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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Docket No. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*

Dear Ms. Brown:

Kinder Morgan Terminals (“Kinder Morgan”) thanks the Board for holding its recent hearing on demurrage and accessorial charges, appreciates the opportunity to appear, and is grateful for the Board’s commitment to restoring fairness and uniformity in demurrage. Pursuant to the Board’s Decision served May 24, 2019 keeping the record open for additional comments, this letter briefly supplements Kinder Morgan’s testimony.

1. Follow-up to Board Member Oberman’s Questions

During the hearing, Board Member Oberman asked us whether Canadian National Railroad (“CN”) “takes the position – and I think they do, that they are required by [EP No. 707] to bill you for demurrage.” We responded that “[t]hey have told us that” and that CN has refused to enter into railroad-terminal-shipper agreements to bill the shipper directly for demurrage.

Kinder Morgan has reviewed this question further and confirms that, as stated in its written testimony (at 10-11), CN has asserted that the Board’s Decision in *Demurrage Liability*, Docket No. EP 707 (STB served Apr. 11, 2014), requires CN to assess demurrage on the receiver. Exhibit C to CN’s Amended Complaint in *Ill. Cent. R.R. v. Kinder Morgan Liquids Terminals, LLC* (N.D. Ill filed Nov. 3, 2016), includes the notice that CN provided to its customers following the Board’s *Demurrage Liability* decision. CN informed its customers that “[t]he new rule will **require** a change in CN’s current billing practice,” and that “[e]ffective July 15, 2014, CN will be assessing responsibility for asset use incurred in the U.S. to any person receiving rail cars for loading and unloading in accordance with the above regulation” (emphasis added). Also, CN states at ¶ 46 of its Amended Complaint that its tariff revisions making the receiver solely responsible for demurrage were made “to comply with the Order and the regulations found at 49 CFR 1333 et seq.” Additionally, at ¶ 48 of its Amended Complaint, CN

asks the Court to declare “that the entity **receiving railcars** for loading or unloading **is liable** for the payment of demurrage under the Order and regulations promulgated thereunder” (emphasis added).

Board Member Oberman also asked Kinder Morgan whether CN takes the position that CN would be in violation of the law if it did not send a demurrage bill or claimed that “they say gee, we’d like to not bill you, but we have to.” We responded that “I do know that they claim that the statute is what empowers them to do that,” and we promised to get back to the Board with further information. In further response, later at the hearing, CN’s legal witness asserted that the demurrage statute, at 49 U.S.C. 10746, uses the words “shall compute” and that “one would need to invoice a customer in order to incentivize behavior.” Draft Hearing Transcript at 909. CN’s witness also testified “our complaint in Kinder Morgan intended to describe and summarize the statutory provisions of 10706.”

CN asserts at ¶ 49 of its Amended Complaint that it “is not required and has **no duty** to collect demurrage charges from the shipper or consignee or any party **other** than the party responsible for loading and unloading railcars under the Order and regulations promulgated at 49 CFR § 1333 et seq” (emphasis added). CN’s Amended Complaint also asks the court to declare that (i) it has no such duty to collect demurrage from any parties other than the receiver, and (ii) it “fully followed the regulations found at 49 CFR § 1333 et seq.” in implementing its demurrage tariff changes establishing liability solely on the receiver.

In summary, CN has asserted as a matter of law that it “needs to invoice a customer” and it is further required and has an affirmative “duty” to assess and collect demurrage solely on the receiver. **Attachment 1** to this letter includes the referenced excerpts from CN’s Amended Complaint and Exhibit C.

2. Chairman Begeman’s Request for Voluntary Carrier Changes

At the hearing, the Chairman Begeman asked the railroads to consider taking voluntary actions to address customer concerns pertaining to the carriers’ demurrage collection practices.

In response, Kinder Morgan sent letters to each of the Class I railroads asking them to voluntarily agree, that, if requested by a shipper and Kinder Morgan, the railroad will (i) provide separate invoices for each shipper that controls a railcar on which a demurrage charge is sought to be assessed, and (ii) agree to bill the shipper directly for demurrage, without requiring Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement. Kinder Morgan asked that responses be sent by June 4, 2019. **Attachment 2** to this letter includes copies of these letters.

To date, Kinder Morgan has heard back from five of the seven Class I carriers. None have accepted our request. CN responded that “Kinder Morgan, as the railcar receiver with proper notice of CN’s demurrage tariff, is responsible for demurrage charges under 49 C.F.R. § 1333.3.” BNSF responded that it has invoiced shippers directly and “already honors your request,” yet also noted that it still “looks to Kinder Morgan as the receiving facility for

payment” where a customer does not pay the invoice. CSX declined to address at all our specific request, other than to say generically its willingness to discuss “concerns about specific locations or specific shippers from a demurrage perspective.” CP replied that “Kinder Morgan is in a good position to protect itself” and a “fair minded case-by-case approach works best.” KCS responded that it is “willing to work with Kinder Morgan to identify alternatives . . . on a case-by-case basis.” Copies of these railroad responses are included at **Attachment 3** to this letter.

These responses (or non-responses) to Kinder Morgan’s voluntary agreement requests, while often vague and elusive, confirm that the railroads look solely to the receiver, Kinder Morgan, as the guarantor of demurrage. The railroads responses are wholly inadequate, and further evidence the problems Kinder Morgan is experiencing in attempting to reasonably address the situation.

