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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 759
Demurrage Billing Requirements

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 759

DEMURRAGE BILLING REQUIREMENTS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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Dated: November 6, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EP 759

DEMURRAGE BILLING REQUIREMENTS

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

On October 4, 2019, the Surface Transportation Board (“STB” or “Board”) issued a notice of proposed rulemaking (“NPRM”) seeking to require Class I rail carriers to include certain specified information in their demurrage invoices and to require Class I carriers to directly bill a shipper for demurrage charges if the shipper and warehouseman have agreed to that arrangement and notified the carrier. The Kansas City Southern Railway Company (“KCS”) hereby submits these comments.

KCS opposes the Board’s proposal to undo the Ex Parte 707 ruling because issues such as lack of privity of contract could prevent rail carriers from collecting demurrage that is rightly owed. KCS is agreeable to providing additional information on its demurrage invoices, provided that KCS itself has that information and provided that the Board allows a sufficient period for reprogramming the invoicing system to include additional information.

Directly Billing Shippers

The Board proposes to require Class I carriers to send demurrage invoices directly to the shipper instead of the warehouseman if the shipper and warehouseman agree to such an arrangement and notify the rail carrier of the agreement. In that event, KCS would not be allowed to collect demurrage from the warehouseman but only from the shipper. KCS opposes this aspect of the NPRM.

KCS joins in, and fully supports, the concurrently filed comments of the Association of American Railroads opposing this change. The proposal would completely reverse the Board's prior decision in Demurrage Liability, EP 707 (STB served April 11, 2014) ("EP 707"). It would allow shippers and receivers to shift liability by contract, ignoring the EP 707 final rules. Such a proposal is bad policy and could be reversible error without reopening and reconsidering EP 707.

KCS understands the Board's goal to ensure that the actual responsible party bear the responsibility for demurrage charges – a goal that KCS shares. KCS also agrees that in some cases the warehouse or terminal operator is not the party that actually causes demurrage to accrue and that responsibility lies with the shipper. KCS, however, strongly disagrees with the Board's proposal.

If the shipper and the warehouse can enter an agreement that the shipper pays demurrage, it is the warehouse, not the railroad, which is best positioned to enforce that agreement. The shipper and the warehouse can, and should, by contract agree which of them is responsible for demurrage costs. If the shipper contracts with the warehouse to take that responsibility, the shipper should pay. But, consistent with EP 707 and the rules adopted in that proceeding, the warehouse/3rd party terminal operator should pay the railroad. The warehouse/3rd party can invoice the shipper for those charges via its contract with that shipper.

In some cases, where the traffic is interlined to KCS for destination delivery at the receiver or warehouse/3rd party, KCS does not even know the identity of the original shipper. KCS may not be in privity of contract with the shipper, and could face immense legal obstacles trying to enforce an agreement between the warehouse and shipper to which KCS is not a party but which provides that the shipper should pay the charges billed by KCS to the warehouseman.

Today, due to EP 707, it is clear who has to pay KCS. If the warehouse should be reimbursed by the shipper, that is an issue between the warehouse and its customer, the shipper. If the warehouse is able to contract with the shipper on who is responsible for demurrage, the warehouse is legally able to enforce that contract. The railroad may not be. The Board should not put KCS in the middle of that relationship.

The NPRM throws all of EP 707 out the window. The proposal to require the railroad to obtain payment from the shipper with no guarantee that the warehouse will pay if the shipper doesn't, should be withdrawn.

Information on Billing Invoices

The Board proposes a requirement applicable to Class I carriers that the following minimum information be provided on or with any demurrage invoices:

1. The unique identifying information (e.g., reporting marks and number) of each car involved;
2. The following shipment information, where applicable:
 - The date the waybill was created;
 - The status of each car as loaded or empty;
 - The commodity being shipped (if the car is loaded);
 - The identity of the shipper, consignee, and/or care-of party, as applicable;
 - The origin station and state of the shipment;
3. The dates and times of (1) actual placement of each car, (2) constructive placement of each car (if applicable and different from actual placement), (3) notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable), and (4) release of each car; and
4. The number of credits and debits attributable to each car (if applicable).

In addition, the Board proposes that prior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that the demurrage charges are accurate and warranted.

The Board has requested specific comment on:

1. The extent to which other billing or supply chain visibility tools or platforms (other

than an invoice or documentation accompanying an invoice) provide rail users with access to information that would satisfy this requirement; and

2. Whether there is additional information that rail carriers could reasonably provide on or with demurrage invoices and that would enable recipients to more effectively evaluate those invoices.

On the first question, as previously discussed in KCS's May 8, 2019 Written Testimony of Mr. Naatz submitted in EP 754, Oversight Hearing on Demurrage and Accessorial Charges, KCS already has in place an information platform that shippers can access that includes most of the information that the NPRM proposed be put into the invoice. KCS provides its customers with demurrage management tools on the MyKCS customer access portal. The MyKCS login is available in a drop down menu on the main KCS webpage, as are links to KCS's demurrage and accessorial tariffs. KCS believes that the MyKCS portal already provides rail users with access to information that is in substantial compliance with the Board's proposal.

In addition to the MyKCS portal, when KCS sends a demurrage invoice today, KCS's invoice contains the information proposed in the NPRM except for the (1) date the waybill was created; (2) the identity of the shipper/consignee/in care of party (in the event they are not the party invoiced); (3) the origin station/state of shipment; and (4) the date and time of notices of constructive placement and release.

KCS does not always have all of the information that the Board's proposal would require be contained in the demurrage invoice. Particularly when KCS serves as a switch carrier, it does not receive the full waybill information from the connecting linehaul carrier. The full waybill would be needed to obtain some of the data elements that the Board wants included in the invoice, such as the remote end of the move, waybill date, etc. KCS is willing to work with other carriers to try to obtain this information on a regular basis in the future, but currently does not always have all of the information the Board's rules would require.

With respect to the Board's proposed requirement that Class I's take "appropriate action" to ensure that the demurrage bills are "accurate and warranted," it is not clear what the Board views as "appropriate action." KCS believes that it already takes "appropriate" actions to ensure that its demurrage bills are accurate, as only a very small fraction of KCS's demurrage invoices are disputed. Also, as shown in its prior testimony, KCS is ready to work with shippers if questions arise. Accordingly, KCS believes that it is already undertaking actions to make sure that its invoices are accurate and warranted.

Given that (1) KCS sometimes does not have all of the information that the Board's proposed rules would require; (2) KCS already provides accurate information with few disputes; and (3) KCS's MyKCS portal and its existing demurrage invoices already contain most of the requested information, KCS would suggest that if the NPRM proposal is adopted as a final rule, the Board consider not requiring KCS to adopt the NPRM-proposed invoice data requirements. Rather, KCS proposes that the Board provide KCS with the flexibility, as it proposes to do with Class II's and III's,¹ to adopt changes to its systems consistent with the spirit of the NPRM rather than to the specific requirements. If KCS is required to adopt the proposed requirements,

¹ The NPRM would exclude Class II's and III's from having to comply with the new invoice requirements, although it does encourage such carriers to improve their systems and adopt as much of the information as possible, information that KCS already provides.

however, KCS recommends that the Board provide a sufficient phase-in period, perhaps 180 days, to allow KCS to re-program its systems.

Respectfully submitted,

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