

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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May 8, 2019

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES	))))))	Docket No. EP 754	Part of Public Record
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**WRITTEN TESTIMONY OF
KINDER MORGAN TERMINALS**

Dated: May 8, 2019

By: Joshua Etzel,
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78 Lafayette Street
Carteret, NJ 07008

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My name is Joshua Etzel. I am the Vice President Operations – Northern Area for Kinder Morgan Terminals (“Kinder Morgan”). On behalf of Kinder Morgan, I appreciate the opportunity to address the issues raised in the Surface Transportation Board’s (“STB’s” or “Board’s”) notice instituting this hearing.

SUMMARY

Kinder Morgan appreciates the Board’s interest and attention to the issue of demurrage and accessorial charges by railroads. This issue is of significant and growing concern to Kinder Morgan, a major North American terminal operator that stores and transloads essential commodities for its customers, including some of the largest shippers¹ in North America.

In 2014, the STB issued a final rule designed to resolve a *narrow* conflict in court decisions on demurrage collections from certain transportation intermediaries, without disturbing the longstanding requirement that receiver liability rest on something more than merely receiving or handling the commodities shipped. Unfortunately, the railroads have exploited the Board’s 2014 decision through one-sided, material changes in tariffs, and highly aggressive demurrage

¹ In this testimony, a “shipper” refers to the person responsible for obtaining transportation and paying the freight. Kinder Morgan is not the shipper with respect to the

assessment and collection practices. Demurrage is now imposed on receivers without any predicate showing of fault. There is no reciprocity, and also no mechanism to address and resolve disputes reasonably. The tariffs and collection practices have not improved car utilization or transportation efficiencies. Kinder Morgan received virtually no demurrage invoices until the Board's 2014 decision. Since then, it has received invoices totaling over \$14 million, without any material changes in its operations or rail traffic volumes generally.

The adoption of "precision scheduled railroading" ("PSR") has only exacerbated the problems. Many of the demurrage changes have been brought about by PSR. As indicated in the railroads' May 21, 2019 submissions to the Board, these new programs and increased charges have produced rapid, high-profit revenue gains for the railroad industry at low- or no-cost. While the strategy of PSR to reduce costs, cut services, boost profit, and hike railroad stock prices to meet the demands of Wall Street may be working well for the railroads, it is degrading service quality and placing significant additional demands on receivers. Kinder Morgan has been required to assume, without compensation, significant new responsibilities long performed by the railroads as part of their line-haul service, even as the carriers have imposed embargoes, permit systems, and discriminatory rate increases targeted at key terminals. These initiatives have caused significant additional harm to Kinder Morgan.

The railroads are effectively doing much less and charging far more for reduced service. They also refuse reasonable requests to include shippers in dispute resolution discussions, or insist as a precondition that Kinder Morgan first guarantee the payment of all outstanding invoices. The effects cascade as the Railroads are now alleging strict liability under

shipment of commodities delivered by the railroads to its terminals.

the Board's 2014 decision, leaving Kinder Morgan with little choice but to cross-sue its customers, effectively doing the carriers' "dirty work" for them. The Board's 2014 decision has increased disputes, incited even more imbalanced carrier practices, and created more uncertainty – exactly the opposite of what was intended.

Kinder Morgan is the true middleman, who does not own the commodity or control the transportation, and it is unable to take its business elsewhere to avoid demurrage charges. While Kinder Morgan does not have formal contractual relationships with railroads or pay for the freight, the railroads that serve its terminals still have considerable monopoly power over it. Here, the railroads are fully using their destination monopoly powers at the local level, creating situations where receivers like Kinder Morgan are forced to deal with poor railroad service and the resulting inaccurate ancillary billing but still have no commercial relationship to use as leverage with the railroads to either fix the service issues or dispute the billing errors.

Kinder Morgan has fought hard against carrier collection actions, and attempted to reasonably negotiate demurrage invoices. It is here now only after failing to get the railroads to reasonably address the problem. Additionally, these programs have the pernicious effect of feeding upon themselves, and the problem has grown as new PSR initiatives have been implemented by additional railroads who are themselves now aggressively seeking new demurrage revenue opportunities.

