

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36131

UTAH CENTRAL RAILWAY COMPANY, LLC—PETITION FOR DECLARATORY
ORDER—KENCO LOGISTIC SERVICES, LLC, KENCO GROUP, AND SPECIALIZED
RAIL SERVICE, INC.

Digest:¹ In this demurrage proceeding, the Board finds, on the record presented, that there is no basis for concluding that the rates in the applicable demurrage tariffs or the method of calculating demurrage are unreasonable or inconsistent with the purposes set forth in 49 U.S.C. § 10746; that the challenged demurrage rules and practices of Utah Central Railway Company, LLC (UCRY), are unreasonable or violated 49 U.S.C. § 11101; or that UCRY's charges resulted from the unreasonable bunching of rail cars for which UCRY was responsible.

Decided: March 20, 2019

This declaratory order proceeding arises out of two actions initiated by Utah Central Railway Company, LLC (UCRY), in the U.S. District Court for the District of Utah, Northern Division.² UCRY, a Class III rail carrier, brought those actions to collect unpaid demurrage charges from Specialized Rail Service, Inc. (SRS), and from Kenco Logistic Services, LLC and Kenco Group (together, Kenco), (collectively, Respondents), which operate warehouse/distribution facilities.

SRS and Kenco filed unopposed motions to stay the district court proceedings and refer the railroad demurrage disputes to the Board. On April 17, 2017, the motions were granted and the district court cases stayed pending the conclusion of this proceeding.

On June 27, 2017, UCRY filed a petition for a declaratory order with the Board, seeking eight specific findings. (UCRY Pet. 4-5.) In general, UCRY asks the agency to find that certain

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The district court proceedings are captioned Utah Central Railway Company, LLC v. Specialized Rail Service, Inc., Civil No. 1:17-cv-00019-RJS (filed Feb. 6, 2017), and Utah Central Railway Company, LLC v. Kenco Logistic Services, LLC and Kenco Group, Civil No. 1:17-cv-00020-DAK (amended complaint filed Feb. 27, 2017).

unpaid demurrage charges against SRS and Kenco are properly charged, reasonable, and consistent with the purposes set forth in 49 U.S.C. § 10746; that UCRY is not responsible for any bunching of rail cars;³ and that UCRY's switching services did not constitute a violation of 49 U.S.C. § 11101. (UCRY Pet. 4-5.)

On September 14, 2017, SRS and Kenco each filed a response to the petition. Kenco seeks findings that the demurrage charges and the method by which they were assessed are unreasonable and inconsistent with the purposes set forth in § 10746 and that UCRY's switching services violated § 11101. (Kenco Reply 12, Sept. 14, 2017.) SRS asks the Board to deny the relief UCRY seeks. (SRS Reply 4-8, Sept. 14, 2017.) Both parties incorporate the other's response and state that, although the specific demurrage charges are different, many of the general issues addressed in their respective pleadings are equally applicable to both. Their position is that many of the charges resulted from delays caused not by Respondents but rather by bunching; breakdowns in UCRY's equipment; UCRY's inability to handle cars delivered by Class I railroads; and UCRY's failure to switch cars as promised or to provide sufficient switching services. Respondents also argue that UCRY failed to prove that the demurrage charges at issue are reasonable. (SRS Reply 2-4, Sept. 14, 2017; Kenco Reply 3-5, 7-12, Sept. 14, 2017.)

On October 26, 2017, the parties informed the Board that they had agreed to discovery and a procedural schedule. On November 27, 2017, the Board requested the parties explore whether this matter could be resolved informally and consider participating in Board-sponsored mediation or arbitration. After the parties declined mediation or arbitration on December 12, 2017, the Board instituted this declaratory order proceeding on December 14, 2017, and adopted the procedural schedule that the parties had jointly proposed, which included a period for discovery. The Board later revised the procedural schedule on multiple occasions on requests by the parties.

On April 20, 2018, UCRY filed its opening statement. On May 1, 2018, the Board granted in part unopposed motions filed by SRS and Kenco to compel discovery and to deem the requests for admissions propounded by Respondents as admitted because UCRY did not timely respond to the requests. That decision found that UCRY was deemed to have admitted those requests,⁴ and, pursuant to decisions served on May 15, 2018, and May 31, 2018, those admissions remain in effect.

³ The parties' pleadings refer interchangeably to "bunching" and "stacking" without providing a definition. The Board will use the conventional definition of "bunching" articulated in past decisions, namely, "rail car deliveries that are not reasonably timed or spaced." See Demurrage Liability (Demurrage Liability 2014), EP 707, slip op. at 23 (STB served Apr. 11, 2014).

