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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 754

OVERSIGHT HEARING ON DEMURRAGE
AND ACCESSORIAL CHARGES

ENTERED
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COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

In a Notice of Public Hearing served on April 8, 2019, the Surface Transportation Board sought public comment on railroad demurrage and accessorial charges, and by decision served on May 24, 2019, held the record open for additional comment. The Association of American Railroads, on behalf of its member freight railroads, hereby submits these comments to provide legal context in this proceeding.

Demurrage has been understood for more than a century as a mechanism to allow both for compensation for the delay or detention of transportation equipment and for a penalty charged to the shipper, or third party, by a transportation service provider for holding transportation equipment. Historically, the Interstate Commerce Commission distinguished between “straight” and “average” demurrage programs, with different consequences for certain claims for relief from the “penalty” portion of demurrage charges. However, since at least the ICC Termination Act of 1995, the agency has held that challenges to demurrage are fact-specific inquiries raised through unreasonable practice claims, and demurrage charges are permissible unless they accrue due to the fault of the serving railroad. The Board has also held that third parties may be subject to demurrage even if they are not named in the bill of

loading as a shipper, consignor, consignee, so long as they have actual notice of the carrier's tariff provision that expressly applies to third parties.

I. General Demurrage Principles

Demurrage is authorized by statute and railroads are directed to “compute demurrage charges, and establish rules related to those 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.”¹ In addition to this provision, demurrage is subject to the Board's regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and rate-related rules and practices. By regulation, demurrage is defined as “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.”² The rules state that the “serving rail carrier”, the rail carrier providing rail cars to a shipper at an origin point or delivering them to a receiver at an end-point or intermediate destination, shall assess demurrage. The serving carrier and its customers “may enter into contracts pertaining to demurrage, but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.”³ Current Board rules provide that a railroad may then assess demurrage charges on “[a]ny person receiving rail cars from a rail carrier for loading or unloading who detains the cars

¹ 49 U.S.C. § 10746.

² 49 C.F.R. § 1333.1.

³ 49 C.F.R. § 1333.2.

beyond the period of free time set forth in the governing demurrage tariff” as long as that the carrier has provided that person notice of the tariff prior to the placement of cars.⁴

A. Early Concepts of Demurrage

The concept of demurrage and its economic underpinnings have been recognized since the earliest days of American transportation law as an allowance or compensation for the delay or detention of transportation equipment and encompasses a penalty charged to the shipper, or third party, by a carrier or other logistics supplier for holding rail, ship, container and trucking equipment.⁵ The economic underpinnings of demurrage and storage can be considered in four broad categories: (1) charges directly related to freight car utilization; (2) other direct operating costs related to the demurrage process; (3) capital costs related to the demurrage process; and (4) opportunity costs associated with congestion caused by excessive freight car processing.⁶

In the rail context, demurrage expanded from common law into a federal statutory matter by the Interstate Commerce Act.⁷ Demurrage has long been recognized by the courts as a charge assessed by railroads against shippers or receivers consisting of compensation to the railroad for expenses incurred, and an incentive to deter undue car detention (to speed the return of rail cars to public service).⁸ That is, demurrage charges were recognized as having a dual purpose as a penalty intended to incent customers to handle cars efficiently and to

⁴ 49 C.F.R. § 1333.3.

⁵ See, e.g., *The Appollon*, 22 U.S. 362, 377-88 (1824).

⁶ See *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, NOR 42102 (July 20, 2010).

⁷ See, e.g., *Texas & P.R. Co. v. Mugg*, 202 U.S. 242 (1906); *Kansas City Southern R.R. Co. v. Carl*, 227 U.S. 639, 653 (1913).

⁸ See *Chrysler Corp. v. New York Central R. Co.*, 234 I.C.C. 755, 759 (1939).

compensate the carrier for the use of cars and track.⁹

. . . demurrage charges are in part compensation and in part penalty . . . in full character, they are neither. Not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning, they have been sustained as rules and regulations.¹⁰

Demurrage and storage charges were recognized as different “from per diem and mileage allowances in that they are primarily a penalty to deter undue car detention, and to a lesser extent, compensation to the railroad for expenses incurred.”¹¹

Like all railroad rates and charges, demurrage was heavily regulated in the past through ICC approval of collective general demurrage tariffs that were modified through broad, industry-wide proceedings.¹² The Board has noted that “[h]istorically, carriers gave public notice of the rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called “filed rate doctrine.”¹³ The first uniform code of demurrage rules and charges was formulated, approved by the National Association of Railroad Commissioners, and endorsed by the ICC in 1909. The Uniform Demurrage Code became effective in 1910 as a tariff containing nine rules.¹⁴ In addition to demurrage

⁹ *Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P.R. Co.*, 271 U.S. 259 (1926).

