

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

248855

Ex Parte No. 759

DEMURRAGE BILLING REQUIREMENTS

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November 6, 2019
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COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) appreciates the opportunity to comment on the notice of proposed rulemaking in the above-captioned proceeding.¹ CSXT believes that the general principles motivating this rulemaking are valid and commendable. CSXT agrees with the Board that customers invoiced for demurrage or any other accessorial charge should have sufficient information to allow them to understand the basis of those charges and to dispute charges they believe to be inappropriate. This is a foundational element of CSXT’s focus on customer engagement across the organization. As CSXT explained in its testimony at the Ex Parte 754 demurrage public hearing earlier this year, it already provides extensive information to customers through ShipCSX, which is designed to help CSXT customers manage their shipments in a way that allows them to avoid demurrage charges in the first instance and to understand the basis of demurrage charges that occur.

While CSXT understands the Board’s goal of ensuring that all customers have adequate information to understand and dispute demurrage charges, the one-size-fits-all regulations that the Board proposes should not be adopted. Requiring that each demurrage invoice be accompanied by eleven categories of detailed information “provided on or with” the invoice is

¹ *Demurrage Billing Requirements*, Ex Parte No. 759 (served Oct. 4, 2019) (“Notice”). CSXT also joins the opening comments of the Association of American Railroads (“AAR”) in full.

unnecessary, fails to appreciate the mechanisms by which railroads communicate with their customers today, and could limit railroads' ability to innovate and provide efficient billing and dispute resolution. CSXT recommends the Board replace the proposed prescriptive rules in the Notice with a more flexible standard that requires railroads to make sufficient information available to customers, but allows railroads and customers to collaborate and innovate as to the best mechanisms to provide that information.

In addition, the Board should not proceed with its proposal to rewrite the rules for demurrage responsibility previously adopted in Ex Parte 707. In EP 707, the Board recognized that because the determination as to how many cars to send and/or receive is a business decision between shipper and receiver, those parties are in the best position to determine, as between the two, who caused demurrage to accrue and how to prevent it in the future. As a result, consistent with the purpose of demurrage, the Board correctly placed the responsibility for determining the cause of demurrage on the parties in the best position to do so, and did not interject rail carriers into the private business arrangements of shippers and receivers. The Board's current proposal to force railroads to be governed by contracts to which they are not a party is a sharp break from current law, which makes clear that the only contracts that alter the default rules are ones between "[a] serving carrier and its customers." 49 C.F.R. § 1333.2. Indeed, the proposal would not even allow a railroad to see the contract by which it would be governed, nor does it require any guarantee that these contracts will actually shift demurrage liability to shippers in all instances.

I. The Board Should Not Adopt Requirements to Prescribe Specific Detailed Information for Invoices and Instead Should Consider a More Flexible Standard.

CSXT shares the Board's desire that customers receive clear demurrage invoices and sufficient information to understand them, but the best way to accomplish that goal is for the Board to promote flexible market solutions. There is no need for the Board to re-regulate demurrage at the detailed level proposed in the Notice, particularly in light of the evidence that railroads are already providing shippers with innovative tools to help them manage their shipments to reduce demurrage in the first instance and understand the demurrage charges that do occur.

A. Detailed Invoice Regulations Are Contrary To Congressional Policy And Unsupported By the Record.

The Notice's proposal would turn the clock back to long-rejected policies that mandated paperwork requirements for demurrage bills and that prescribed inefficient nationwide practices. *See, e.g., Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail, Carriers of Property*, Ex Parte No. 285, 47 Fed. Reg. 58273 (1982). In that decision, the ICC held that Congress's instruction to eliminate unnecessary federal regulation meant that the Board should move away from demurrage rules that "generate needless paperwork and negate the efficiencies provided by the use of computers. The kind of recordkeeping required by these rules is clearly expensive, cumbersome, and unnecessary, and no longer serves to protect the public interest." *Id.* In place of its former demurrage recordkeeping rules, the ICC instead adopted a flexible standard:

Rail carriers must make and maintain records of all movements of freight cars which will readily reveal data sufficient to assess applicable charges and support all allowances required or authorized by lawful tariffs. Instead of the Commission prescribing the methods, the carriers should use any type of record compatible with their particular systems of recordation, and retain the records at whatever location and in whatever manner they desire. This approach is consistent with the Federal

policy of less government interference in the day-to-day operations of the rail industry.