⁴ That decision also deferred ruling on Respondents' requests for attorneys' fees regarding the discovery matters. The Board does not typically award attorney's fees and finds that doing so is not justified here. See Springfield Terminal Ry.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42108, slip op. at 2 & n.2 (STB served June 22, 2009).

Kenco and SRS filed their replies to UCRY's opening statement on, respectively, June 14 and June 15, 2018. UCRY filed its rebuttal on July 19, 2018.

BACKGROUND

UCRY operates approximately 34 miles of rail line in and around Ogden, Utah. UCRY interchanges traffic with Union Pacific Railroad Company (UP), and with Utah Railway for BNSF Railway Company (BNSF), in Ogden. (UCRY Opening 5.) UCRY, a subsidiary of Patriot Rail Company LLC, provides exclusive rail switching services at the Business Depot Ogden (BDO). (*Id.* at 5 & Ex. A (V.S. Durant) at 1.)

UCRY operates one daily weekday shift with a crew working Monday through Friday from 8:00 a.m. to 4:00 p.m. UCRY receives cars from UP on Sundays, Tuesdays, and Thursdays, and from BNSF on Wednesdays. UCRY states that it has no control over when cars will be delivered by UP and BNSF for interchange or over the number of cars that will be delivered. UCRY states that it uses ShipperConnect, a software program commonly used in the rail industry, to track cars in real time and to provide its crews with updated information on when UP and BNSF will arrive at interchange. (*Id.* at 5.)

SRS and Kenco operate warehouse/distribution facilities within the BDO. According to SRS, its rail dock can hold six to seven rail cars depending on the length of each car. SRS states that it receives approximately 60 to 70 rail cars per month from various suppliers. Shipments originate on Class I railroads and are interchanged to UCRY in the Ogden area by UP and BNSF.⁵ (SRS Reply 2-3, June 15, 2018.) According to Kenco, the unloading dock at its facility can accommodate six rail cars. (Kenco Reply 5, June 14, 2018.)

As noted above, UCRY went to court to collect unpaid demurrage charges from SRS and Kenco. Demurrage is 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 car detention to encourage the efficient use of rail cars in the rail network.⁶ UCRY contends that SRS owes demurrage charges totaling \$84,720 under invoices dated between March 2014 and September 2016; that Kenco owes demurrage charges totaling \$106,980 under invoices dated between March 2015 and October 2016; and that both Respondents owe additional charges including interest due under the governing tariffs.⁷

⁵ Although Utah Railway makes the physical interchange, BNSF is responsible for when the cars arrive at interchange, (UCRY Opening 5 n.2), and the parties' pleadings describe these movements as interchanges from BNSF.

⁶ 49 C.F.R. § 1333.1; see also *N. Am. Freight Car Ass'n v. BNSF Ry.*, NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007), *aff'd sub nom. N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008); *Chrysler Corp. v. N. Y. Cent. R.R.*, 234 I.C.C. 755, 759 (1939).

⁷ UCRY initially sought to recover \$84,930 from SRS but, as described below, has withdrawn the demurrage claims relating to three cars. Copies of the SRS and Kenco invoices

(continued . . .)

(UCRY Opening 9; UCRY Rebuttal 37.) The applicable tariffs are: UCRY Local Freight Tariff 6004-2 (UCRY 6004-2) (effective Sept. 30, 2013 through Apr. 9, 2014); UCRY Local Freight Tariff 6004-3 (UCRY 6004-3) (effective Apr. 10, 2014 through Oct. 31, 2015); and Patriot Rail Company, LLC Freight Tariff No. 1000 (PRC 1000) in conjunction with UCRY Charge Catalog 2000 (effective Nov. 1, 2015 through Dec. 31, 2016).⁸

UCRY allows 48 hours of free time before demurrage charges are assessed. Under UCRY 6004-2 and UCRY 6004-3, the 48-hour free time period begins at 7:00 a.m. on the day following placement (or constructive placement)⁹ for loading and unloading cars, excluding holidays. Under PRC 1000, the 48-hour free time period begins at 12:01 a.m. following placement (or constructive placement), excluding both weekends and holidays.¹⁰ Once the 48-hour free time period expires, demurrage begins to accrue and continues until the car has been released to UCRY. (UCRY Opening 7.) All three tariffs state that cars are to be released through ShipperConnect, although the tariffs provide alternatives that allow cars to be released by telephone, fax, or email for a prescribed service fee. PRC 1000, which took effect November 1, 2015, also requires car placement requests to be submitted through ShipperConnect but states that requests made to the Customer Service Center via telephone, email, or fax will be accepted for a prescribed fee.¹¹ There is no allegation or evidence before the Board that Respondents made use of these alternative methods for releasing or requesting placements of cars.

