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ENTERED
Office of Proceedings
November 6, 2019
Part of
Public Record

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November 6, 2019

VIA E-FILING

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

Re: EP 757
Policy Statement on Demurrage and Accessorial Rules and Charges

Dear Ms. Brown:

In accordance with the decision served in the above-captioned matter on October 4, 2019, enclosed are the Comments Of The Kansas City Southern Railway Company. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EP 757

**POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL
RULES AND CHARGES**

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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**Attorneys for The Kansas City Southern
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Dated: November 6, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EP 757

**POLICY STATEMENT ON DEMURRAGE AND ACCESSORIAL
RULES AND CHARGES**

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

On October 4, 2019, the Surface Transportation Board (“STB” or “Board”) issued a Notice of Proposed Statement of Board Policy (“Policy Statement”). The Kansas City Southern Railway Company (“KCS”) herein comments on the Policy Statement.

As an initial matter, KCS thanks the Board for its thoughtful and considered approach in issuing a Policy Statement rather than issuing inflexible regulations. In the context of demurrage policy and procedures, the idea of providing general guidelines, while leaving actual determinations of whether a particular practice or approach is unreasonable to individual fact-specific cases, is the right approach.

In issuing a Policy Statement, however, it is important that the Board not use these general guidelines to pre-judge a particular demurrage or accessorial rules or practices as automatically unreasonable simply because that rule or practice is outside of the Policy Statement. It may well be that a particular practice falls outside of the guidelines or imposes demurrage on a shipper even though the shipper may not be at fault, but nonetheless such practice may be well founded in law.

For example, as noted in the Association of American Railroad's ("AAR") post-hearing comments filed in EP 754¹ and the concurrently filed comments by the AAR in this proceeding, comments in which KCS joins, it is well established in law that a shipper may be assessed demurrage even if the demurrage occurred because of actions outside the shipper's control, i.e., the demurrage was not directly the shipper's fault or within its control. In such situations, the Board should not automatically declare such a lawful practice in a particular fact specific case "unreasonable" simply because the practice is disfavored in the Policy Statement. The Board is required to follow the law even if the legally-required result may not conform entirely to the Board's preferred policy. As it did with respect to its comments on bunching,² the Board should make it clear that it will review each unreasonable practice complaint on an individual basis and that it will not hold a particular practice unreasonable simply because that practice is inconsistent or disfavored in the Policy Statement.

KCS believes the Policy Statement, overall, provides useful guidance that can be used by shippers and railroads in resolving demurrage disputes. As KCS continues to implement precision scheduled railroading ("PSR") principles applicable to its business, KCS will look

¹ Oversight Hearing on Demurrage and Accessorial Charges, EP 754. AAR comments filed June 6, 2019. Pursuant to 49 CFR 1112.7, KCS hereby incorporates by reference the copy of AAR's June 6 comments found on the Board's website at [https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/d93bd280690e38fe85258411006fef08/\\$FILE/247882.pdf](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/d93bd280690e38fe85258411006fef08/$FILE/247882.pdf).

² The Policy Statement made it clear that "[d]emurrage disputes pertaining to bunching are best addressed in the context of case-specific facts." Policy Statement at 14. This is particularly important to KCS. As the Board knows, approximately 80-85% of KCS's traffic is interchanged to/from another carrier. As a result, bunching on KCS may occur as the result of activities occurring off the KCS system. Such events could include significant weather events or customer ordering or shipping patterns from multiple origins that affect deliveries from off-line locations to KCS interchange. Similar to the Board's statement with respect to shippers, KCS should not be prohibited from collecting demurrage if the operating decisions or actions that resulted in the bunched deliveries were not within the reasonable control of KCS.

toward the Policy Statement for guidance and seek to make adjustments to its implementation plans as appropriate.³

The objective of KCS's PSR implementation is to create a more efficient railroad that can consistently exceed our customers' service expectations. KCS will continue to work with its shippers in implementing PSR with the goal of ensuring that its PSR initiatives improve service and customer satisfaction, not disrupt it.⁴ In doing so, KCS seeks to achieve a balanced and workable means of implementing PSR. The Policy Statement will help guide that implementation.

