage liability should attach. However, receivers of rail cars are in fact on notice that demurrage may accrue right now. Businesses that receive railcars are voluntary, conscious participants in the rail network that routinely take possession of railcars as part of their commercial operations. They participate in the rail transportation system as part of their active business. These businesses know – or should know before they decide to participate in rail transportation – the rules of the road. Rather than solving the *Groves*-like situation, ambiguity regarding what constitutes “actual notice” could instead lead to more *Groves*-like cases. Only now, the intermediary could seek to avoid liability by arguing that it did not receive sufficient “actual” notice. Such uncertainty would frustrate the Board’s stated intent in promulgating the rule.

Alternatively and at a minimum, the Board should clarify what constitutes actual notice of the rail carrier’s demurrage tariff. The NPR states, “[c]arriers are to use ‘electronic responses and notices when both parties have the requisite capabilities. Otherwise, the response should be written.’ We believe that carriers will have no trouble ensuring that actual notice is part of their regular business practices and customer communications.” NPR at 13-14 (quoting *Disclosure, Pub. & Not. Of Change of Rates—Rail Carriage*, 1 S.T.B. 153, 159 (1996)). The proposed rule might be read as requiring railroads to deliver a full copy of their demurrage tariffs in either written or electronic form, depending on the capabilities of the parties.

Such actual notice would be a significant communication challenge. As railroads’ data systems are currently designed to send and receive only specific information, it is

unlikely that the transmission of demurrage tariffs can be accomplished by electronic means without changes to those systems. Thus, the effect of the proposed rule may be that railroads supply written copies of their demurrage tariffs to every entity on their systems that have handled rail cars in the recent past. Given these difficulties, the AAR asks the Board to clarify whether it would be sufficient notice under the proposed rule if a railroad supplied a link by e-mail to a demurrage tariff available online. If the Board believes that would place too much of a burden on parties to obtain the tariff information, the Board could require a summary of terms be provided with the initial communication. Such notice would be a more effective and efficient way to ensure dissemination of the relevant information. Regardless of the form the Board ultimately adopts, the Board should establish clear standards as to what constitutes actual notice to avoid unnecessary future litigation arising from parties seeking to avoid liability.

Second, to the extent the Board retains a notice requirement, the AAR asks that the Board clarify to whom actual notice must be given. The Board uses the phrase “receiver of rail cars”. But the term “receiver” is too limited because it could be understood to exclude those parties that receive empty rail cars for loading (i.e., the originator of the traffic or “shippers”). Therefore, the AAR asks the Board to clarify exactly what parties are covered by the proposed rule and make it clear that those intermediaries who receive either loaded and empty rail cars are covered.⁷

⁷ Some railroads may not currently have the ability to identify every warehouse or other third-party intermediary connected to its system that is capable of receiving a rail car, as railroads transmit and receive information from their customers and others in different ways to meet their business needs. Such parties may not be customers of the railroad and the railroad may have no pre-existing commercial relationship with them. This problem would be particularly acute in the warehouse business in which warehouses change names, change owners, are shifted between holding companies – all unbeknownst to

Third, to the extent the Board adopts an actual notice requirement, the Board should also clarify when notice is required. It is unclear from the NPR that notice would be required after a final rule is adopted or whether a final rule adopted by the Board and published in the Federal Register sufficiently puts parties on notice. It is black letter law that publication of government rules in the Federal Register sufficiently puts all intermediaries on notice that they are liable for demurrage. *See, e.g., Chip Steak Co. v. Hardin*, 332 F.Supp. 1084 (N.D. Cal. 1971) *aff'd* 467 F.2d 481, *cert. denied* 411 U.S. 916 (1973).

Even if the Board believes it is necessary that the railroads supply every third-party intermediary on its system a full written copy of its demurrage tariff, it is also unclear whether railroads would then need to resupply the tariff again to affected parties whenever there is a change to the tariff. If that is the case, the AAR asks that the Board consider requiring railroads to provide only notice of the change in such cases, rather than requiring the railroads to resupply the entire tariff. Moreover, the Board should consider limiting this requirement to material changes to the tariff.

III. The proposed agency exception to the proposed rule is unnecessary in light of the Board's interpretation of Section 10743

In the NPR, the Board stated that, notwithstanding agency and court precedent, the provisions of 49 U.S.C. § 10743 should not be interpreted to apply to demurrage. The Board looked to the language of Section 10743 that the Board said focused on "rates for transportation of a shipment of property," and concluded that charges arising from car usage or detention such as demurrage should not be understood to fall within that phrase because they are not related to

the railroad. The proposed rule may pose similar communication difficulties when new entities locate along the railroads' lines after the railroad has provided notice.

the movement of freight. The NPR notes that "demurrage charges that arise during the course of transit are not tied to ownership of the goods; demurrage occurs after delivery or placement (actual or constructive); and indeed, the third-party consignee is often the party most directly able to mitigate demurrage." NPR at 15. The Board also based its interpretation of Section 10743 on its finding that the statutory provision was adopted to address issues other than demurrage.

In previously applying Section 10743 to demurrage charges, courts and the agency have also applied the exception at 49 U.S.C. § 10743(a)(1) that a person receiving property as an agent for the shipper or consignee will not be liable for "additional rates" that may be found due beyond those billed at the time for delivery, if the receiver notifies the carrier in writing that it is not the owner of the property, but is an agent for the owner. NPR at 5 (citing 49 U.S.C. § 10743(a)(1)). The Board's interpretation that Section 10743 should not apply to demurrage would then have the effect of removing this exception, as well. Yet, the NPR would create a regulatory exception to demurrage liability that would allow a third-party intermediary to escape liability for demurrage charges "if that person is acting as an agent for another party . . . [and] that person has provided the rail carrier with actual notice of the agency status and identity of the principal." NPR at 17. But the logic of the Board's interpretation of Section 10743 renders the exception unnecessary.