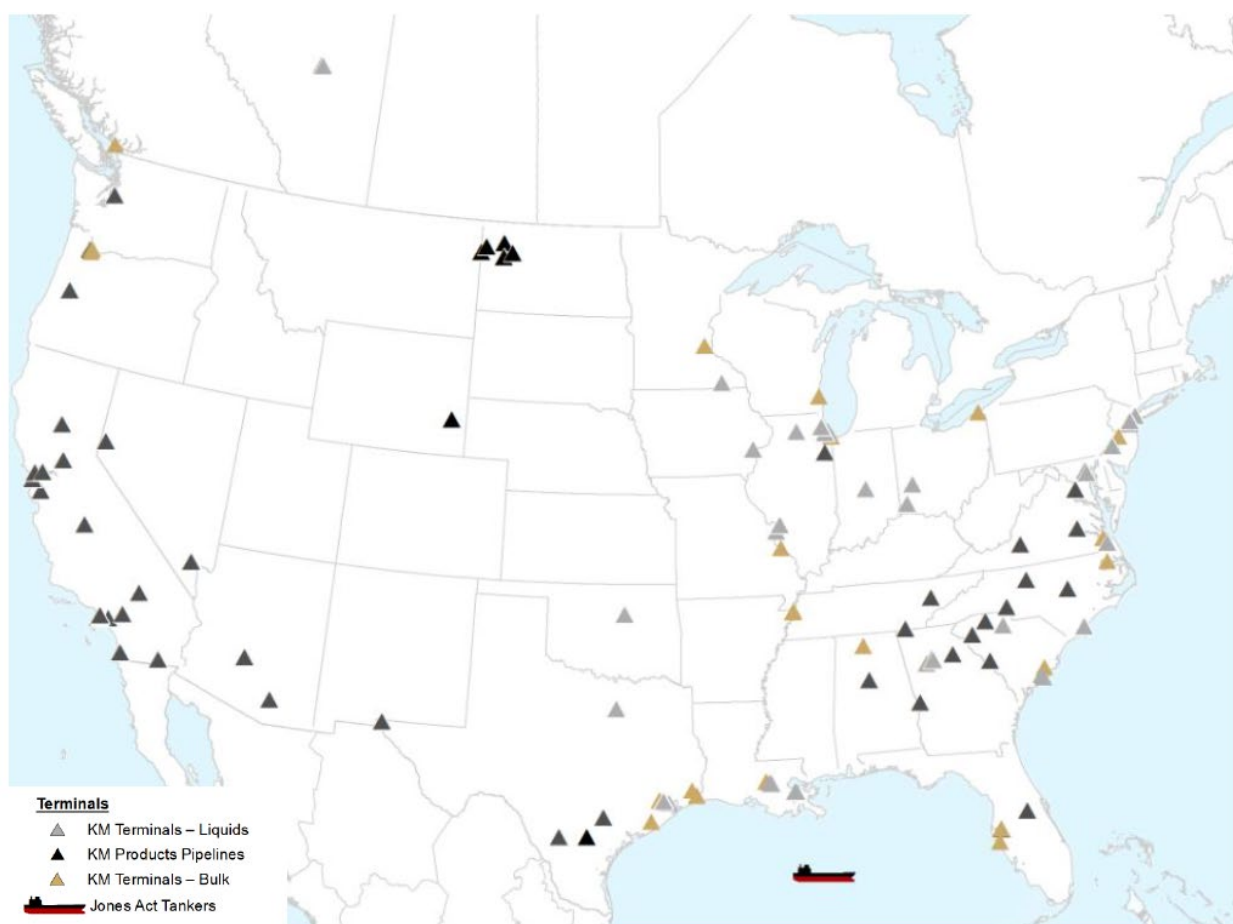
To address the harsh and unintended effects of the Board's 2014 demurrage decision, and to restore balance and fairness to the demurrage assessment system, Kinder Morgan respectfully requests that the Board take immediate actions to remedy the situation, by adopting the specific tailored requests set forth in Section III, below. These include (1) addressing the