The carriers’ replies also largely echo their responses to Board Member Oberman’s questions during the hearing confirming that the railroads’ demurrage tariffs are not fault-based. Instead, the railroads are treating the Board’s *Demurrage Liability* decision as having created a new strict liability regime on receivers, and receivers only, much different than the narrow clarification and fault-based system announced by the Board.

Kinder Morgan believes that its request is very fair, as it is predicated upon agreement by the shipper and terminal, and would help end the gridlock that has prevented reasonable discussion and resolution of individual disputes. As discussed in our written testimony, allowing railroads to sue receivers, and thereby force receivers to countersue railroads and cross-sue terminal customers (the shippers who are actual railroad customers), is simply not an effective, efficient, or reasonable means to address the demurrage problem.

These railroad replies, together with the railroads’ hearing testimony, further confirm that, because of the carriers’ continuing refusal to take reasonable, voluntary corrective steps, the Board needs to step-in and require the railroads to directly and favorably respond to this simple, common sense request.

3. Remediating the Receiver Collection Issue

During the hearing, virtually all non-railroad stakeholders echoed Kinder Morgan’s testimony that the carriers’ demurrage programs are unbalanced, lack reciprocity, and are causing significant harm to consumers’ businesses and the efficient flow of railroad traffic. The receiver demurrage problem is substantial, and it is an important component that needs to be addressed if the Board hopes to reasonably resolve the problem.

Nothing in Kinder Morgan’s testimony was contested or contradicted by the railroads in their testimony. As discussed, the railroads’ general refusal to include shippers into dispute resolution discussions with receivers, and their insistence that receivers bear sole responsibility for charges and be the guarantor, is only increasing tensions and disputes, and creating growing uncertainty.

Ms. Cynthia T. Brown

June 6, 2019

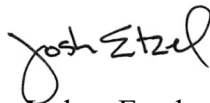
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The testimony of the numerous stakeholders participating at the hearing reinforces the need for the Board to take reasonable and necessary steps to restore balance in railroad demurrage. As the Board considers actions to address the situation, it is crucial that the receiver component of the problem, affecting hundreds of terminals around the United States, also be addressed – especially as the current system of collection on receivers is creating massive inefficiencies, unnecessary lawsuits, and increased costs.

In addition to asking that carriers be required to enter into reasonable three-party agreements, Kinder Morgan has provided the Board with several other reasonable, specifically tailored requests to remedy the situation. First, the Board needs to address the harsh and unintended effects of the *Demurrage Liability* decision, by reversing or at least clarifying the decision, including requiring a railroad to establish a legal foundation and receiver fault for liability. Second, the Board should immediately incent the railroads to adopt more balanced and reciprocal tariff terms in the discrete areas discussed by Kinder Morgan. Third, the Board should immediately establish a Demurrage Dispute Resolution Program within the Office of Rail Customer and Public Assistance that shall, at the election of any party, establish expedited settlement conferences between railroads, shippers, and receivers to resolve ongoing disputes.

Kinder Morgan respectfully submits that these modest changes will help restore fairness and uniformity in demurrage, and are reasonable and necessary to address a situation that has become unworkable. We look forward to working with the Board, the railroads, and our terminal customers to meet this objective.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Etzel". The signature is fluid and cursive, with the first name "Josh" and last name "Etzel" clearly distinguishable.

Joshua Etzel
Vice President – Operations
Northern Area

Enclosures

ATTACHMENT 1

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ILLINOIS CENTRAL RAILROAD	:	
COMPANY, an Illinois Corporation, d/b/a	:	
CN,	:	
	:	CASE NO. 16 cv 08044
Plaintiff,	:	
	:	
	:	CIVIL ACTION
vs.	:	
	:	
	:	AMENDED COMPLAINT
KINDER MORGAN LIQUIDS	:	
TERMINALS, LLC, a Delaware LLC,	:	
	:	
Defendant.	:	

Plaintiff, Illinois Central Railroad Company (hereinafter “Plaintiff CN”) is an Illinois corporation, d/b/a CN, with its principal office located at 17641 South Ashland Avenue, Homewood, Illinois 60430, by way of complaint against defendant, Kinder Morgan Liquids Terminals, LLC, a Delaware limited liability company, with its principal office located at 1001 Louisiana Street, Houston, Texas, (hereinafter "Defendant KM"), says:

JURISDICTION

The Court obtains diversity jurisdiction in this matter under 28 U.S.C. § 1291 because the Plaintiff is an Illinois Corporation with its Principal Place of Business in Illinois and defendant KM is a Delaware limited liability company with a principal office and principal place of business located in the State of Texas and with its only member being Kinder Morgan LP “D” a Delaware Partnership also located and having a principal place of business in Texas. The amount in dispute exceeds \$75,000.

The Court also obtains jurisdiction in this matter because the matter is brought by Plaintiff CN, an interstate railway carrier subject to the jurisdiction of the Surface Transportation Board (STB), to recover from defendant KM demurrage charges pursuant to 28 U.S.C.A. § 1337(a) (a federal

question jurisdiction) and being a cause of action arising under the Interstate Commerce Act 49 U.S.C. §10702 and 49 U.S.C. §10746 and a cause of action to recover switching fees under 49 U.S.C. §10702 and 49 U.S.C. §11101 .

VENUE

1. Plaintiff CN, a resident of Illinois and whose principal place of business is in Illinois, operates rail service in the U.S. including in the City of Chicago, Illinois. Defendant KM, has its headquarters in Houston, Texas; its only member is Kinder Morgan Operating LP “D” a Delaware Partnership also headquartered in Houston, Texas.