(. . . continued)

are attached to UCRY's opening statement at Exhibit A, Appendix B; the Kenco invoices are also attached to Kenco's Sept. 14, 2017 reply at Exhibit E.

⁸ Pertinent excerpts of the tariffs are attached to Kenco's September 14, 2017 reply to the petition at Exhibit C and to UCRY's opening statement at Exhibit A, Appendix A.

⁹ Constructive placement occurs when a rail car is available for delivery but cannot actually be placed at the receiver's destination because of a condition attributable to the receiver (for example, because of lack of room on the tracks in the receiver's facility). The railroad holds the car and sends notice of the hold to the receiver. See Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc., FD 34920, slip op. at 3 n.6 (STB served May 30, 2008).

¹⁰ For example, if a car is placed on Thursday afternoon, demurrage does not begin until 12:01 a.m. Tuesday, giving the receiver four days after delivery to clear the track before demurrage charges start to accrue, and four credit days would be reflected on the invoice (48 hours of free time plus Saturday and Sunday). (UCRY Opening 7.)

¹¹ *Id.*, Ex. A, App. A, UCRY 6004-2 (Item 1250) & PRC 1000 (Section 1.11); Kenco Reply, Sept. 14, 2017, Ex. C, UCRY 6004-3 (Item 1250).

UCRY states that Kenco and SRS are both closed-gate locations with limited track capacity and must notify UCRY when they can receive constructively placed cars.¹² (UCRY Opening 6.) If no cars are released or ordered, UCRY does not switch cars for the customer because no work shows up on the train crews' paperwork. (*Id.* at Ex. B (V.S. Tharp) at 3.) UCRY also states that when an impediment not caused by Kenco or SRS prevented spotting of cars, Respondents were not charged demurrage until the impediment was removed. (*Id.* at 14.)

SRS and Kenco contend that UCRY is not entitled to recover the requested demurrage charges because the delays in getting cars placed and released were caused not by them, but rather by UCRY itself. In particular, they argue that "UCRY's [inadequate] infrastructure, breakdowns, failure to communicate, and generally poor service" were the causes of the delays that were experienced (SRS Reply 7-8, June 15, 2018); that UCRY missed switches and provided untimely switching in violation of an "agreed upon service plan" (*id.* at 8 (citing Ex. 9 (Armstrong Decl.) ¶ 3)); that failure to switch cars, bunched cars, and problems with ShipperConnect caused significant demurrage (Kenco Reply 6-7, June 14, 2018 (citing Ex. A (Fisher Decl.) ¶ 21)); and that "UCRY did not provide Kenco with adequate training, if any, on how to use ShipperConnect to track inbound deliveries" (*id.* at 4 (citing Ex. A (Fisher Decl.) ¶ 8 & Ex. B (Fisher Affdv.) ¶ 16)). Kenco also contends that when adequate switching services were provided, even when cars were inappropriately delivered in bunches, it was able to unload them without incurring demurrage. (*Id.* at 2-3, 15.)

UCRY contends that its demurrage charges were appropriate. UCRY says that it provides Respondents with one switch a day when Respondents notify UCRY that either (1) cars are empty and ready to be removed, or (2) there is space available at their facilities to deliver loaded cars. (UCRY Rebuttal 5-6.) UCRY states that, if Kenco or SRS cannot take delivery of the cars offered by UCRY, then UCRY must constructively place the cars until Respondents request that the cars be spotted to their respective facilities through ShipperConnect. (*Id.* at 6.) UCRY argues that failures by Kenco and SRS to use ShipperConnect, even though they were offered training, caused cars to remain constructively placed and led to additional demurrage. (*Id.* at 6, 9, 12.) UCRY explains that during the relevant period, requests for a switch needed to be made by 8:00 a.m. to guarantee same-day service, and that Respondents generally did not make requests prior to the 8:00 a.m. cutoff. (*Id.* at 4 & n.5, 10-12 (citing Ex. B (SRS Demurrage Chart) & Ex. C (Kenco Demurrage Chart).) With respect to the allegations of breakdowns, UCRY acknowledges that it experienced maintenance and operating issues during the winter of 2015-16 that impacted SRS, but states that, as explained in its opening statement, UCRY did not charge SRS demurrage during the time periods associated with these problems. (*Id.* at 12-13.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp.