Id. (emphasis added). The ICC's decision to eliminate its former regulations prescribing demurrage paperwork requirements was an important step in aligning the agency's regulations with Congress's deregulatory purpose. In contrast, the Notice's proposal to begin requiring every demurrage invoice issued by a Class I carrier to contain at least eleven detailed categories of information is a return to the sort of top-down regulation that Congress and this agency have long rejected.

The record contains no evidence from which the Board could justify this regulatory intervention. The Notice recounts complaints that certain shipper representatives made at the demurrage hearing about demurrage invoicing being insufficient. Notice at 5-6. But the Board was presented with no hard evidence illustrating such insufficiencies. (For example, no party produced examples of the supposedly deficient invoices.) Nor was the Board presented with any evidence that insufficient demurrage billing is a systemwide problem requiring national intervention (as opposed to a problem with an individual carrier's billing practices that could be addressed on an individualized basis, through STB's informal complaint process, or upon formal complaint).

On the contrary, the record showed the detailed information that CSXT and other railroads make available to their customers. As the following section demonstrates, CSXT provides ample information to its customers that enables them to assess demurrage charges and work to reduce demurrage by improving car utilization.

B. The Detailed Information And Sophisticated Tools That CSX Provides Customers Through ShipCSX Show That There Is No Need for Regulatory Intervention.

In the Notice, the Board invited comment on the extent to which other supply chain visibility tools or platforms would satisfy its proposed information requirements. CSXT showed at the Ex Parte 754 hearing that it gives its customers access to extensive information about their shipments and tools they can use to evaluate the basis for demurrage charges and to challenge charges they believe to be unwarranted. This information is generally provided through ShipCSX, a sophisticated software platform that CSXT has developed to enable its customers (including warehouses/receivers) to manage their supply chains and understand the basis for charges. CSXT believes the electronic tools it provides empower customers to manage their inventory so as to limit delays and associated charges, and are valued by customers as a significantly superior means of communicating information. Accordingly, CSXT submits to the Board that a platform such as ShipCSX provides rail users with access to more than the minimum information proposed to be required on or with an invoice.

Below are some screenshots that illustrate the kind of information that ShipCSX provides to customers. Figure 1 is an example of information that CSX makes available in the “Demurrage Charges” module of ShipCSX. This tool allows customers to view demurrage activity for the current month as well as the prior three months. As Figure 1 illustrates, this page presents most of the information categories that the Notice would require be presented “on or with” a demurrage invoice.² Information available on this page includes car identifying

² CSXT’s physical invoice already contains most of this information today. Because that document is already challenged in terms of available physical space, it would be difficult to add additional categories without significantly cluttering the invoice. However, as noted, CSXT makes the remainder of the information available to customers via ShipCSX.

information (including equipment id, car type, and commodity); time and date for all relevant events (including arrival, notification of arrival, customer order-in, placement, and release); and demurrage information (including total days, applicable credits, and missed switching allowances). The “Bill Type” listed in the gray banner will supply the customer with the type of cars (*e.g.*, Railroad or Private), the name, city and state of the customer location that is incurring the demurrage; and whether the bill is for empty or loaded cars.³

FIGURE 1

ShipCSX Quick Links You are [redacted] How tomorrow moves [CSX]

MyShipCSX Plan Ship Trace Pay Resources Admin Rail Partners Contact Us Log Out

You are here: ShipCSX > Pay > Demurrage Charges > Account Location MTD Information October 18, 2019 1:13 PM EDT Help

Account Location MTD Information Open Gate Yard Demurrage Set Options

Demurrage Charges - Details [Return to previous page](#) [Go to Plant Switch](#)

Use the table below to view information for specific details related to your demurrage charges. You can track demurrage for individual railcars by a variety of options, as well as obtain an overall total of demurrage days accrued. The information provided on this page may also be used in providing the necessary data for timely bill disputes within ShipCSX Account Invoices.