2. Defendant KM operates a 145 acre liquid storage terminal located at 8500 West 68th Street, Argo, Illinois 60501 (the “KM Argo Facility”). The charges sued for in this matter all accrued at Defendant’s KM Argo Facility.

PARTIES

3. Plaintiff CN is an Illinois Corporation with a principal place of business at 17641 South Ashland Avenue, Homewood, Illinois 60430. CN does business in Illinois and several other states.

4. Defendant KM is a Delaware Limited Liability Company whose principal place of business is at 1001 Louisiana Street, Houston, Texas. Defendant KM’s only member is Kinder Morgan Operating LP “D” , a Delaware Partnership, whose principal place of business is Houston, Texas. Defendant KM operates a liquid storage and transload terminal at the KM Argo Facility.

UNDERLYING FACTS

5. Plaintiff CN and its connecting carriers at all times mentioned were common carriers by railroad engaged in interstate commerce and doing business in the United States.

6. The subject matter of this action stems from charges assessed by Plaintiff CN under tariffs published by Plaintiff CN for demurrage (Asset Use) services and intraplant switching services performed by Plaintiff CN at the request of Defendant KM which received the subject railcars for loading and unloading at the KM Argo Facility. The specific tariff that applies to the charges in this action are found in Optional Services-Carload Tariff #CN 9000 series for the various dates for when the charges accrued (the “CN Tariff”).

7. The claims asserted by Plaintiff CN in this complaint are made pursuant to the decision in STB Docket EP 707 served April 11, 2014 and effective on July 15, 2014 (the “Order”), and promulgated under the regulation found at 49 CFR § 1333.3 (See certification of Phillip Gregory attached hereto as **Exhibit A**). A copy of the Order is attached hereto as **Exhibit B**. The current applicable CN Tariff can be found on the CN Website at www.cn.ca.

8. Prior to the accrual of any of the demurrage charges which are the subject of this lawsuit, Plaintiff CN served Defendant KM with notice of the applicable CN Tariff in compliance with 49 CFR § 1333.3. A copy of the notice to all customers including Defendant KM in this matter is attached as **Exhibit C**.

9. Plaintiff’s tariff regarding demurrage charges has not materially changed in regards to demurrage as applicable to KM’s Argo, Illinois facility after the date of the delivery of the notice of the tariff to KM as mentioned in paragraph 8 above.

10. Pursuant to 49 U.S.C.A. §10746, the Plaintiff has an obligation to compute demurrage charges and establish rules related to those charges and enforce those rules which it has established in the CN Tariff in accordance with the Order (copy attached as **Exhibit B**) and Demurrage Liability, 49 CFR 1333.

11. The CN Tariff is applicable to the demurrage and intraplant switching of railcars. The CN Tariff is periodically updated and published on the CN website though there has been no material changes to the CN's demurrage tariff as to the demurrage which has accrued at KM's Argo, Illinois facility which is the subject of this complaint.

FIRST COUNT

12. Between August, 2015 and October 31, 2016, Plaintiff CN transported freight railcars (both loaded with product to be unloaded and empty railcars to be loaded) to the KM Argo Facility. Copies of invoices which specifically list the railcars, the dates the railcars were "constructively placed" (constructive placement is the industry term for railcars held on the railroad's tracks either on request or when they cannot be accepted for/on delivery) the dates that Defendant KM ordered the railcars to be placed at the KM Argo Facility and the date the railcars were actually placed at the KM Argo Facility are included on the invoices as noted in the Disclosures and Amended Disclosures of the Plaintiff. A list of all the invoices are shown on the Statement of Demurrage Invoices attached hereto as **Exhibit D**. All of the railcars so placed at the KM Argo Facility were placed for loading or unloading by the Defendant pursuant to 49 CFR § 1333.3.

13. Defendant KM designated the KM Argo Facility as a "Closed Gate" facility, which means a railcar cannot be placed by Plaintiff CN at the KM Argo Facility at the time of arrival at Plaintiff CN's nearby rail yard due to the standing instructions from Defendant KM not to place any railcars there, unless and until Defendant KM delivers to Plaintiff CN specific instructions to place such railcar at the KM Argo Facility (commonly referred to as the

“placement instructions”). Defendant KM may give Plaintiff CN the “placement instructions” at the time the railcar arrives at Plaintiff CN’s nearby yard or at a later date.

14. In the event Defendant KM does not deliver the “placement instructions” to Plaintiff CN at the time of arrival of a railcar at Plaintiff CN’s nearby yard, Plaintiff CN holds such railcar at Plaintiff CN’s nearby yard until such time as the Defendant KM gives “placement instructions” to Plaintiff CN to deliver the railcar to the KM Argo Facility. Holding a railcar that is available for delivery until “placement instructions” are given is commonly referred to as “Constructive Placement”.

15. A notice of Constructive Placement is routinely delivered by Plaintiff CN to Defendant KM. Because a railcar in Constructive Placement status is available for delivery, the timeline for assessing demurrage charges on a railcar begins to run when a railcar is placed in Constructive Placement status.

16. When a railcar is moved by Plaintiff CN to an accessible position for loading or unloading at the KM Argo Facility, such placement is commonly referred to as an “Actual Placement”.

17. At all times during from August, 2015 through October 31, 2016, the railcars which are the subject of this lawsuit and referred in Plaintiff CN’s Statement of Demurrage Invoices attached hereto as **Exhibit D** were under the control of Defendant KM because Defendant KM exclusively gave directions to Plaintiff CN as to when and where the railcars were to be placed at the KM Argo Facility and when they were to be removed from the KM Argo Facility.