harsh and unintended effects of the *Demurrage Liability* decision, (2) ensuring that tariffs are reasonably reciprocal with balanced incentives, and (3) establishing an informal Demurrage Dispute Resolution Program to help promptly resolve demurrage disputes. As part of this, the Board can and should provide immediate relief, by clarifying that, if requested by a shipper and its receiver, a carrier shall agree to bill the shipper directly for demurrage, and without requiring the receiver to assume responsibility for any unpaid demurrage assessments as a condition of such agreement. This is an important matter that has effectively gridlocked reasonable discussion and resolution of individual disputes.

I. **BACKGROUND**

A. Kinder Morgan Overview/Reliance on Railroads

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. In 2018, Kinder Morgan's liquids terminals throughput totaled almost 900 million barrels of commodities and its dry-bulk terminals totaled over 64 million tons of materials. Kinder Morgan's terminal locations are reflected below:



Kinder Morgan contracts with over 4,700 customers in North America for the receipt, storage, and transload of commodities. Many of these shipments are received by rail. In 2018, Kinder Morgan handled and transloaded more than 105,000 manifest railcars and 375 unit trains in North America. Those trains carried over 46 million barrels of liquid product and 5 million tons of dry bulk product. Kinder Morgan prides itself in being a world class terminal operator. Its plant, equipment, systems, and personnel allow it to efficiently receive, transload, and store commodities received by rail and other modes at strategic locations.

It is important to understand what Kinder Morgan does, and does not, do. Kinder Morgan contracts to provide customers a fixed volume of storage and rated capacity to load and/or unload railcars for the customer's account. 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. The customers, who are the shippers of the commodities and are responsible for paying the transportation charges, arrange for the transportation, bill and tender the shipments, and, in combination with the involved railroad(s), direct deliveries.

While each terminal is unique, Kinder Morgan is generally a stranger to the dealings between the railroads and the shippers. Kinder Morgan does not control or generally have the ability to observe the billing, tender, movement, railroad interchange, pick-up, and return of empty railcars to the shipper. The railroads and shippers control those matters exclusively. Transportation rates and service terms are often confidential, and Kinder Morgan is not a party to railroad-shipper transportation pricing authorities, arrangements, and communications.

Kinder Morgan is aware that individual railroads have implemented shipper forecast scheduling systems, train “pre-release” requirements, individual trip plans, and train and railcar movement systems to monitor train and railcar shipments. These systems and plans are proprietary and confidential, and are also under the exclusive control of the railroads and shippers. Railroad e-business platforms may give Kinder Morgan some visibility into individual railcar status, but generally not the location or shipping status of individual railcars, until the railcar is actually received and available at the local railroad switching yard or, with open-gate facilities, the railcar is actually delivered to the terminal. Railroad claims that receivers have full visibility and control over the volume and timing of railroad deliveries are simply unfounded.

B. The Narrow Intent of the Board's EP 707 Decision

The Board's 2014 Decision in *Demurrage Liability*, Docket No. EP 707 (STB served Apr. 11, 2014) ("*Demurrage Liability*"), was purposely narrow in scope. The STB initiated the proceeding after two federal appellate courts, the Third and Eleventh Circuits, split on whether a consignee listed in the bill of lading, without consent, could be held liable for demurrage charges.

In its Advance Notice of Proposed Rulemaking, the STB recognized that "[t]he law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped," and that this has provided "some degree of certainty" for the parties involved in the transportation chain, as evidenced by the "absence of litigation over the matter." *Demurrage Liability* (STB served Dec. 3, 2010), at 4. In order to address the narrow court conflict and create more certainty, the Board determined that demurrage liability should rest not on the bill of lading, but on pertinent conduct: "we are adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading." *Demurrage Liability* (STB served Apr. 11, 2014), at 15.