[Printable Version](#) [Download](#)

Cars detail event data for -October-2019 Total (121) Cars [Help](#)

Location: [redacted]

Bill Type: CSXT 8100-RAILROAD CARS FOR UNLOADING (RCIOZA1411304)

Filter Details: Select Column containing Filter Text: (*) Case Sensitive [Apply filter](#) [Show More Data](#)

Displaying (121) of (121) Cars

All	Equipment Id	Car Type	Commodity	Arrival Event	Notified	Ordered	Placed	Released	Demurrage Days	Load/Unload Credit	Missed Switch	Plant General Credit	Plant General Allowance
☐	FBOX [redacted]	A406	PULPBRD	08/20/19 14:49					0	0	0	0	0
☐	CSXT [redacted]	A402	SCPAPER	09/21/19 08:23	09/21/19 09:01	09/22/19 07:41	09/27/19 12:31	10/04/19 11:19	8	1	0	0	0
☐	FBOX [redacted]	A406	SCPAPER	09/21/19 08:23	09/21/19 09:01	09/22/19 07:41	09/27/19 12:31	10/07/19 07:04	11	1	0	0	0
☐	GTW [redacted]	A432	SCPAPER	09/21/19 08:23	09/21/19 09:01	09/26/19 07:16	10/08/19 11:23	10/08/19 15:07	5	1	0	0	0

ShipCSX also includes information on the consignee for individual shipments, which creates a simple mechanism for receivers that are terminals or warehousemen to identify the consignee for individual cars incurring demurrage. This can be done through the “Shipping Instructions” page, which allows customers to view the bill of lading for individual shipments.

³ CSXT separately bills demurrage for loaded and empty cars, so each invoice will be for only one type of car – empty or loaded.

As Figure 2 illustrates, this includes information on the date the waybill was created; the shipper, consignee and/or care of party if applicable; and the origin city and state. Customers can also follow links to view details of the audit trail or the waybill.

FIGURE 2

Shipping Instructions Status

Check the status of shipping instructions. Click on an individual BOL number to view details, edit, print or create new shipping instructions. Select multiple check boxes to e-mail or print several at a time.

Total Items: 1											
Actions: Select One GO Show: Last 7 days GO Refine Search New Search Page: 1 of 1											
All	Versions	Audit Trail	BOL Number*	Lead Equipment	Status	Date	Shipper / Consignee	Origin / Destination	Commodity Code (STCC)	Waybill Number	Sent By
	None	Details	CSXT 139452	CSXT 139452	Accepted	09/13/2019			4024115 - SCRAP OR WASTE PAPER, NOT		EDI

Actions: * Click on the BOL Number for a detailed view.

[Top of page](#)

ShipCSX also provides real-time access for customers to view car activity and demurrage charges on an overall location basis, allowing active fleet management and reducing the likelihood of unexpected demurrage liability. Figure 3 illustrates a typical view that a customer can use to monitor charges.

FIGURE 3

You are [REDACTED]
How tomorrow moves

[MyShipCSX](#)
[Plan](#)
[Ship](#)
[Trace](#)
[Pay](#)
[Resources](#)
[Admin](#)
[Rail Partners](#)
[Contact Us](#)
[Log Out](#)

You are here: [ShipCSX](#) > [Pay](#) > [Demurrage Charges](#) > Account Location MTD Information October 18, 2019 1:49 PM EDT [Help](#)

Account Location MTD Information

Open Gate Yard Demurrage

Set Options

Demurrage Charges [Go to Plant Switch](#)

Selecting the appropriate month and plant location will provide you with a summary or detailed information on your current estimated demurrage charges and car activity, allowing you to proactively monitor your fleet. As well as, provide you with a historical view of summary or detail information from past months.

[Printable Version](#) [Download](#)

Demurrage Charges [? Help](#)

Choose your month and plant location, then select submit to view your report.

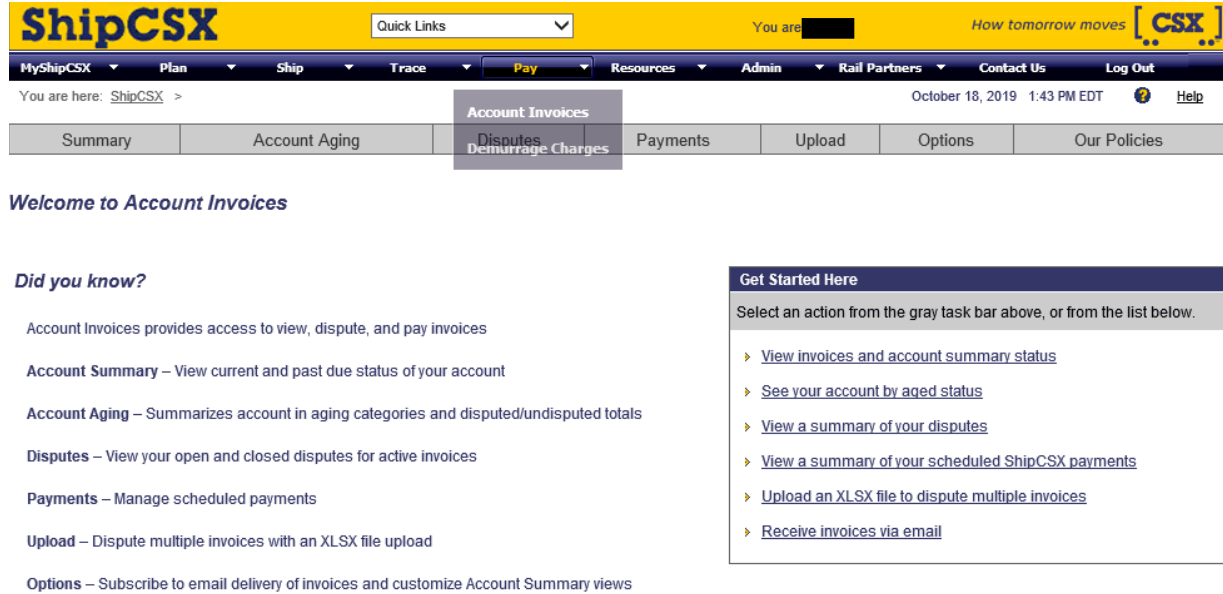
Month:
Location:

[Customer Lookup](#)

Demurrage Charges Location Summary Report							Total (2) Bill Types		? Help				
Clicking on a column heading results in ascending/descending sort views. View your Daily Summary Report by clicking on the calendar icon.													
Filter Summary: Select One							Apply filter						
												Displaying (2) of (2) Bill Types	
Month	Bill Type	Account Status	Total Cars	Car Events Calculated	Demurrage Days	Load/Unload Credits	Missed Switch Allowance	Plant General Credit	Plant General Allowances	Chargeable Days	Total Charges	Freight Bill Number	
October-2019	CSXT 8100-RAILROAD CARS FOR UNLOADING	OPEN	<u>1</u>	1	1	1	0	0	0	0	\$0.00		
October-2019	CSXT 8100-RAILROAD CARS FOR LOADING	OPEN	<u>105</u>	56	60	56	0	0	0	4	\$600.00		

When CSXT customers do not agree that charges are appropriate, ShipCSX also provides them with effective tools for disputing those charges. Figure 4 illustrates the page that customers use to view and dispute invoices and monitor the status of disputes.

FIGURE 4



Through ShipCSX, CSXT is already providing the information proposed to be included on invoices. CSXT submits that between its current physical invoice and the ShipCSX electronic platform, CSXT already provides sufficient information enabling customers “to verify the validity of the demurrage charges; [to] permit shippers and warehousemen to properly allocate demurrage responsibility amongst themselves; and [to] assist shippers and receivers in determining how to modify their behavior to encourage the efficient use of rail assets.” Notice at 8.

None of the Ex Parte 754 testimony that the STB cites as a basis for the proposed regulations are applicable to CSXT. The complaints by one shipper organization that customers receive “woefully inadequate documentation . . . to allow assessment and evaluation of the validity of the charges” plainly does not describe the kind of documentation that CSXT provides. *Id.* at 5. Similarly, the concerns expressed by some customers about not having information on the date and time of certain events are not true for CSXT—as Figure 1 illustrates. *Id.* Nor do

complaints by warehouse interests about lacking information on consignees apply to CSXT—Figure 2 illustrates that CSXT provides that information as well. *Id.* at 5-6.

Indeed, CSXT is currently going beyond the Notice’s requirements, by providing access to this information through a highly functional platform rather than on a traditional invoice. Further, CSXT frequently receives positive customer feedback about its eSolutions offerings, with customers preferring electronic access to this data. In short, there is no basis for the Board to impose uniform nationwide regulations regarding the content or form of transmission of demurrage invoices. The Board has no cause to take these re-regulatory steps in the face of plain evidence that rail customers already have access to sufficient information about the basis for potential demurrage charges.

C. If The Board Adopts Regulations in this Area, They Should Encourage Flexibility.

For the reasons outlined above, no additional Board regulations in this area are needed. Long before the Board instituted either this proceeding or the Ex Parte 754 proceeding, CSXT’s commitment to the customer experience motivated it to develop informative and user-friendly customer tools that go well beyond the Notice’s proposed requirements. Even if some other railroad has issued incomplete or otherwise deficient invoices at some time, the solution is not for the Board to adopt nationwide requirements prescribing eleven categories of detailed information that must be included on or with every demurrage invoice issued by a Class I railroad. At most, the Board should make clear that railroads have an obligation to provide customers with sufficient information to evaluate the charges assessed against them.