18. The Surface Transportation Board (“STB”) describes demurrage as “a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a

specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue railcar detention to encourage the efficient use of rail cars in the rail network.” 49 C.F.R. Section 1333.1. See Order, attached as **Exhibit B**.

19. Plaintiff CN’s demurrage rules and charges are described in the CN Tariff, which is amended from time to time. CN refers to demurrage as “Extended use of railroad-provided cars” and of “Private railcars on CN Track” in the CN Tariff.

20. Plaintiff CN gives credits or “free time” for loading and unloading of railcars as found in Item 9200 in the CN Tariff. The CN Tariff provides a maximum of free time of 48 hours. After the expiration of free time, demurrage charges begin to accrue.

21. Plaintiff CN has not entered into any private contracts with any customers, shippers, consignees or Defendant KM related to the payment of demurrage charges for shipments made to the KM liquid storage facility at Argo, Illinois.

22. In this case, the Defendant KM was the party that received rail cars for loading or unloading who detained the cars beyond the period for free time as set forth in the CN Tariff and, as such, shall be held liable for demurrage charges since Plaintiff CN delivered actual notice to defendant KM of the CN Tariff and Defendant KM failed to provide Plaintiff CN with any notice that the Defendant KM was acting as an agent for another party and the identity of the principal.

23. Plaintiff is entitled to recover the cost of demurrage charges from Defendant KM pursuant to the Interstate Commerce Commission Termination Act (hereinafter ICCTA), 49 U.S.C. §10702 and §10747 and regulations thereunder 49 CFR §1333.1.

24. Plaintiff CN bills Defendant KM demurrage charges on a weekly basis.

25. Defendant KM made claims for adjustment to the demurrage charges and Plaintiff CN made appropriate adjustments and applied applicable credits.

26. Plaintiff CN sent invoices to Defendant KM for demurrage charges after applying credits and/or adjustments. The outstanding invoices after the application of all credits and adjustments total **\$1,841,045.00** which is currently due and owing.

27. Defendant KM has failed or refused to pay the Plaintiff CN's invoices which are due and owing and which are shown on the Statement of Demurrage Invoices attached hereto as **Exhibit D**.

28. There remains due and owing by Defendant KM to Plaintiff CN the sum of **\$1,841,045.00** US Dollars pursuant to the CN Tariff.

29. The invoices referred to on **Exhibit D** were delivered by Plaintiff CN to Defendant KM to the location where the invoices have always been disputed and/or paid; however, after applicable credits were applied to the invoices, Defendant KM has failed and refused to pay the invoices noted in this Complaint on **Exhibit D**.

30. As a result of the failure or refusal by Defendant KM to make payment of such charges referred to on **Exhibit D**, Plaintiff CN has suffered damages.

WHEREFORE, Plaintiff CN demands that judgment be entered in favor of Plaintiff CN and against Defendant KM in the amount of **\$1,841,045.00**, plus interest and costs of suit and any additional demurrage charges which accrue at the Defendant KM Argo facility after October 31, 2016.

SECOND COUNT – SWITCHING CHARGES

31. Plaintiff CN repeats the allegations of paragraphs 1 through 30 of the Amended Complaint as if repeated at length herein.

32. In this instance, intraplant switching in this case involves the movement by Plaintiff CN of railcars from one location inside the KM Ago Facility to another location within the KM Argo

Facility, as described in Item 13000 in the CN Tariff, attached hereto as **Exhibit H**. Under ICCTA, a rail carrier is authorized to provide transportation or services on reasonable request including switching services 49 U.S.C. § 11101. Under 49 U.S.C. § 10702, a rail carrier providing transportation or services subject to the jurisdiction of the STB shall establish reasonable rates for such services and rules and practices related to such services. The CN Tariff complies with Plaintiff CN's requirement under ICCTA to establish such rates, rules and practices related to services.

33. Specifically, Item 13000 of the CN Tariff describes "optional switching services" as follows:

When you need switching services

Switching services relate to the pick-up and delivery of railcars at your plant for loading and unloading are included in the cost of our linehaul shipment. There may be times when you require additional switching services – for example to have railcars moved within your plans or turned for loading or unloading. You have the option of hiring a third party contractor to perform your in-plant switching, or acquiring a trackmobile, a locomotive or a car puller and have your own employees move your railcars. You may take advantage of CN's optional services and have our crew and local locomotives perform the work for you.

.....
INTRA PLAN SWITCHING – ADDITIONAL SWITCHING AT YOUR LOCATION

There is no fee for the Initial placement or pick up of railcars at your location. If you require an additional switch within your plant (*interplant switch*) a fee will apply.

34. Item 13000 of the CN Tariff clear states the fee for intraplant switching is \$210 per railcar. The rate for other types of switching services are listed in Item 13000 of the CN Tariff.

35. Defendant KM made requests for intraplant switching services and Plaintiff CN performed the switching services at the request of Defendant KM. Consequently, Defendant KM is liable for such switching services as described under Item 13000 of the CN Tariff and pursuant to 49

U.S.C. § 11101 and 49 U.S.C. § 10702. The total intraplant switching charges accrued in the amount of **\$28,577.00** pursuant to the CN Tariff.