¹² Absent a request for actual placement of specific cars, UCRY will place the most easily accessible cars on the appropriate siding the next time it switches cars after receiving notice that cars have been released. (UCRY Rebuttal 8.)

Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). In resolving this controversy, the Board finds, as explained below, that the rates in the applicable demurrage tariffs, the method of calculating demurrage, and UCRY’s demurrage rules and practices, have not been shown to be unreasonable or inconsistent with the purposes set forth in 49 U.S.C. § 10746.¹³ The Board also finds no basis in the record for a determination that UCRY’s practices violated 49 U.S.C. § 11101 or that UCRY charged demurrage when it was responsible for the bunching of rail cars.

Demurrage charges are subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage charges have both compensatory and punitive aspects and are intended to promote efficient use of rail resources. Demurrage Liability 2014, EP 707, slip op. at 2, 31.

Requests for Admissions

Before addressing the parties’ arguments about the propriety of the demurrage charges, the Board will address Respondents’ contentions concerning the requests for admissions deemed admitted by operation of law due to UCRY’s failure to respond.¹⁴ The admissions concede that: UCRY experienced maintenance issues in the winter of 2015-16;¹⁵ UCRY was “in a dispute regarding insufficient interchanges” with UP and BNSF during the timeframe during which demurrage was assessed;¹⁶ UCRY did not provide Respondents “with timely switches for all times during which” it is seeking demurrage;¹⁷ “some railcars” that UCRY constructively placed were not constructively placed “due to the fault of” Respondents, and UCRY experienced “bunching” on its track due to no fault of Respondents;¹⁸ during the period UCRY assessed

¹³ Where a railroad has initiated a proceeding to collect assessed demurrage charges, it has the burden of proof and therefore must provide evidence to establish actual or constructive dates of car placement and release and to show how the assessed charges were computed. See R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42102 et al., slip op. at 6 (STB served July 20, 2010). Respondents do not challenge the evidence presented in UCRY’s opening statement to make that showing. Respondents now have the burden to provide competent evidence that the assailed charges are unlawful based on the claims asserted by Respondents. See Savannah Port Terminal R.R., FD 34920, slip op. at 8 n.20. Respondents have not met that burden.

¹⁴ The requests for admissions are attached to SRS’s June 15, 2018 reply as Exhibit 1 and to Kenco’s June 14, 2018 reply as Exhibit C.

¹⁵ Req. for Admis. 2.

¹⁶ Req. for Admis. 3 & 4.

¹⁷ Req. for Admis. 5.

¹⁸ Req. for Admis. 6 & 7.

demurrage, it “placed more railcars than [Respondents] could handle at a given time”;¹⁹ UCRY “at times” assessed demurrage after being notified to switch cars at Respondents’ facilities;²⁰ the demurrage charges are higher than the corresponding car-hire fees levied against UCRY by the Class I railroads;²¹ and problems with ShipperConnect “contributed” to delayed deliveries to Kenco.²² Respondents argue that the admissions establish that UCRY’s attempt to collect any of the assessed demurrage is unreasonable. (SRS Reply 5, June 15, 2018; Kenco Reply 17-18, June 14, 2018.)

The Board disagrees with Respondents’ assertions that the admissions compel denial of the petition or a blanket determination that the assessed demurrage is unreasonable. The general propositions established by the admissions—many of which contain undefined or qualified terms or establish facts that do not resolve the dispute at issue—do not warrant a blanket finding of unreasonableness in this proceeding. Nor do they establish that any particular demurrage charges were unreasonable, because the requests are not tied to specific cars or movements and, as discussed below, Respondents presented no evidence that would otherwise enable the Board to make those determinations.

Reasonableness of Daily Demurrage Rates and Manner of Calculation

The tariffs allow 48 hours of free time, which commences at the specified time following placement and does not count holidays (and, under PRC 1000, weekends), for loading and unloading cars before demurrage begins to accrue. Under UCRY 6004-2 and UCRY 6004-3, once free time expired, UCRY charged demurrage of \$40 per day for the first four days, \$55 per day for the next two days, and \$70 per day for each day thereafter until the car is released. Once free time expired under PRC 1000, UCRY charged demurrage of \$70 per day.²³

Respondents take exception to the amount of the daily charge insofar as it exceeds the car-hire expense incurred by UCRY for rail cars subject to UCRY’s demurrage assessment. (See SRS Reply 6, June 15, 2018; Kenco Reply 16, June 14, 2018.) But it is well settled that, because they serve different purposes, demurrage and car-hire charges need not be equivalent. Whereas car-hire charges compensate a car owner solely for the use of that car, demurrage is a charge that “both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time . . . **and** serves as a penalty for undue car detention to encourage the

¹⁹ Req. for Admis. 8.