The railroads strongly supported the Board's narrow approach, uniformly agreeing on the need only for a limited clarification by the Board to address the narrow circuit court split issue presented. For example, CSX asked the Board to "resolv[e] the *Groves* conflict, but no more," and stressed that it "would be imprudent to overhaul current demurrage law in order to resolve this rare exception, especially where shippers, carriers and intermediaries have relied on existing law for over a century to create the current system. Reply Comments of CSX Transportation, Inc. (filed Sept. 21, 2012), at 7. The Association of American Railroads agreed:

“It is unnecessary to introduce uncertainty into an area that generally has worked well with the exception of the *Groves* loophole.” Comments of the Association of American Railroads (filed Aug. 24, 2012), at 12. Norfolk Southern concurred: “NS wants to be clear that it is not suggesting that all delays at destination are attributable to the conduct of intermediaries (or other receivers). Such delays can also result from the carrier’s conduct [W]e are asking only that the Board assist NS and other carriers in *collecting* demurrage charges when they are reasonably imposed for delays attributable to the conduct of intermediary receivers.” Opening Comments of Norfolk Southern Railway Company (filed Mar. 7, 2011), at 10.

Kinder Morgan thus understands that the Board similarly intended a narrow approach with its 2014 decision, and not to disturb established custom and practice, contractual relationships, and the basic framework of demurrage law that consignors, consignees, intermediaries, rail carriers, and judicial bodies had relied upon for over a century.

The railroads’ interpretation and application has been vastly different in practice. 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 totaling over \$14 million on Kinder Morgan alone since the Board’s 2014 decision. The railroads treat the language of 49 C.F.R. 1333.3, subjecting to demurrage “[a]ny person receiving rail cars from a rail carrier for loading or unloading who detains the cars” as having created a whole new strict liability regime on receivers, and receivers only, much different than the narrow clarification announced by the Board.

Kinder Morgan has been subjected to numerous railroad demurrage collection initiatives, and several major collection actions since 2014. Carrier demurrage demands are

growing with the implementation of PSR by most of the Class I railroads, with new demurrage policies and increased demurrage revenues being a major component of these programs. Kinder Morgan had no, or very limited, demurrage assessments before the Board's *Demurrage Liability* decision, and our terminal operations and rail traffic volumes generally have not changed. The railroads implementation of PSR and associated collection initiatives have not resulted in improved use of railcar assets or more efficient deliveries.

Further, the railroads have generally refused to include all necessary supply chain participants in discussions over demurrage. Receivers like Kinder Morgan typically do not have a business relationship with the railroads. Rather, both entities are working for the customer shipping or receiving goods via rail. Thus, the STB's decision to allow carriers to seek demurrage from a party with which it does not otherwise have a business relationship removes the market incentive for the railroad to resolve demurrage disputes reasonably. The results are seen in the increased claims and litigation by the railroads against Kinder Morgan. In the limited instances where carriers do consent to discussion with other participants, they still insist that the receivers serve as the guarantor of all demurrage invoices, which has effectively blocked any reasonable discussion and possible resolution of disputes.

II.

THE BROAD CONSEQUENCES AND EXTREME CONFUSION AND DIVISION CREATED BY THE *DEMURRAGE LIABILITY* DECISION

In its EP 754 hearing notice, the Board asked parties to summarize recent experiences with railroad demurrage and accessorial charge practices, impacts from recent changes, and perspectives on whether railroad tariffs "have created balanced and appropriate incentives for both customers and railroads." Unfortunately, Kinder Morgan's experiences since

the Board's *Demurrage Liability* decision have been highly unsatisfactory. Carrier demurrage tariff changes and collection practices have been punitive and have harmed Kinder Morgan's business without improving the efficient use of assets or the provision of rail service. The demurrage tariffs lack balance and reciprocity, reasonable dispute resolution mechanisms, and any incentives for railroads to provide efficient service to meet the service needs of shippers and receivers.

Kinder Morgan respectfully submits that the railroads' extreme, expansive interpretation of demurrage responsibility on receivers contravenes the language, intent, and spirit of the Board's *Demurrage Liability* decision, as well as the railroads' own assertions at the time on the intended narrow focus of the rules. As a result, the Board's stated intent of the new rules to "promote uniformity in the area" and "assist in providing clarification" for the industry has been nullified. *Demurrage Liability* (STB served Apr. 9, 2014) at 5, 9.