If the Board nonetheless mandates that certain categories of information be made available to customers being billed for demurrage, the Board should make clear that making

information available on an electronic platform is sufficient to comply with the rule and that railroads are not required to duplicate all such information on an invoice.

II. The Board Should Clarify What Constitutes “Appropriate Action”

The Notice also proposes to add a provision to the Part 1333 regulations requiring that “[p]rior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that charges are accurate and warranted.” While CSXT does not disagree with the sentiment behind this requirement, CSXT is concerned that this language could produce unintended consequences in the form of litigation over whether charges are “accurate” or “warranted.” Further, the Board does not explain what “appropriate action” means, leaving the possibility that any railroad action might fall short of this undefined standard.

It is certainly true that some demurrage invoices may include errors—just as rail customers doubtless generate the occasional inaccurate invoice in their lines of business. But there has been no showing that this is a nationwide problem that requires a sweeping regulatory intervention, or that there is something unique about demurrage billing that would justify imposition of a new regulation aimed at invoice accuracies and warranties (whatever that may mean).

III. The Board Should Not Adopt The Proposal To Allow Receivers to Reassign Demurrage Responsibility Without Railroad Consent.

The Board’s proposal to allow railcar receivers to require railroads to bill other parties for the demurrage incurred at that receiver location without railroad consent should not be adopted. This proposal is not consistent with the law or purpose of demurrage, and it would constitute a one-sided regulatory change that would (1) improperly interject rail carriers into private demurrage disputes between shippers and receivers and (2) allow receivers to escape liability for the delays they cause.

To be clear, CSXT does not object to entering contracts that alter default demurrage responsibilities—CSXT rather objects to being forced to alter demurrage arrangements due to *contracts to which it is not a party*. CSXT has always been willing to consider alternative demurrage billing arrangements when intermediary receivers and their shipper customers are mutually proposing a different approach. But CSXT considers these arrangements on a case-by-case basis, and only when they are consistent with the primary purpose of demurrage to incentivize efficient car utilization. CSXT’s experience is that in many situations shippers are not in the best position to limit railcar delays and thus not the appropriate party to be responsible for demurrage. CSXT naturally interfaces with the intermediary receivers located on its network, who are responsible for managing the flow of cars into and out of their facilities and who determine when and in what sequence to order in and release railcars. (Indeed, the primary business proposition of an intermediary receiver is that it is providing this service to customers.) Because the railroad is not privy to this information or to the private arrangements between the receiver and its customers, it therefore makes sense for the receiver to have responsibility for demurrage (and for it to make appropriate commercial arrangements with its customers to incentivize efficient behavior and pass along charges that are the fault of the receiver’s customers).

A. Forcing Railroads to Abide By Contracts To Which Railroads Are Not Parties Is Inconsistent With 49 U.S.C. § 10746 and with the Well-Reasoned Conclusions of Ex Parte 707.

Forcing a railroad’s demurrage billing to be governed by contracts to which that railroad is not a party is directly inconsistent with Congress’s instruction that railroads have the right to “compute demurrage charges and establish rules related to those charges” in the first instance. 49 U.S.C. § 10746. It also directly contradicts the Board’s conclusion in Ex Parte 707 that

demurrage should typically be assessed on parties “receiving railcars.”⁴ The Part 1333 Rules explicitly provide that carriers can enter contracts for a different arrangement—but they are equally explicit that the only contracts that can alter the default demurrage rules are ones in which the “serving railroad” is a party. 49 C.F.R. § 1333.2. This provision giving railroads the freedom to enter contracts to alter the baseline demurrage rules is consistent with demurrage’s function as an incentive for efficient railcar movements and with Congress’s recognition that railroads have the authority in the first instance to establish demurrage policies. In contrast, forcing railroads to be governed by the terms of contracts in which they are not parties is a sharp break from the statutory purpose and from the policies that the Board adopted just five years ago.

The Board should not lightly abandon the conclusions it reached in the Ex Parte 707 rules, which were adopted after an extensive three-and-a-half year rulemaking proceeding, in which it took comments from stakeholders including shippers, railroads, and intermediary receivers. Shipper interests supported the receiver-based liability framework of the final rule. The National Industrial Transportation League argued that “the receiver of rail cars that caused the loading or unloading delays [should] . . . be responsible for demurrage. This fault-based approach properly places accountability on the party that fails to efficiently handle the rail cars.”⁵ While some warehouse interests opposed the Ex Parte 707 rules, NITL aptly noted that this opposition appeared solely motivated by a desire to avoid “exposure for demurrage.”⁶

⁴ 49 C.F.R. § 1333.3 (defining parties “subject to demurrage” as “[a]ny 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”).

