

November 5, 2019

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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The Honorable Martin J. Oberman
Member
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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Office of Proceedings
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Public Record

Re: Docket No. EP 759, *Demurrage Billing Requirements*

Dear Chairman Begeman, Vice Chairman Fuchs, and Commissioner Oberman:

I respectfully submit this letter in support of the Surface Transportation Board's ("STB") Proposed Rulemaking in *Demurrage Billing Requirements*, Docket No. EP 759, served on October 7, 2019 ("NPRM"). As the former Chairman of the STB, I believe this NPRM is good government in that it seeks to fix unintended consequences from a prior regulatory proceeding. I wholeheartedly encourage the STB to adopt these proposed regulations.

In summary, the STB proposes changes to the Board's existing regulations regarding demurrage liability. Specifically, the Board proposes a requirement that a Class I carrier directly bill the shipper if the shipper and third-party intermediary agree to that arrangement and have so notified the rail carrier, as well as certain requirements for information to be provided on Class I carriers' demurrage invoices.

This NPRM mainly stems from the testimony provided at the May 22, 2019 hearing in *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754. Among the speakers were third-party intermediaries or terminal operators, who accept railcars for loading and unloading but have no property interest in the freight being transported or contractual relationship with the rail carrier at issue.

As background, before 2014, STB precedent had provided that a rail carrier's tariff could not charge demurrage on a third-party intermediary that did not own the freight, was not a consignee or consignor in the bill of lading or was not party to the contract of transportation. However, around 2014, a split in the U.S. courts of appeals occurred arising out of the question about who should bear liability for demurrage when a third-party intermediary that detains rail cars beyond the designated time period is named as a consignee on the bill of lading without its knowledge or after asking the shipper not to include it on the bill of lading. The STB decided it needed to settle this issue because of this split. In issuing its final rule, the STB in *Demurrage Liability*, Docket No. EP 707 (STB served April 11, 2014), codified at 49 C.F.R. part 1333, determined that the party's placement on the bill of lading was no longer determinative; instead, the third-party intermediary receiving the rail cars that detains them beyond the free time in a rail carrier's tariff could be held liable for demurrage if that person had actual notice of the demurrage tariff. The STB noted that "these rules should encourage warehouseman and shippers to address demurrage liability in their commercial arrangements." *Id.* at 9.

Subsequent to this decision, the railroads began to bill terminal operators directly for demurrage charges upon giving notice of the demurrage tariff. This new practice began to create all types of costly problems for these terminal operators who had no contractual relationship with the rail carriers. As a result, terminal operators felt compelled to advise the STB of the EP 707 decision's unintended consequences at the demurrage hearing in May. The International Liquid Terminals Association ("ILTA"), the organization that represents terminal operators, expressed its dissatisfaction with the demurrage invoices its members received from rail carriers that did not include sufficient detail or information, making it impossible to challenge these charges or seek reimbursement from shippers when applicable. It noted that most terminals include provisions in their contracts that require shipper customers to pay demurrage when the terminal operators were not at fault. However, they found that they were unable to demonstrate who was at fault because the invoices provided limited detail. The terminal operators found the invoices often failed to list the shipper, and frequently incorrectly identified the railcars or shippers. Because the terminal operators had no contractual relationship with the railroads, they could not get access to the needed accurate information to confirm or dispute the charges.

ILTA also testified that the existing demurrage rules put in place in EP 707 have left its hands tied when dealing with these issues. ILTA stated that many of its issues could be solved through the direct billing of the shippers. However, ILTA emphasized that terminal operators have not been able to obtain agreement from railroads to operate in this manner despite having the shipper agree to this direct-billing arrangement. Terminal operators cannot make railroads agree to this arrangement because of the rules in EP 707 that allow railroads to charge them despite this agreement with their shippers. ILTA expressed its frustration with this situation and believed this unintended result could be remedied by the STB with a clarifying rule. ILTA asked the STB to require direct billing of the shipper where there is a privately negotiated agreement between the terminal operator and the shipper to that effect.

I applaud the STB for hearing this testimony from the ILTA and others in an identical situation and taking swift action to remedy the unintended consequences from the rule in EP 707. The STB's rule proposal to require certain information on demurrage invoices and to make Class I carriers send demurrage invoices directly to the shipper without a payment guarantee by the terminal operator will go a long way towards fixing these problems faced now by terminal operators.

I urge the STB to adopt the proposed regulations set forth in the NPRM in this proceeding. I believe this regulatory change demonstrates how well the STB reacts to an issue when it is brought to its attention. While all issues are not as easy to fix, I thank the STB for doing so here when the solution is straightforward.

Sincerely,



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