²⁰ Req. for Admis. 9.

²¹ Req. for Admis. 10.

²² Req. for Admis. 11 (propounded only by Kenco).

²³ UCRY Opening, Ex. A (V.S. Durant) at 2; *id.* at App. A (tariffs), UCRY 6004-2, Charge Schedule, Item 3950, UCRY 6004-3, Item 3950 & PRC 1000, Charge Schedule, Item 3.01-3.03. The 48-hour free time period commenced at 7:00 a.m. following placement under UCRY 6004-2 (Item 1300) and UCRY 6004-3 (Item 1300), and at 12:01 a.m. under PRC 1000 (Item 1.12).

efficient use of rail cars in the rail network.” 49 C.F.R. § 1333.1 (emphasis added); see N. Am. Freight Car Ass’n, NOR 42060 (Sub-No. 1), slip op. at 8; Turner, Dennis & Lowery Lumber Co. v. Chicago, M. & St. Paul Ry., 271 U.S. 259, 262 (1926). The Board finds that the Respondents have not shown that the daily demurrage charges set forth in the tariffs are unreasonable or inconsistent with the purposes of § 10746.

Respondents do not challenge the provisions that govern the mechanics of how demurrage is calculated under the tariffs. However, Kenco argues that it should not be charged demurrage under the tariffs for cars held in constructive placement because actual placements were not prevented by a condition attributable to Kenco. (Kenco Reply 11-12, June 14, 2018.) If Respondents had demonstrated particular instances in which they could not properly request car placements as required by the tariffs, it would be appropriate to consider their claims involving the effect of bunching or inadequate switching on cars held in constructive placement in those particular situations. Respondents made no such showing here. The Board finds, on the record presented, that there is no basis for a conclusion that the manner in which demurrage was calculated is unreasonable or inconsistent with the purposes of § 10746.

Reasonableness of Demurrage Rules and Practices

The governing tariffs, which Respondents do not specifically challenge, required Respondents to use the ShipperConnect software system (or one of the described alternative methods) to release cars, and to place orders for cars as of November 1, 2015.²⁴ Pursuant to authorizing provisions in the tariffs, a cut-off time for placing orders (8:00 a.m.) had to be met to guarantee same-day switching service.²⁵ But on this record, it appears that cars remained in constructive placement and accrued demurrage because Respondents (i) did not use ShipperConnect (or another authorized method) to request placements²⁶ and (ii) did not timely place orders to guarantee same-day switching service.²⁷

Kenco argues that it was unable to use ShipperConnect because the system malfunctioned “at times,” and that UCRY failed to adequately train Kenco on how to use ShipperConnect as a tool to track inbound deliveries. (Kenco Reply 18, June 14, 2018.) But Kenco does not provide any evidence to substantiate these claims or explain when ShipperConnect might have malfunctioned, how such malfunctions impacted the demurrage charges specifically sought in

²⁴ Kenco Reply, Sept. 14, 2017, Ex. C, UCRY-3 (Item 1250) & PRC 1000 (Section 1.11); UCRY Opening, Ex. A, App. A, UCRY 6004-2 (Item 1250).

²⁵ Kenco Reply, Sept. 14, 2017, Ex. C, UCRY-3 (Item 4600) & PRC 1000 (Section 7.04); UCRY Opening, Ex. A, App. A, UCRY 6004-2 (Item 4600); UCRY Rebuttal 4 & n.5, 10; id. at Ex. A (V.S. Durant) at 5.

²⁶ UCRY Rebuttal 12, 20-21, 28-29; id. at Ex. B (SRS Demurrage Chart); id. at Ex. C (Kenco Demurrage Chart).

²⁷ UCRY Rebuttal 10-11; id. at Ex. A (V.S. Durant) at 5; id. at Ex. B (SRS Demurrage Chart); id. at Ex. C (Kenco Demurrage Chart).

UCRY's collection case, or whether Kenco tried to use other methods permitted under the tariffs to release cars or request placements. Because Kenco has not submitted such evidence, the Board cannot find that any of the demurrage charges assessed to Kenco are attributable to any lapses involving ShipperConnect.