This is not to say that KCS supports all of the comments and objectives of the Policy Statement. KCS does not believe that the changes proposed in Demurrage Billing Practices, EP 759 (STB served Oct. 4, 2019) ("EP 759") dealing with directly billing shippers instead of warehouseman should be adopted. KCS is filing separate comments in that proceeding.

Likewise, the Policy Statement states, correctly, that demurrage is a charge that "both compensates rail carriers for the expense incurred when rail cars are detailed beyond a specified period of time (i.e., 'free time') for loading and unloading and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network." Policy Statement at 2.⁵

³ As a result of the hearing, KCS already modified Item 60 of the KCS 6000-F demurrage tariff by eliminating the \$50 fee charged for each incorrectly disputed car.

⁴ Consistent with the Policy Statement, KCS has endeavored to provide shippers ample notice of demurrage and accessorial changes and to work with them while the changes are pending to smooth transition to new rules.

⁵ The law directs rail carriers to compute demurrage charges "in a way that fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." 49 U.S.C. § 10746. And the Board's regulations expressly define demurrage as having both functions: compensation and incentive. 49 C.F.R. § 1333.1.

Yet, after enunciating the correct legal purpose of demurrage, the Policy Statement largely ignores the compensation function of demurrage.

The Board characterizes “the overarching purpose of demurrage” as being to incentivize the efficient use of rail assets. *Id.* at 6. While an important incentive for responsible use of rail assets, the compensation portion of demurrage billings also is important. It is both a way to ensure that there is an adequate car supply and to directly reimburse carriers for the expenses incurred while a car remains unavailable for loading.⁶ This compensation portion is especially important for carriers, like KCS, that are still working to meet the Board’s revenue adequacy standards. Accordingly, in applying the guidelines in the future, KCS believes that the Board has a legal obligation to consider both the efficiency component of demurrage and the compensation portion.

KCS’s goal is to consistently be the fastest-growing, best-performing, most customer-focused transportation provider in North America. KCS realizes that it is in the business of serving customers, and that providing excellent service is what will enable it to continue to grow. As KCS says and practices, service begets growth. In achieving these objectives, KCS is hopeful that the Policy Statement, if adopted, will not be used as a means to limit innovation, result in numerous unreasonable practice disputes simply because KCS’s policies might not mirror, precisely, the Policy Statement, or otherwise be used to create disputes or be used in place of

⁶ Car hire expenses that carriers charge each other for the time their cars spend on another carriers’ system is one means to ensure an adequate car supply. The more time a car is unavailable for loading, the more car hire expense a carrier incurs. Demurrage helps to directly compensate for those added expenses and contributes to a carrier’s ability to obtain and maintain an adequate car supply. See EP 749, slip op. at 3 (noting that the practices of warehousemen who accept cars for loading and unloading could be in position to facilitate or impede car supply); and Remittance Of Demurrage Charges By Common Carriers Of Property, EP 289, 353 I.C.C. 567 (1977) (Changes in demurrage practices would improve the return on the car owner's investment and would increase the incentive to invest in freight cars and thereby improve car supply).

precedent. Rather, KCS hopes that the Policy Statement will be used primarily to guide carriers and shippers in their implementation of demurrage and accessorial charges and voluntary resolution of disputes.

In any future decision in this proceeding, the Board needs to make it clear that cases will still be resolved on a case by case basis consistent with the law and that revenue inadequate carriers should not be hampered in their attempts to implement PSR in a reasonable and balanced approach. KCS will continue its focus on working with its customers to meet their individual needs in all phases of its business, including with respect to demurrage and accessorial charges and using the Policy Statement to help guide those discussions.

Respectfully submitted,



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