36. Plaintiff CN delivered invoices to Defendant KM for intraplant switching charges between August, 2015 and October 31, 2016, totaling in the sum of **\$28,577.00** US Dollars, as set forth on the Statement of Switching Charges attached hereto as **Exhibit E**, pursuant to the CN Tariff (Item 13000) for railcars previously delivered to the KM Argo Facility. Defendant KM has never disputed these charges. A list of the intraplant switching charges is attached hereto as **Exhibit F**.

WHEREFORE, Plaintiff CN demands that judgment be entered in favor of Plaintiff CN and against Defendant KM for payment of these charges in the amount of **\$28,577.00**, plus interest and costs of suit plus any additional intraplant switching charges which accrue after October 31, 2016.

THIRD COUNT FOR DECLARATORY JUDGMENT PURSUANT TO RULE 57 FRCP

37. Plaintiff CN repeats the allegations of paragraphs 1 through 36 of the Amended Complaint as if repeated at length herein.

38. A copy of a letter from the Vice President and Chief Operations Officer of Kinder Morgan Terminals, Michael Dodson, attached hereto as **Exhibit G**, explains the position taken by Defendant KM and the basis for not paying demurrage and related charges.

39. As set forth in **Exhibit G**, Defendant KM represented to Plaintiff CN that Defendant KM's interpretation of the Order and the associated regulations governing the assessment of demurrage require a rail carrier to find or agree to alternate ways to have the

demurrage paid by parties other than the entity receiving the railcars for loading or unloading. Plaintiff CN does not adopt Defendant KM's interpretation of the Order.

40. Defendant KM asked Plaintiff CN to enter into a tri-party agreement to bill and collect demurrage charges from a shipper and to release Defendant KM from liability for demurrage charges.

41. Plaintiff CN considered a form of a tri-party agreement prepared by Defendant KM which provided that the shipper would voluntarily agree: (i) to enter into a tri-party agreement; (ii) for Plaintiff CN to bill the shipper and (iii) for the shipper to voluntarily pay for the demurrage charge; however, Plaintiff CN informed Defendant KM that a carrier has no obligation to release the party that receives railcars for loading and unloading from the liability to pay the demurrage charges in the event the shipper fails or refuses to do so. Alternatively, the Order does not prevent Defendant KM and any shipper from contractually requiring a shipper to reimburse or indemnify Defendant KM for the liability for demurrage. As such, Plaintiff CN told Defendant KM that it would not agree to release it from the liability for demurrage charges in the event that the shipper failed or refused to pay the demurrage charges.

42. Defendant KM's position is in direct conflict with the provisions of 49 CFR §1333.3.

43. Defendant KM has communicated to Plaintiff CN that Defendant KM's interpretation of the Order and the associated regulations governing demurrage at 49 CFR § 1333 et seq. are the primary reasons that Defendant KM has failed or refused to pay Plaintiff CN's invoices.

44. The requirements for a justiciable case or controversy exist since under these circumstances there is a substantial controversy, between the parties having adverse legal interest with sufficient immediacy to warrant an issuance of a declaratory judgment.

45. The Interstate Commerce Act, as amended by the ICC Termination Act of 1995, provides that demurrage is subject to STB regulation; specifically, 49 USC § 10702 requires railroads to establish reasonable rates and transportation related rules and practices, and 49 USC § 10746 requires railroads to compute demurrage and to establish demurrage-related rules “in a way that fulfills the national needs related to freight car use and distribution and that will promote an adequate car supply.”

46. Plaintiff CN revised the CN Tariff to comply with the Order and the regulations found at 49 CFR § 1333 et seq. A copy of the notice to all customers including Defendant KM in this matter is attached hereto as **Exhibit C**. A copy of its CN Tariff complying with the Order and regulations is attached hereto as **Exhibit H**.

47. Such revisions to the CN Tariff were not applicable to the demurrage charges billed to Defendant KM because any rate increases for demurrage excluded the greater Chicago area. Consequently, the revisions to the CN tariff were not material changes and, as such, EP 707 does not require CN to provide actual notice of those changes to Defendant KM after providing a blanket notice of the CN Tariff to Defendant KM.

48. Plaintiff CN is entitled to declaratory relief for current and future interpretation for having this court interpret the Order and regulations promulgated thereunder confirming (when there is no contractual agreement to pay demurrage) that the entity receiving railcars for loading and unloading is liable for the payment of demurrage under the Order and regulations promulgated thereunder at 49 CFR § 1333 et seq.

49. Plaintiff CN is entitled to declaratory relief having this court find that when there is no contractual agreement to pay demurrage, Plaintiff CN is not required and has no duty to collect demurrage charges from the shipper or consignee or any party other than the party responsible for loading and unloading railcars under the Order and regulations promulgated at 49 CFR § 1333 et seq.

50. Plaintiff CN is entitled to declaratory relief finding that Defendant KM was the party receiving railcars for loading and unloading and, therefore, is subject to liability for the payment of demurrage charges referred in this matter under the Order and regulations promulgated at 49 CFR § 1333 et seq.