Kenco also asserts that "the ShipperConnect system does not allow a shipper to release a car on the day that it is actually placed, preventing Kenco from stopping the demurrage clock and potentially delaying the next switch." (*Id.*) Kenco contends that this alleged shortcoming is an unreasonable practice that violates the tariffs, which do not preclude same-day releases of cars. (*Id.*) However, Kenco produced no evidence to substantiate this claim, which UCRY disputes and refuted in its rebuttal.²⁸ (UCRY Rebuttal 12; *see* UCRY Opening, Ex. A, App. B (*see* SRS invoices 101510, 101599, 101331, 101565 and 101706) & UCRY Rebuttal, Exs. B & D (corresponding entries on SRS Demurrage and Movement Charts), which collectively indicate multiple examples of same-day releases through ShipperConnect.)

On the record presented, Respondents have not shown that UCRY's practices pertaining to the use of ShipperConnect are unreasonable or inconsistent with the purposes set forth in § 10746 and the Board's related regulations, namely, to encourage the efficient use of rail cars to promote fluidity in the system. *See Demurrage Liability*, EP 707, slip op. at 13 (STB served May 7, 2012); *Demurrage Liability 2014*, EP 707, slip op. at 15, 31. Nor is there a basis for the Board to conclude that the 8:00 a.m. deadline for requests to guarantee a same-day switch is unreasonable. Moreover, the record indicates that Respondents were able to stop demurrage from accruing on both released and constructively placed cars by placing a request through ShipperConnect, even when UCRY could not respond immediately to the request. (*See* UCRY Opening 8, 12; UCRY Rebuttal 27.)

SRS claims that in certain cases demurrage accrued because UCRY provided untimely switches in violation of an alleged "agreed upon service plan," (SRS Reply 8, 18, June 15, 2018), which SRS did not submit or describe in any detail, and the existence of which UCRY denies (UCRY Rebuttal 27). Such agreements are relevant under Board precedent,²⁹ but, as no such agreement has been included in the record of this proceeding, the Board cannot consider the issue further.

The record also does not support SRS's claims that UCRY improperly provided "late switches" (defined by SRS as switches made after 2:00 p.m.). (SRS Reply 13, June 15, 2018;

²⁸ SRS identifies one instance in which UCRY charged \$70 each for three cars that SRS unloaded the same day they were spotted (July 5, 2016) but was unable to release as empty because ShipperConnect did not show the cars as placed. (SRS Reply 17, June 15, 2018.) As noted above, UCRY has agreed to remove the \$210 in charges for these cars. (UCRY Rebuttal 17, 33.)

²⁹ *See generally R.R. Salvage & Restoration, Inc.*, NOR 42102, slip op. at 5; *Savannah Port Terminal R.R.*, FD 34920, slip op. at 5-7; *Capitol Materials Inc.—Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry.*, 7 S.T.B. 576, 581-82, 584 (2004).

see generally *id.* at 8-10, 12-14.)³⁰ The tariffs do not specify a time by which switches were to occur, and SRS presented no evidence of an independent agreement establishing a specific time. And as UCRY notes, Respondents may have received switches later in the day for a variety of reasons, including cars arriving on interchange and UCRY attempting to accommodate a late request. (UCRY Rebuttal 19.) On the record presented, the Board cannot find that SRS's claims regarding UCRY's switches establish an unreasonable practice. See generally *Capitol Materials*, 7 S.T.B. 576-84.

Compliance with 49 U.S.C. § 11101

Kenco contends that UCRY violated 49 U.S.C. § 11101(a), which requires rail carriers “to provide transportation or service on reasonable request,” by failing to provide sufficient switching services. Kenco argues that UCRY should have refused to accept bunched deliveries from its Class I partners, but that, once UCRY accepted those cars, it had an obligation to provide more than one switch per day. (Kenco Reply 14, 17, June 14, 2018.) It asserts that, in any event, despite “repeated requests from Kenco to remove empty cars and bring a new set of full cars,” UCRY did not switch cars for Kenco on a daily basis. (*Id.* at 14.) According to SRS, UCRY capacity constraints led to bunching and “consistently” late and missed switches.³¹ (SRS Reply 8, 11, June 15, 2018.) UCRY argues in response that the law requires it to accept cars from its Class I connections, which its facility is capable of servicing; that Kenco and SRS did not use ShipperConnect or place timely switching requests on a consistent basis, which is why a daily switch may not have taken place; and that neither Kenco nor SRS provided any evidence that they requested UCRY to move cars and that UCRY refused. UCRY asserts that multiple daily switches are not needed because, when Kenco or SRS release a car or request spotting of a constructively placed car, demurrage, if accruing, stops on that car regardless of whether UCRY can handle the request. (UCRY Rebuttal 25-27; see *id.* at 10-11.)