A. Railroads Have Implemented One-Sided Demurrage Tariff Changes

In the aftermath of the Board's 2014 *Demurrage Liability* decision, the railroads have revised their demurrage tariffs in various respects. All of them are one-sided.

First, carrier tariffs seek to make receivers solely responsible for all demurrage charges. For example, CN's Optional Services tariff (CN 9000) now assigns all demurrage strictly on "any person receiving rail cars for loading or unloading." CN seeks to extract all demurrage from receivers, even where they are not at fault in causing alleged railcar delays. Shortly after the 2014 decision, CN notified Kinder Morgan that the STB's rules "required" it to change its billing practices and assess demurrage charges solely on receivers in the United States. CN retained its rules for demurrage assessed in Canada on the "shipper for railcars to be loaded,"

the “consignee for railcars to be unloaded, or enroute,” or “any other third party mutually agreed to in writing with CN to accept responsibility for all asset use charges.”

Not long after issuing its new U.S. demurrage tariff, CN filed a collection action against Kinder Morgan seeking substantial demurrage charges arising since August 2015 at Kinder Morgan’s Argo Terminal, *Ill. Cent. R.R. Co. v. Kinder Morgan Liquids Terminals, LLC* (N.D. Ill., amended complaint filed Nov. 3, 2016). That litigation is ongoing, and CN now claims that it is owed at least \$8.4 million. As part of its complaint, CN again contends the Board’s *Demurrage Liability* decision required it to revise its tariff to assess demurrage charges solely on the receiver.

Second, CN also contends that it is not required, and has no duty, to seek demurrage charges from anyone other than the receiver. CN claims that it is fully justified in refusing to enter into agreements with shippers who agree and request to be invoiced and pay demurrage, unless Kinder Morgan first agrees to be the sole guarantor of all unpaid assessments. Other carriers have refused to enter into similar voluntary three-party agreements, unless Kinder Morgan guarantees payment for such arrangements.

Imposing strict liability on receivers negates any incentive for the real customers to return railcars to the system. Those customers recognize that liability will fall solely on the receiver. For example, a shipper at Kinder Morgan’s Perth Amboy Terminal very recently held 61 tankcars at the local switching yard, leaving Kinder Morgan able to request a switch-in for only 2 of the 63 cars available due to the customer’s preferences and/or its assigned tanks being full. The customer, not Kinder Morgan, tendered and shipped the tankcars with full knowledge of the constraints at the terminal and the likelihood that substantial demurrage assessment would

follow. Nonetheless, CSX assessed demurrage at \$175 per car per day solely on Kinder Morgan, amounting to over \$10,000 in daily demurrage charges for one customer. If Kinder Morgan pays this demurrage, and the customer refuses reimbursement, Kinder Morgan must then face the prospect of having to sue its customer for demurrage that should have been assessed on the customer directly.

Third, railroads are aggressively imposing demurrage against receivers without establishing cause or fault. Railroads have eliminated or limited long-settled demurrage defenses from their tariffs, such as railcar “bunching” due to carrier fault. Railroads are assessing charges against receivers, even where:

- The carrier places the cars on non-working track, such that the railcars are not actually available and ready for delivery;
- The carrier “bunches” railcars, causing the alleged delays that resulted in the demurrage charges;
- The carrier misses or improperly performs switches;
- The carrier delivers the wrong railcars;
- The carrier delivers railcars late;
- The carrier refuses to deliver the railcars ordered;
- The carrier fails to comply with instructions regarding the delivery of railcars;
- The carrier fails to timely pick-up cars; and
- The carrier’s failure to deliver railcars as requested creates a “ripple effect” on charges assessed, by causing other cars awaiting delivery after missed deliveries to incur demurrage charges due to the initial carrier service failure.

