

Testimony of
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Railroad Demurrage and Accessorial Charges
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Chairman Begeman, Vice Chairman Fuchs, and Member Oberman, thank you for the opportunity to testify today on behalf of the International Liquid Terminals Association. The International Liquid Terminals Association (ILTA) represents more than 85 companies operating liquid terminals in all 50 U.S. states and in 37 countries. Our members' facilities form a critical link in the transportation of a wide range of liquid commodities, including crude oil, refined products, chemicals, renewable fuels, fertilizers, vegetable oils and other food grade materials. Terminals provide essential logistics services that enable domestic commerce and connect the U.S. economy with overseas markets.

Terminal operators are not customers of the railroads and have no direct contract or service agreement with the railroads. Instead, terminals and railroads share customers, who contract with the terminal to provide a fixed volume of storage and a rated capacity to load and/or unload railcars for their account. Terminal operators serve as agents for their customers in directing railcar activity at the terminal. These shared customers – the shippers – specify the number of railcars in use based on loading and unloading capacities specified in their contracts with the terminal. Terminal operators do not own the products, do not initiate shipments, and do not schedule receipts.

Railcar storage and demurrage (hereafter “demurrage”) are legitimate services and railroads are due proper compensation for delays and inefficiencies caused by other parties. Prior to 2014, railroads assessed demurrage charges directly to its customers. In some cases, a failure of service on the part of the terminal operator would cause a delay. Under these circumstances, the charged customer (the shipper) would pay the demurrage charges assessed by the railroad, and then seek compensation from the terminal operator. Resolution of these cases would be guided by the contract between the terminal and the shipping customer.

In 2014, STB issued a final rule that established a new option for railroads – the ability to seek compensation for demurrage from consignees, rather than shippers, for delays in loading and unloading railcars and returning them to the carrier at origins and destinations. This left warehousemen, including terminal operators, liable for demurrage charges, even though they had no contractual relationship with the railroads, and no control over the frequency or volume with which shippers may consign railcars to them.

In the last five years, since the 2014 final rule went into effect, the situation has become untenable for terminal operators. During the previous rulemaking process, ILTA noted in its comments that [the rule] “...would virtually guarantee constant disputes and endless litigation on the question of whether ‘actual’ notice had been provided to one or both of the parties to a demurrage claim.” In fact, that situation has come to pass. Railroads and terminal operators are increasingly involved in litigation over payment for demurrage incurred on shippers' railcars.

Most terminals include clauses in their contracts requiring shippers to pay any demurrage fees that were incurred by no fault of the terminal operators. However, terminal operators now often find they are unable to verify the basic validity of demurrage charges levied on them by the railroad, making it impractical to compel shippers to reimburse them for the charges.

The demurrage invoices provided by the railroads to terminals include railcars related to numerous shippers. The limited detail provided makes it difficult or even impossible to determine which specific railcars and shippers were at issue in each case of demurrage. The individual shippers are often not listed, and the railcars and commodities are frequently in error. While the railroads have access to the appropriate information related to the demurrage charges, the terminal – lacking a contractual relationship with the railroad – has no access to information it would need to confirm or dispute the charges.

In many cases, railroads have been unable to provide further substantiation when the charges have been challenged. Terminal operators have been forced to establish and maintain management systems that duplicate existing railroad systems to track railcar activity through their facilities to attempt proper evaluations of demurrage charges. The administrative burden of these efforts has been considerable. The terminal operators are also required to advance monies to the railroads prior to reimbursement from their customers, tying up the terminal operator's capital.

Further complicating the situation, the railroads' current practice is to require the terminal operator to present a demurrage dispute resolution request **before** they receive the documented demurrage bill. At least one railroad has threatened new discretionary track storage fees on terminal operators that would be assessed on an overall railcar volume basis rather than against specific railcars, making it even more difficult to seek reimbursement.¹

The absurdity of treating terminals as if they were "aggregated shippers" is perhaps best encapsulated in the dilemma over "free day" credits assigned by the railroads. Confusion arises when the railroad aggregates "free day" credits across multiple railcar shippers' accounts, and then assigns these credits to the terminal.

For the terminal operator, this creates an impossible dilemma. Allocating the credits between its shippers is impractical because the demurrage invoices lack detail. Even more problematic, the terminal operator cannot provide documentation to explain how it is allocating credits without disclosing proprietary information about other shippers at the terminal. Conversely, if the terminal fails to allocate the credits at all, the terminal is denying a benefit owed to shippers under their contracts with the railroads.

ILTA members have actively pursued resolution of the challenges related to demurrage billing through outreach to both their shipping customers and to the railroads. In some cases, shippers have refused to accept demurrage charges passed along from terminal operators, leaving them to argue with the railroads over payment. Some shippers have even countered requests from terminals by citing the 2014 ruling. In other cases, terminal operators have joined with shipping customers in asking the railroads to return to the previous practice of assessing demurrage charges to the shipping customer, with whom they have a direct contractual relationship. Unfortunately, to our knowledge, none of these negotiations have met with success.

Going forward, even if the railroads were to provide enough documentation to justify demurrage charges and to properly attribute responsibility among shipping customers, requiring terminal operators to act as middlemen between shippers and the railroads would still impose an inappropriate burden. The 2014 ruling has had the unintended consequence of creating an unwarranted expectation that terminal operators are responsible for mediating demurrage negotiations between railroads and

¹ See for example Norfolk Southern Railroad's Item 6265 - "Customer Caused Congestion" rule under tariff NS8002-A.

shippers. Despite repeated attempts at dialogue with the railroads, the terminal industry has been unable to address these problems successfully.

On a related matter, also since the 2014 rule went into effect, railroads have been assessing charges to terminals related to storage of hazardous materials. Although the 2014 ruling does not address hazardous materials storage, we surmise that the railroads have interpreted the 2014 rule on direct billing to terminals for demurrage charges to also apply to other categories of charges. We note that these charges are in addition to higher tariffs that railroads already assess to their customers for shipments of hazardous materials. Again, terminals have no contractual relationship with the railroads, and none of these charges to terminals are appropriate in our view. We ask that the STB also specifically direct the railroads to cease imposition of additional storage fees to terminals for hazardous materials.

To remedy the situation and restore the ability to ensure fair and transparent assessments of demurrage charges, we ask the STB to amend the 2014 ruling and remove the option of direct billing of demurrage charges to consignees such as terminals.

Thank you again for the opportunity to testify. ILTA and its member companies look forward to working with the Board, and we are happy to provide any needed additional information at your request.