³⁰ Nor did SRS present evidence that the demurrage credits UCRY issued for delays associated with UCRY's equipment and track problems during the winter of 2015-16 were inadequate. (See UCRY Opening 13-14; SRS Reply 12-13, June 15, 2018; UCRY Rebuttal 12-13.)

³¹ To support its claim about UCRY's lack of capacity, SRS contends that an email from a UCRY officer, Jack Burgess, attached to its June 15, 2018 reply as Exhibit 10, “specifies and confirms UCRY's inability to handle interchanges, sort cars, and perform switches to SRS on an ongoing basis due to the lack of track space and operations personnel.” (SRS Reply 11, June 15, 2018.) However, as UCRY notes in rebuttal, SRS misstates the content of the email (which does not state or show that UCRY was unable to serve SRS due to capacity constraints) and misdescribes its context (which shows on its face that Mr. Burgess sent the email at the request of SRS to describe UCRY's perspective on challenges encountered by UCRY and SRS due to infrequent and erratic switching from BNSF). (See UCRY Rebuttal 13-14; SRS Reply, June 15, 2018, Ex. 10.) SRS presented no evidence that capacity constraints prevented UCRY from providing service to SRS or resulted in improper demurrage charges.

To prove a violation of the common carrier obligation at 49 U.S.C. § 11101(a), the complaining party must show that the carrier failed to provide service upon reasonable request. Savannah Port Terminal R.R., FD 34920, slip op. at 8; Meyer v. N. Coast R.R. Auth., FD 34337, slip op. at 4 (STB served Jan. 31, 2007). Respondents have not made the necessary showing here.

Respondents' principal claim—that UCRY violated § 11101(a) by failing to provide switching services on reasonable request—has no record support.³² Neither Kenco nor SRS provide evidence that UCRY failed to respond to service requests submitted pursuant to the terms of the applicable tariffs (which do not establish a specific switching schedule). In particular, Respondents have not shown that UCRY ever declined to provide a daily switch requested pursuant to the tariffs' terms.

Respondents alternatively contend that when large numbers of cars arrive at interchange, UCRY should provide additional switches and demurrage should not be assessed until Respondents are able to receive the cars. There is no set rule establishing the number of switches a rail carrier is required to provide, as the Board looks at what is reasonable under the circumstances. Here, however, given Respondents' failure to present evidence that they properly requested switches, there is no basis for further consideration of this contention.

Bunching-Related Issues

UCRY states that, as the receiving carrier, it had no control over the timing or number of cars delivered to it by connecting Class I carriers.³³ (UCRY Opening 5, 11 & Ex. A (V.S. Durant) at 2-3.) Respondents do not contest UCRY's statements and acknowledge that they do not know whether UCRY or the Class I carriers caused the bunched deliveries Respondents say

³² Kenco asserts that it made "repeated requests" to UCRY "to remove empty cars and bring a new set of full cars." (Kenco Reply 14, June 14, 2018.) However, the numbered facts cited by Kenco (Nos. 10-12, id. at 5-6, and Nos. 20-24, id. at 7-8) do not substantiate this contention. Only one of the numbered facts (No. 24) refers to Kenco making requests for switches, and it simply states: "At times, UCRY assessed demurrage to Kenco on railcars sitting on Kenco's spur after Kenco notified UCRY to switch the railcar. (RFA No. 9)." (Id. at 8.)

Similarly, the Car Spot Analyses submitted by SRS, which purport to show "the cars that were missed due to a late or missed switch" and "what SRS's inventory should have been if no spots had been missed or late," do not identify cars or take into account UCRY's tariff provisions concerning car placement requests and the 8:00 a.m. cut-off to guarantee same-day switches. (See SRS Reply 9-10, June 15, 2018; id. at Ex. 9 (Armstrong Decl., Exs. A & B).)

³³ UCRY also notes that it did not wait to form trains or wait until a certain number of cars were received before attempting delivery to Respondents but, rather, attempted to deliver cars as they arrived. (UCRY Rebuttal 14, Ex. D (SRS Movement Chart), Ex. E (Kenco Movement Chart).)

they experienced.³⁴ (Kenco Reply 6, June 14, 2018; SRS Reply 6, June 15, 2018.) On the record presented, there is no evidence that UCRY was responsible for a bunching of cars with respect to the demurrage charges at issue.³⁵ And while Respondents contend that UCRY is at fault because it missed switches, the record indicates that, to the extent switches did not occur, it was due to Respondents' failure to request switches pursuant to the applicable tariffs. Therefore, there is no relief the Board can give on this record for claims of bunching.