These provisions differ from prior tariffs. For example, CN responded to customer complaints and regulatory scrutiny over the fairness of its demurrage tariffs in 2010 by

adopting more balanced provisions giving relief for railcar bunching or placements outside defined switch windows. CN also adopted an audit process to improve reporting discrepancies and improve billing accuracy.² Without consulting with customers or the STB, CN has now eradicated these pro-consumer protections from its tariffs. Additionally, its position in litigation is that any such longstanding fault-based defenses are no longer valid following the STB's *Demurrage Liability* decision.

Furthermore, in addition to seeking significant amounts of demurrage from parties without determining the cause or party causing the demurrage, railroads have also hindered the ability of the parties it is charging to evaluate whether demurrage charges are proper. In order to defend against a demurrage dispute, a receiver such as Kinder Morgan needs, at a minimum, to examine the train movement data from its serving railroad, and perhaps other connecting railroads, and evaluate the alleged basis for the carrier's charges and credits. This information is largely kept hidden by the carrier, which will not willingly disclose this information when seeking demurrage charges. Even if the railroads were willing to provide some or all of this supporting data, enormous time and effort (together with outside expert assistance) would be required to evaluate each affected railcar, and the data is typically only a small slice of the information available to the railroad.

Fourth, carrier tariffs seek to impose discriminatory fees and other targeted unreasonable practices at select locations. For example, CN Tariff 9000 imposes daily demurrage charges at Chicago that are over 1.5 times those charged elsewhere on the CN system. These discriminatory charges clearly exceed carrier costs, producing unjust penalties against

² Submission to the Rail Freight Service Review Panel by Canadian National Railway

receivers and economic windfalls for carriers. Additionally, CN recently increased its common carrier tariff rates by \$300/car for ethanol shipments only at Kinder Morgan-Argo, but not at other Chicago locations, or for ethanol trains moving through Chicago in interchange. CN has provided no cost-based or other justification, leaving Kinder Morgan to believe that CN is simply retaliating against Kinder Morgan for refusing to pay CN's unreasonable demurrage tariff demands and for contesting CN's demurrage collection lawsuit.

Beyond that, CN recently adopted significant new operating changes at Kinder Morgan-Argo, and will soon no longer deliver railcars or pickup empties from customer spots. CN has been performing these basic railroad functions for decades as part and parcel of its line-haul delivery service, but now apparently wants to lower its service costs and save crew time by having Kinder Morgan assume CN's delivery responsibilities. CN refuses to compensate Kinder Morgan for assuming these railroad duties. Kinder Morgan is reluctantly making such changes, under protest at considerable expense, in order to prevent a loss in service, but without any assurances from CN that such changes will result in improved carrier service performance.

Fifth, Railroads are also assessing demurrage against receivers even after implementing indefinite embargoes on traffic receipts and establishing train "permit" programs. For example, since September 5, 2018, CN has embargoed all in-bound shipments of ethanol to Kinder Morgan-Argo. CN issued the embargo without consultation or notice to Kinder Morgan, and it has remained in effect for over eight months. CN's stated cause is "Congestions/Accumulation." CN has allocated limited permits per week for inbound train shipments to Argo. However, CN itself controls the permits and refuses to allow Kinder Morgan to allocate

Company (filed Apr. 30, 2010).

permitted capacity. Additionally, even after informing Kinder Morgan of the number of permits to be issued for a given week, CN then regularly reduces the actual number of permits issued by 10-20% or more.

Kinder Morgan requested that CN immediately end the embargo, take all appropriate actions necessary to restore service as soon as possible to normal levels, and provide Kinder Morgan with CN's specific plans and timing for restoring service. CN has refused to remove its embargo, or to cease demurrage assessments on ethanol cars even as it assumes full control over all ethanol shipments through its unilaterally imposed embargo and permit system. The Canadian Transportation Agency, after investigating similar service issues in the Vancouver area, recently issued a decision on April 15, 2019, finding that similar CN embargos issued under the guise of "Congestion/Accumulation" violated the carrier's service obligations. *Re: INVESTIGATION by the Canadian Transportation Agency (Agency) into possible freight rail service issues in the Vancouver area, pursuant to subsection 116(1.11) of the Canada Transportation Act, S.C., 1996, c. 10, as amended (CTA)*, Case No. 19-00189 (CTA served Apr. 15, 2019).