WHEREFORE, Plaintiff CN requests that the Court enter a Declaratory Judgment as follows:

a. That the regulations found at 49 CFR§ 1333 et seq. were in effect at the time the shipments involved in this matter were made.

b. That Plaintiff CN is entitled to declaratory relief ordering that (when there is no contractual agreement to pay demurrage) that the Defendant KM, as the entity receiving railcars for loading and unloading at the KM Argo facility, is responsible for the payment of demurrage charges under the Order and regulations promulgated thereunder at 49 CFR § 1333 et seq.

c. That Plaintiff CN is entitled to declaratory relief ordering that when there is no contractual agreement to pay demurrage, Plaintiff CN is not required and has no duty to collect demurrage charges from the shipper or consignee or any party other than the party receiving railcars for loading and unloading under the Order and regulations promulgated at 49 CFR § 1333 et seq.

d. That the STB had the legal right to make its decision in the Order and to promulgate and publish the regulations found at 49 CFR §1333 et seq.

e. That Plaintiff CN fully followed the regulations found at 49 CFR § 1333 et seq., including giving the Defendant KM full notice of its tariff and of the application of the new regulations before they came into effect on July 15, 2014 and that no subsequent notice was required because there have been no material changes to the Tariff related to demurrage charges as applied to the KM liquid storage facility at Argo, Illinois.

WHEREFORE, Plaintiff demands the following relief:

- a. Judgment on the First Count for recovery of demurrage charges in the amount of **\$1,841,045.00.**
- b. Judgment on the Second Count for recovery of switching charges in the amount of **\$28,577.00.**
- c. A Declaratory Judgment pursuant to the allegations of the Third Count.

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Attorneys for Plaintiff

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DATED: November 3, 2016

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June 13, 2014

Dear Customer,

CN would like to notify you that we will be changing the way we invoice demurrage (asset use) in the U.S. resulting from the Surface Transportation Board's (STB) issuance of new demurrage regulations, effective July 15, 2014.¹

As described in CN's Optional Services tariffs, CN currently assesses payment of asset use charges to:

- the shipper at origin
- consignee at destination or en route
- third party mutually agreed to in writing with CN to accept responsibility for all asset use charges

The STB's regulations indicate that any person receiving rail cars from a rail carrier for loading or unloading in the United States may be held responsible for asset use charges. Examples of such "person" include warehouses, distribution centers, care of parties, third parties, etc. As set forth in Appendix A to the decision, the regulations (49 C.F.R. 1333.3) provide that:

"Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of rail cars. The notice required by this section shall be in written or electronic form."

The new rule will require a change in CN's current billing practice. Effective July 15, 2014, CN will be assessing responsibility for asset use incurred in the U.S. to any person receiving rail cars for loading and unloading in accordance with the above regulation. Asset use charges incurred in Canada will remain unchanged – the responsible party remains the shipper for rail cars to be loaded and the consignee for rail cars to be unloaded. As amended to reflect the new regulations, CN's asset use (demurrage) charges are published in the following tariffs, with links to the tariffs provided HERE:

CN 9000: carload shipments
CN 9003: dimensional shipments
CN 9004: unit trains

To ensure you always have the latest copy of these publications, we encourage you to register on CN's eBusiness tool at www.cn.ca and subscribe to CN's optional services' tariffs. If you have any questions regarding this change, please contact your Account Manager or CN's Sales Center at 1-888-MOVIN-CN. Please also notify us of any customer name or contact changes to ensure that our records are kept up to date.

Thank you in advance for your cooperation.

Sincerely,

Fiona Murray

CN, Vice-President, Corporate Marketing

¹ The new demurrage regulations were adopted by the STB in Ex Parte 707, *Demurrage Liability*, decision served April 11, 2014. The decision may be accessed on the STB's website at www.stb.dot.gov.



ATTACHMENT 2



May 29, 2019

Via Email and Overnight Mail

Jill K. Mulligan
V.P. and General Counsel
BNSF Railway Company
2500 Lou Menk Drive, 3rd Floor
Fort Worth, TX 76131

Re: *Oversight Hearing on Demurrage and Accessorial
Charges, STB Docket No. EP 754*

Dear Ms. Mulligan:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that BNSF Railway Company (“BNSF”) voluntarily agree that, if requested by a shipper and Kinder Morgan, BNSF will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Derek Taylor,
V.P., Southern Region
Canadian National Railway Company
17641 Ashland Ave
Homewood, IL 60430

Keith Courtoreille
Senior Manager, Service Delivery
Canadian National Railway Company
935 de La Gauchetiere Street, W
Montreal QC H3B 2M9
Canada

Re: *Oversight Hearing on Demurrage and Accessorial
Charges, STB Docket No. EP 754*

Dear Mr. Taylor and Mr. Courtoreille:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that Canadian National Railway Company (“CN”) voluntarily agree that, if requested by a shipper and Kinder Morgan, CN will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Pam Arpin
Assistant V.P. – Customer and Corporate Services
Canadian Pacific Railway Company
478 McPhillips Street
Winnipeg, MB, R2X 2G8
Canada

Re: *Oversight Hearing on Demurrage and Accessorial
Charges*, STB Docket No. EP 754

Dear Ms. Arpin:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that Canadian Pacific Railway Company (“CP”) voluntarily agree that, if requested by a shipper and Kinder Morgan, CP will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Arthur Adams
V.P. – Sales and Customer Engagement
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Re: *Oversight Hearing on Demurrage and Accessorial
Charges*, STB Docket No. EP 754

Dear Mr. Adams:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that CSX Transportation, Inc. (“CSXT”) voluntarily agree that, if requested by a shipper and Kinder Morgan, CSXT will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Mike Naatz
Executive V.P. and Chief Marketing Officer
Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Re: *Oversight Hearing on Demurrage and Accessorial
Charges, STB Docket No. EP 754*

Dear Mr. Naatz:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that Kansas City Southern Railway Company (“KCS”) voluntarily agree that, if requested by a shipper and Kinder Morgan, KCS will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Alan Shaw
Executive V.P. and Chief Marketing Officer