It is possible that UP and BNSF may have held at least some cars destined for the BDO in order to form trains that would meet their own business goals. The overall effects of such possible actions, including effects on system fluidity, could be considered in demurrage cases. The actions of the Class I carriers, however, were not developed in this proceeding, even though the record before the Board indicates that Respondents may have had reason to believe the Class I carriers were the source of the bunched deliveries experienced at Ogden.³⁶ Receivers that believe they have been improperly assessed demurrage charges due to bunched deliveries made by a carrier that participated in the movement, but is not the delivering carrier, have avenues to seek recourse. Receivers could pursue recovery (including reparations for the assessed charges) against third-party carriers by seeking to join those carriers in demurrage civil actions or adjudications before the Board.³⁷ In such cases, receivers can attempt to show that a particular demurrage charge caused by bunching should be borne by the third-party carrier(s) rather than the receiver.³⁸

³⁴ Indeed, other statements in Respondents' pleadings suggest they believed the Class I carriers were often the source of bunching. (See SRS Reply 6, June 15, 2018 (arguing that "[t]he Class I railroads should not be permitted to bunch and cause delay, and then penalize UCRY for the naturally resulting delays" and that UCRY should not be permitted to turn delays caused by the Class I connecting railroads into a "cash grab") and record citations *infra* note 36.)

³⁵ See, e.g., *N. Am. Freight Car Ass'n*, 529 F.3d at 1172-73.

³⁶ See Kenco Reply, Sept. 14, 2017, Ex. B (Christopher Decl.), Ex. A thereto (letters dated Aug. 25, 2015, Sept. 3, 2015 & Mar. 3, 2016 from Kenco's Corporate Counsel); SRS Reply, Sept. 14, 2017, Ex. B (Armstrong Decl.), Ex. 6 thereto (thread containing Sept. 14, 2016 Armstrong email) & Ex. 7 thereto (thread containing Aug. 29, 2016 Armstrong email).

³⁷ Parties may also contact the Board's Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov), which is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

³⁸ The Board is aware that several Class I carriers have recently implemented changes to their demurrage and accessorial tariffs. To better understand the revenues that such charges generate, each Class I carrier has been asked to disclose its quarterly revenues from demurrage and accessorial charges, for each quarter of 2018 and 2019. See Dec. 17, 2018 letters from the STB Chairman to Class I railroads; see also Nov. 20 & Nov. 27, 2018 letters from the STB Chairman (noting that while improving asset utilization across carriers' rail networks is important, demurrage and accessorial tariffs need to be commercially fair). (The referenced letters are available in the Correspondence section of the e-library on the Board's website under Non-Docketed Public Correspondence.) The Board may need to consider future action to ensure
(continued . . .)

Waiver Issues

UCRY contends that it is entitled to service charges (interest) as set forth in the relevant tariffs for demurrage charges properly assessed by UCRY. (UCRY Opening 4.) Kenco contends that interest should be waived because UCRY did not provide a timely response to Kenco's demurrage disputes and thus should not be allowed to benefit by collecting interest resulting from UCRY's delay. (Kenco Reply 19, June 14, 2018.) Given the equitable issues presented by these claims and that they may be impacted by evidence not before the Board, the Board leaves these issues for resolution by the district court, if it so chooses. UCRY also contends, in rebuttal, that Respondents did not dispute the demurrage charges in specified invoices in compliance with tariff requirements and have therefore waived their rights to dispute these charges. (UCRY Rebuttal 28-30.) Because this was raised for the first time on rebuttal, the Board will not consider this argument.

It is ordered:

1. Respondents' requests for attorneys' fees in their March 2018 motions to compel UCRY to respond to discovery are denied.
2. The issues in this declaratory order proceeding are resolved as described above.
3. This decision is effective on its service date.
4. Copies of this decision will be mailed to:

The Honorable Dale A. Kimball
United States District Court for the District of Utah, Northern Division
351 South West Temple, Room 1.100
Salt Lake City, UT 84101

RE: No. 1:17-cv-00020-DAK

and

The Honorable Robert J. Shelby
United States District Court for the District of Utah, Northern Division
351 South West Temple, Room 1.100
Salt Lake City, UT 84101

(. . . continued)

that shippers, receivers, and smaller carriers are not being forced to bear the burden of delays due to actions not attributable to them.

RE: No. 1:17-cv-00019-RJS

By the Board, Board Members Begeman, Fuchs, and Oberman.