While a warehouse provides services that could come within traditional notions of agency with regard to handling the freight, a warehouse might not be understood to be an agent of the owner of the goods with respect to the handling of rail cars. Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent

manifests assent or otherwise consents so to act. *See* Restatement Third, Agency sec. 1.01 (1996). The legal scope of the relationship between a warehouse and the owner of freight would turn on the scope of agency between the two, if any, and the extent of control of the owner of the freight over the holding of rail cars by the warehouse beyond the free time. *See, e.g., U.S. v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010). Determining whether or not a particular freight owner/warehouse relationship constitutes an agency that encompasses demurrage charges would be fact-specific and require the Board and the courts to look at each relationship on a case-by-case basis. Further, if the commercial agreement between the principal/owner and the intermediary/agent contemplated that the principal might cause demurrage to be incurred, the principal and agent can and should address that potential in their agreement, allocate the liability as between them, and not involve the railroad.

Even if the Board concludes that holding rail cars beyond free time specified in demurrage tariffs would fall within an agency relationship, there are significant logistical problems with the prospect of warehouses providing railroads with actual notice of agency status and being relieved of responsibility for demurrage. First, the principal is not a party to the communication. The proposed rule could thus create the *Groves/Novolog* problem in reverse. A “principal” could disclaim that it had notice or that it has assented to its status to avoid demurrage charges. Second, the proposed rule appears to envision a car-by-car transfer of information between the receiver and the railroad that is simply beyond the capability of some railroads’ electronic data systems. Under the proposed rule, a warehouse could be an agent for a shipper or ultimate receiver for some cars, but not others, or agent for some receivers/shippers but not others. Such complexity is avoidable, as the warehouse will always be in control of its own conduct with regard to the rail car and is the party that should be responsible for demurrage.

Accordingly, the Board should remove the provision of its proposal that would permit a party that handles railcars to avoid liability by claiming it is merely an agent.

IV. The Board should clarify the scope of its proposed rule

The foregoing discussion focuses primarily on the practical implementation of the Board's proposed rule with regard to third party receivers of rail cars such as warehousemen. That focus reflects the situation that gave rise to this proceeding, which is uncertainty when intermediaries or third parties that handle rail cars should be liable for demurrage charges. The loophole created by *Groves* was limited to this sub-group of shippers and receivers who are intermediaries, such as warehouses. However, the language of the Board's proposed rule could be read to have a much broader application.

As the AAR made clear in its opening comments, the vast majority of situations involving demurrage charges are quickly resolved and there are no questions as to what party is liable for the charges. The NPR notes that "[i]n the simplest case, demurrage is assessed on the 'Consignor' (the shipper of the goods for delays in loading cars at origin) and on the 'Consignee' (the receiver of the goods for delays in unloading cars and returning them to the carrier at destination)." NPR at 2-3. "The disputes between railroads and parties that originate or terminate rail cars can involve relatively straightforward application of the carrier's tariffs to the circumstances of the case." *Id.* at 3. The difficulties that led to this proceeding arose only in the rare case where a third-party warehouse was named in the bill of lading as the consignee, but has claimed to have not known of or assented to that designation. Rather than targeting its rule to only closing the *Groves* loophole, the proposed rule could undermine existing bases for demurrage liability for other parties that handle rail cars as well. By the language the Board

used, which seems to address all instances of demurrage liability, the AAR is concerned that the Board's proposed rule would be read more broadly than intended. It is unnecessary to introduce uncertainty into an area that generally has worked well with the exception of the *Groves* loophole.

The AAR is also concerned that the broader than necessary language in the proposed rule would lead to practical difficulties in providing actual notice of a carrier's demurrage tariff to every party that may originate or receive a carload of traffic. As railroads' electronic systems have evolved to accommodate bill of lading information, it may not even be possible for each carrier to identify every entity on its system that receives rail cars for loading and unloading. There may also be unforeseen consequences of severing the link between the bill of lading and demurrage.

As a result of these concerns, the AAR believes the Board should clarify that this proposed rule does not remove any existing legal basis for liability. As noted above, the AAR does not believe any notice requirement should be adopted. However, if one is, the Board should consider adopting notice rules for only third-party intermediaries like warehouses, which would be consistent with the limited scope of the rule to close the *Groves* loophole. In such a scenario, the bill of lading would continue to govern demurrage in most cases, but where a rail car is delivered to a receiver that a railroad has actual notice is not the beneficial owner of the freight, demurrage may only be charged to that receiver where that party has actual notice of the demurrage tariff. Actual notice to the railroad would be achieved either through a designation in the bill of lading as a "care of" party or by actual notice by the third-party to the railroad that it is accepting the rail car as an agent of the consignor or consignee named in the bill of lading.

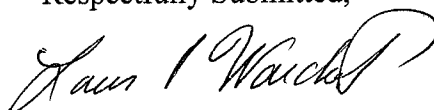
Conclusion

The AAR generally supports the intent of the Board's proposal. The AAR respectfully asks the Board to clarify the issues discussed above and consider whether there is a more limited solution that would meet the Board's stated goals.

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