Ed Elkins
V.P. Industrial Products
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Re: *Oversight Hearing on Demurrage and Accessorial
Charges*, STB Docket No. EP 754

Dear Mr. Shaw and Mr. Elkins:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that Norfolk Southern Railway Company (“NS”) voluntarily agree that, if requested by a shipper and Kinder Morgan, NS will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area



May 29, 2019

Via Email and Overnight Mail

Kenny Rocker
Executive V.P., Marketing and Sales
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

Re: *Oversight Hearing on Demurrage and Accessorial
Charges, STB Docket No. EP 754*

Dear Mr. Rocker:

This letter is in follow-up to Surface Transportation Board (“STB” or “Board”) Chairman Ann Begeman’s request made during last week’s hearing in Docket No. EP 754 that the railroads advise the Board of voluntary actions being taken pertaining to their demurrage collection practices.

Kinder Morgan Terminals (“Kinder Morgan”) hereby requests that Union Pacific Railroad Company (“UP”) voluntarily agree that, if requested by a shipper and Kinder Morgan, UP will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.

Kinder Morgan respectfully requests that you **respond to this request by June 4, 2019.**

Sincerely,

Joshua Etzel
Vice President – Operations
Northern Area

ATTACHMENT 3



Jill K. Mulligan
Vice President and General
Counsel

BNSF RAILWAY COMPANY

Law Department
P. O. Box 961039
Fort Worth, TX 76161-0039

2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131-2828
Telephone: (817) 352-2353
Fax: (817) 352-2399
Jill.mulligan@bnsf.com

June 4, 2019

Via Email: Joshua_Etzel@kindermorgan.com

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

Re: Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754

Dear Joshua,

Thank you for your letter dated May 29, 2019. BNSF Railway Company (BNSF) welcomes the opportunity to continue working with Kinder Morgan to understand the root cause of and reduce demurrage at Kinder Morgan terminals across the BNSF network.

At the outset, I wish to note that BNSF already honors your request that we invoice several Kinder Morgan shippers directly for demurrage incurred at Kinder Morgan terminals. From February 2016 to May 2019, at Kinder Morgan's request, BNSF billed Kinder Morgan shippers approximately \$3.4M out of a total of approximately \$5.4M in demurrage charges incurred at Kinder Morgan terminals; the remaining \$2M in charges were invoiced directly to Kinder Morgan entities who presumably own the receiving locations, and those Kinder Morgan entities paid \$1.96M of the charges. Parsing out which bills go to which shippers/Kinder Morgan facilities is a highly manual job for BNSF personnel; this is a task undertaken in good faith and in an effort to work with Kinder Morgan and Kinder Morgan's customers.

To the extent a Kinder Morgan customer does not pay its demurrage charges, BNSF looks to Kinder Morgan as the receiving facility for payment. We have found that most of the time when a demurrage dispute is lodged by a Kinder Morgan customer, it is because there has been a miscommunication regarding the portion of landing spots at a receiving facility that have been designated by Kinder Morgan for the use of a particular

Joshua Etzel
June 4, 2019
Page 2

shipper, resulting in the over-releasing cars into the pipeline. We have identified 59 Kinder Morgan terminals at which Kinder Morgan receives rail cars from BNSF, listed on the attached Exhibit A. We have also identified 252 total origins from which shipments to these 59 Kinder Morgan terminals originate. The origins are listed on the attached Exhibit B.

In order for BNSF to understand how it can better help Kinder Morgan manage its pipelines, it would be helpful if Kinder Morgan could confirm for us the capacity (e.g., how many car spots) Kinder Morgan has at each of the BNSF-served facilities and how those are allocated to your shipping customers. Knowing facility capacity and how cars are being directed to the various facilities could help both Kinder Morgan and BNSF in diagnosing the root cause of the demurrage charges that Kinder Morgan and its customers are incurring.

Please note that, like all receivers, Kinder Morgan does have full access to BNSF's tools and has visibility into in cars being released from origin destined to Kinder Morgan facilities. BNSF personnel stand ready to provide additional training to your local teams.

Sincerely,



Jill K. Mulligan
Enclosures

Highly
Confidential
Pages Omitted



Kathryn J. Gainey
Counsel, U.S. Regulatory Affairs

601 Pennsylvania Avenue, NW
Suite 500, North Building
Washington, DC 20004
T 202-347-7840

Kathryn.Gainey@cn.ca

June 6, 2019

Joshua Etzel
Vice President – Operations
Northern Area
Kinder Morgan, Inc.
1001 Louisiana St., Suite 1000
Houston, TX 77002

Re: *Oversight Hearing on Demurrage and Accessorial Charges*, STB Docket No. EP 754

Dear Mr. Etzel,

I write in response to your letter to CN dated May 29, 2019 requesting that CN agree upon request to provide separate invoices and to bill a shipper directly for demurrage without requiring Kinder Morgan to assume responsibility for any unpaid demurrage assessments.

As you know, CN and Kinder Morgan are in the midst of litigating a dispute pertaining to Kinder Morgan's unpaid demurrage charges. CN in good faith agreed to stay its demurrage litigation against Kinder Morgan and explored with Kinder Morgan whether third-party agreements were feasible. Despite the efforts of the parties, most of Kinder Morgan's customers either refused or did not respond. In the few instances where Kinder Morgan's smaller customers expressed interest, Kinder Morgan refused CN's request that Kinder Morgan be responsible in the event its customer did not pay the demurrage invoice. The parties were unable to reach agreement in the settlement discussions, and litigation has resumed.