CSXT and NS have issued similar embargoes and carrier controlled permit systems since last fall, without consulting or notifying Kinder Morgan. The measures have restricted certain in-bound shipments to the Kinder Morgan-Perth Amboy and Carteret terminals on the basis of "Congestions/Accumulation." Only after Kinder Morgan formally protested did the carriers end the embargos. Even with these embargoes in place, and with the carriers in full control of the train and car movements to its terminals, Kinder Morgan still received demurrage invoices from the carriers.

Sixth, the carriers have implemented a number of additional one-sided demurrage tariff provisions, including:

- Decreasing or eliminating demurrage “free time” and demurrage credits;
- Applying railcar demurrage even on non-switch days;
- Limiting or blocking legitimate self-help remedies of receivers to avoid demurrage charges (e.g., restricting receivers from diverting trains);
- Requiring use of proprietary “e-business” and “e-bill” programs for railcar placement notices and ordering, and assessing charges that conflict with established local operating protocols and practices, contain errors, and do not reasonably provide for reasonable customer disputes; and
- Imposing unreasonably high interest rates on uncollected invoices, without establishing any valid basis in the underlying tariff or otherwise.

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.

B. Carriers’ Demurrage Tariffs Are Not Reciprocal

The carriers’ demurrage tariffs are one-sided and not reciprocal as explained above. As discussed, the tariffs automatically assign all liability solely on the receiver, without any consideration of actual railcar delay fault or third-party responsibility. No relief is available where demurrage results from railcar delay attributable to carrier operating and management practices, third parties, or other factors outside the control of the receiver. The railroads’ May 1,

2019 submissions to the Board show that they have removed altogether, or limited significantly, credits for private railcars. The vast majority of the railcars shipped to Kinder Morgan terminals are private. Also, carrier tariffs contain no provisions requiring or incenting carriers to promptly deliver and return railcars to common carriage service, to compensate receivers, or otherwise remedy carrier caused and/or third-party caused delays.

CN's May 1, 2019 submission states, at p. 4, that "when railcar deliveries are delayed, CN personnel will review relevant information such as contemporaneous crew reports to determine whether demurrage charges are appropriate before charges are billed to the customers. If CN personnel determines that the delay was due to a CN service issue, adjustments are made before any bill goes to the customer." No such procedures apply for Kinder Morgan's account, to the best of our knowledge.

To the contrary, CN has stated in the pending litigation that it has no obligation to conduct any investigation of any service issues before sending demurrage invoices, and that it does not review the invoices for service issues before being sent. It has further asserted that Kinder Morgan has no right to ask CN to deliver railcar at a specific time, and Kinder Morgan cannot obtain relief if CN does not meet the service window established by the operations groups for CN and Kinder Morgan.

The carrier tariffs also 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.

The railroads promise timely review and resolution of disputes, but often use tariff provisions ostensibly designed to provide consumer protections and guarantee proper billing and dispute resolution as a means to force customers to pay in full, even where there are bona fide disputes over charges. For example, CN has billing guarantee provisions in its tariff that require CN to respond to invoicing errors raised by customers within 15-21 days. CN highlights this provision as a pro-consumer dispute resolution mechanism in its May 1, 2019 submission to the Board. However, CN has claimed in litigation that the dispute process in its demurrage tariff is a party's only opportunity to raise disputes with invoices, and that any parts of invoices that are not specifically disputed within the very short period allowed are admitted as true.

What is purportedly a "consumer protection" mechanism has essentially become an offensive tool for CN to try to force its demurrage invoices upon receivers without any rigorous review of the charges. As stated, particularly disturbing is the rail carriers' refusal to enter into reasonable three-party dispute resolution discussions with Kinder Morgan and its customers (railroad shippers). Such three-way discussions have long been relied on by carriers, shippers, and receivers to reasonably address demurrage. However, the railroads, as explained above, now prefer to leave their shippers out of the discussions and press their claims solely against receivers, with whom the railroads have no formal business relationship, unless the receiver guarantees payment of all demurrage assessments and claims.