⁵ Comments of National Industrial Transportation League at 4, *Demurrage Liability*, Ex Parte No. 707 (filed Aug. 24, 2012).

⁶ Reply Comments of National Industrial Transportation League at 2, *Demurrage Liability*, Ex Parte No. 707 (filed Sept. 21, 2012) (“The League and the railroad commenters generally

After considering all the comments, the Board concluded that it was appropriate to place responsibility for demurrage on the receivers of railcars, including warehouses and other intermediaries, because those entities are “in the best position to expedite the loading or unloading of rail cars at origin or destination.” *Demurrage Liability*, Ex Parte 707, at 8 (Apr. 9, 2014) (“*EP707 Final Rule*”). This “guiding principle” that demurrage could be assessed on railcar receivers “would enable carriers to adopt tariffs that place responsibility for delaying the return of rail cars on the party in the best position to expedite the movement of those cars.” *Demurrage Liability*, Ex Parte 707, at 10 (May 3, 2012) (“*EP707 NPRM*”). The Board allowed “a serving carrier and its customers” to alter this default rule by contract, 49 C.F.R. § 1333.2, but it rejected proposals that would allow receivers to unilaterally pass demurrage liability onto their customers. *EP707 Final Rule* at 16-17. Here, too, the Board should not adopt the Notice’s proposal to allow receivers to disclaim demurrage liability via contracts to which railroads are not parties.

B. Forcing Railroads to Abide By Contracts To Which Railroads Are Not Parties Is Practically Unworkable.

Even if forcing railroads to be bound by receiver-customer agreements could be reconciled with Ex Parte 707 (and it cannot), the Notice overlooks two major practical problems with this proposal.

First, the Notice ignores the inherent complications with binding railroads with contracts to which they are not parties. The proposed rule requires only that the railroad be “notified of

recognized the need for a clear rule that eliminates legal uncertainties and allows for the reasonable use of demurrage to promote the efficient use of railcars. Accordingly, the League and railroad commenters generally supported the adoption of a conduct-based rule for demurrage liability. While many of the intermediary commenters expressed concerns over the conduct-based approach, their concerns were generally limited to an assumption that the rule would increase their exposure for demurrage.”)

the agreement,” and only by one party. Not only does this create a concern that a counterparty to the agreement might disclaim its validity to the railroad, but the railroad will have no knowledge of the terms of the agreement itself. The Notice speaks generally of “arrangement[s]” for direct billing, but does not grapple with the fact that any such contracts may have substantially different provisions. Some shippers might only accept liability for demurrage if the receiver is not negligent, or if the receiver can show that it did not create the liability by prioritizing another customer’s shipments over its own. Others might condition payment of demurrage invoices on the receiver’s performance of other contractual obligations. Railroads will have no ability to understand or effectively enforce these contractual provisions and no ability to adjudicate responsibility in situations where receiver and shipper disagree as to fault. Again, the receiver is the one party that is best positioned to determine whether the fault for liability lies with the railroad (such that demurrage should be canceled) or with the shipper customer (such that it should be passed along to that customer) or with the receiver (such that the receiver should bear the cost for the charges caused by its own delay).

Second, shippers at multi-shipper receiver facilities will often face challenges to understand the basis of demurrage charges for their traffic and effectively consider whether disputes are appropriate. While a receiver is privy to a complete picture of all incoming traffic and all car orders and releases, individual shippers can only receive information for their own traffic. Information about incoming shipments to other customers at that receiver facility will typically be protected by 49 U.S.C. § 11904, and such information will be especially competitively sensitive at facilities that handle shipments of the same commodity for several shippers. Shippers who can only view their slice of traffic will be in a poor position to assess

whether any demurrage charges are attributable to railroad fault or to the receiver's conduct (such as favoring one customer's traffic over others).

These practical complexities make it more difficult to collect demurrage, would undermine the purpose of demurrage, and harm the interests of the rail network as a whole. The Board should not undo the reasonable rules that it forged in Ex Parte 707.

IV. CONCLUSION

For the foregoing reasons, we request the Board to withdraw the rule proposed in the Notice and carefully consider the rationale and alternatives offered herein.

Respectfully submitted,

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