Kinder Morgan, as the railcar receiver with proper notice of CN's demurrage tariff, is responsible for demurrage charges under 49 C.F.R. § 1333.3, and Kinder Morgan is in the best position to minimize demurrage liability by managing its pipeline, promptly ordering in cars from Glenn Yard, and expediting unloading of cars so empties can be pulled and more loads can be placed. This is in the interests of all participants in the supply chain, including your customers.

Kinder Morgan of course is free to negotiate agreements for payment of demurrage charges with its own customers as the Surface Transportation Board's decision in Ex Parte 707 contemplates.

Joshua Etzel
June 6, 2019
Page 2

Sincerely,

/s/ Kathryn Gainey

Kathryn J. Gainey

cc: Richard Sanders



Pam Arpin
AVP Customer & Corporate Services
Network Service Centre

O 204-947-8202
C 204-998-7877
E pam_arpin@cpr.ca

June 4, 2019

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

Re: Demurrage Practices at CP

Dear Mr. Etzel:

I am in receipt of your letter and request of May 29, regarding demurrage and Kinder Morgan.

From our perspective the relationship with Kinder Morgan has been bilateral and cooperative. I am unaware of any major issues. The issues that have arisen have been handled fairly and reasonably on a case-by-case basis. In one instance in March of this year Kinder Morgan correctly noted that CP spotted cars that were not ordered. No demurrage was associated with these privately owned cars. In April, Kinder Morgan disputed potential demurrage charges on the basis that it was adversely affected by flood waters. We agreed, and cancelled a \$6,385 demurrage pre-bill in the pre-invoice stage.

Apart from demurrage, but of relevance to the health of our relationship, CP on its own accord put Kinder Morgan's switching charges on temporary hold due to the flooding at Muscatine, Iowa in order for Kinder Morgan to work its way out of a difficult situation. That hold will soon be released but the point is CP listens.

We believe, as shown here, a fair minded case-by-case approach works best for both railroad and receiver. We also note, from our perspective, Kinder Morgan is in a good position to protect itself by addressing in its commercial contract with its shippers, liability for demurrage charges Kinder Morgan attributes to its shippers' loading and unloading practices.

If particular concerns arise, please do not hesitate to reach out to me or my staff.

Sincerely,

A handwritten signature in black ink that reads "Pam Arpin".

Pam Arpin
Assistant Vice President



CSX Transportation, Inc.
500 Water Street, J875
Jacksonville, Florida 32202
Tel. 904-366-4191
Fax 904-366-4191
Arthur_Adams@csx.com

Arthur L. Adams, Jr.
VP SALES & CUSTOMER ENGAGEMENT

June 4, 2019

Via Email and Overnight Mail

Joshua Etzel
Vice President Operations – Northern Area
Kinder Morgan Terminals
78 Lafayette Street
Carteret, NJ 07008
Joshua_Etzel@kindermorgan.com

Re: Oversight Hearing on Demurrage and Accessorial Charges, STB Docket No. EP 754

Dear Mr. Etzel:

Thank you for your May 29, 2019 letter regarding the recent hearing in the above-referenced Surface Transportation Board (“Board”) docket. For information, CSX intends to file comments with the Board addressing Chairman Begeman’s request.

As you know, every partner across the supply chain has a responsibility to promote network fluidity, and CSX fully expects all parties to the waybill to proactively manage their pipelines towards that goal. That said, if Kinder Morgan has concerns about specific locations or specific shippers from a demurrage perspective, we are happy to have a fact-based conversation and seek meaningful resolution for all parties involved. We have demonstrated our willingness to work through these issues in the past and will continue to do so in the future.

Kinder Morgan is a valued CSX customer and we greatly appreciate your perspective on these challenging issues.

Sincerely,


Arthur Adams



KANSAS CITY SOUTHERN

www.kcsouthern.com

MIKE NAATZ
EXECUTIVE VICE PRESIDENT
CHIEF MARKETING OFFICER

June 4, 2019

VIA Email and Overnight Mail

Joshua Etzel
Vice President – Operations
Northern Area
Kinder Morgan, Inc.
1001 Louisiana St, Suite 1000
Houston, TX 77002

Re: Response to Your Letter Dated May 29, 2019

Dear Mr. Etzel:

This letter is in response to your letter dated May 29, 2019 regarding the *Oversight Hearing on Demurrage and Accessorial Charges*, STB Docket No. EP 754 and your subsequent request to provide alternative billing and invoicing solutions for demurrage. Thank you for taking the time to raise your concern and offer a potential alternative to the current arrangement.

Kinder Morgan Terminals (“Kinder Morgan”) specifically requested that Kansas City Southern (“KCS”) “voluntarily agree that, if requested by a shipper and Kinder Morgan, KCS will 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 Kinder Morgan to assume responsibility for any unpaid demurrage assessment as a condition of such agreement.” Recognizing that your requested change involves multiple parties and may result in complications to other parties beyond a specific shipper and Kinder Morgan, KCS is willing to work with Kinder Morgan to identify alternatives to the current processes and agreements on a case-by-case basis.

At the time of this writing, various attempts to contact one another by phone have proven to be unsuccessful. However, we welcome the opportunity to speak to you about this matter in more detail with the objective of finding a better way of conducting business. I can be reached via phone at 816.983.1467.

Sincerely,

A handwritten signature in black ink that reads 'Michael Naatz'.

Mike Naatz

Cathedral Square • 427 West 12th Street • Kansas City, MO 64105