Kinder Morgan simply cannot accept such liability where it is not at fault or responsible. The unfortunate outcome is more faulty collection actions. Kinder Morgan respectfully submits that having the railroads sue receivers, and thereby forcing receivers to countersue railroads and cross-sue terminal customers (the railroad customers), is not an effective, efficient, or reasonable means to address the demurrage problem.

III. **REMEDYING THE SITUATION**

To restore fairness and uniformity in demurrage, Kinder Morgan respectfully requests that the Board immediately issue appropriate policy guidance, directives, and later revised rules as necessary, as follows:

1. To address the harsh and unintended effects of the *Demurrage Liability* decision, clarify that:
 - (a) The *Demurrage Liability* decision and accompanying rules do not impose strict liability on receivers, or any receiver liability absent a showing of actual fault;
 - (b) Receivers should not be held liable for demurrage unless the tariff terms sought to be applied are reasonable and reciprocal and function to improve the efficient use of assets and the provision of rail service deliveries; and
 - (c) In order to assess demurrage charges on receivers, in addition to the need to establish a legal foundation for liability, a railroad should be required to demonstrate that purported delays relating to receiving, unloading, and returning of equipment are the sole fault of the receiver, and are not attributable in whole or part to the carrier, other third party participants in the supply chain, or other factors outside the control of the receiver.
2. To curb continuing carrier overreach and abuse, and to ensure that tariffs are reasonably reciprocal and have balanced incentives, the Board should further clarify:
 - (a) If requested by a shipper and its receiver, a carrier shall provide separate invoices for each shipper that controls a railcar on which a demurrage charge is sought to be assessed, and agree to bill the shipper directly for demurrage, and without requiring the receiver to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

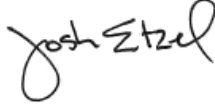
- (b) A demurrage tariff will be deemed presumptively unreasonable if it:
 - (i) Seeks to establish liability solely on a receiver;
 - (ii) Fails to provide for sufficient “free time” and credits and other provisions to accommodate the operating requirements and infrastructure limitations of the individual location where the demurrage is sought to be applied;
 - (iii) Fails to provide for adequate reciprocal provisions affording the receiver with relief from demurrage assessment, and reasonable remuneration, including where carrier operating and management practices and/or third parties other than the receiver may cause or contribute to railcar delays leading to demurrage charges, in the event of embargoes, or where the railroad fails to meet reasonable pick-up windows and switching requests;
 - (iv) Includes interest charges for demurrage higher than that allowed in Board investigation and complaint proceedings, as provided under 49 C.F.R. § 1141.1; or
 - (v) Fails to include reasonable dispute resolution mechanisms.
- 3. To resolve current and potential future demurrage disputes, the Board should immediately establish a Demurrage Dispute Resolution Program within the Rail Customer and Public Assistance Program, with appropriate staff, which shall, at the election of any party, establish expedited settlement conferences between railroads, shippers, receivers, and consignors/consignees to resolve ongoing disputes.

Kinder Morgan submits that the foregoing requests are reasonable and necessary to address the situation. Because of the ongoing disputes, uncertainty, and serious issues presented, Kinder Morgan respectfully requests that these requests be adopted immediately. If the Board ultimately decides that it needs to further consider any part of this request, or parts of this request, Kinder Morgan respectfully requests that the Board immediately adopt Requests 2(a), 2(b)(iv), and (3), as it further considers the other requests.

IV.
CONCLUSION

Kinder Morgan appreciates the opportunity to appear at this hearing and present its views, and respectfully requests that the Board adopt the above requests as soon as possible.

Respectfully submitted,

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

Joshua Etzel,
Vice President Operations – Northern Area
Kinder Morgan Terminals
78 Lafayette Street
Carteret, NJ 07008

Dated: May 8, 2019