¹⁰ *Iverson v. United States*, 63 F. Supp. 1001, 1005 (D.D.C. 1946).

¹¹ *Railroads Per Diem, Mileage, Demurrage – Agreement*, 1 I.C.C.2d 924, 933 (1985).

¹² See, e.g., *Car Demurrage Rules, Nationwide*, 340 I.C.C. 83 (1971); *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777 (1975).

¹³ *Demurrage Liability*, EP 707, slip op. 3 & n.4 (STB served Apr. 11, 2014) (citing *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990)).

¹⁴ See *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 288 (1917) (citing *In re Demurrage Investigation*, 19 I.C.C. 496). See also *Chrysler Corp. v. New York Cent. R. Co.*, 234 I.C.C. 755, 759 (1939); *Increased Demurrage Charges*, 300 I.C.C. 577, 578 (1957).

charges contained in the Uniform Code, the carrier's right to impose additional penalty charges to prevent undue detention of equipment was upheld by the ICC and the courts.¹⁵ The courts, in turn, enforced the terms of carriers' ICC-approved tariffs.¹⁶

Historically, demurrage tariffs filed with the ICC offered "average" and "straight" demurrage. As explained by the Board, "[a]verage demurrage permits shippers to offset demurrage charges by earning credits for cars returned within the free time, but it does not provide for reduced demurrage charges except for delay caused by floods, earthquakes, tornadoes, or hurricanes."¹⁷ Under an average demurrage tariff, the shipper or receiver can offset demurrage liability incurred over some period of time on a certain number of cars through the credits earned from the early return of other cars.¹⁸ "Straight" demurrage was assessed on a per-day basis for detention in excess of the allowable free time. There were no credits for returning cars early, but the shipper or receiver was not assessed demurrage if severe weather or other circumstances beyond their control prevent them from returning cars on time.¹⁹

An important difference between "straight" and "average" demurrage plans involved the consequences of railroad-caused delay. In "a straight demurrage situation, the ICC has,

¹⁵ See *Edward Hines, etc. Trustees v. United States*, 263 U.S. 143, 149 (1923) (noting that ICC recognized that the penalty charge is declared to be "in addition to any existing demurrage and storage charges." *Sullivan Lumber Co. v. Great Northern Railway Co.*, 58 I.C.C. 110, 111.).

¹⁶ *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-65 (1956) ("The single question confronting the court in this case concerns whether or not the demurrage charges assessed by plaintiff were proper. This inquiry concerns the construction, rather than the reasonableness, of a tariff or service order. Any question regarding reasonableness is properly the concern of an administrative tribunal.").

¹⁷ *Exemption of Demurrage from Regulation*, EP 462, slip op. at 1 & n. 3 (STB served Mar. 29, 1996).

¹⁸ See *Car Demurrage Rules, Nationwide*, 350 I.C.C. at 779.

¹⁹ *Exemption of Demurrage Charges*, at 1 & n. 3.

with consistency, ordered reparation of the ‘penalty’ portion of demurrage charges on proof that the shipper was not the proximate cause and had acted with due diligence.”²⁰ If ordered to remit a “penalty” component, the ICC would order the carrier to calculate the charge in excess of the “compensatory” component, which was an ICC-prescribed per diem charge plus 20% for incidental costs.²¹

In addition, the courts made it clear that a railroad’s “straight” demurrage plan had to provide the shipper with a mechanism for obtaining relief when railroad conduct, including bunching of cars, was the cause of demurrage.²² But because a “straight” demurrage plan gave shippers a mechanism for obtaining relief from demurrage due to railroad fault, railroads did not have to provide credits to shippers for early release of cars. Credits, used in “average” plans, were an alternative way for shippers to avoid responsibility for railroad-caused delays. Therefore, credits were not used in “straight” demurrage plans. Moreover, the concept of fault that would relieve demurrage obligations was limited. As observed by a federal district court, “[d]emurrage is not concerned with culpable or willful delay – but only with delay

²⁰ *Monongahela Power Co. v. Interstate Commerce Commission*, 640 F.2d 504, 505 (4th Cir. 1981) (citing *Prince Mfg. Co. v. Norfolk & Western Ry.*, 356 I.C.C. 702 (1978)). Due diligence was a strict standard for the customer to satisfy. See *Chrysler v. New York Central R. Co.*, 234 I.C.C. 755, 758 (1939). Due diligence was determined in part by the shipper’s use of prudent foresight in the particular circumstances, including special efforts to minimize detention. To satisfy the obligation of “due diligence,” the ICC held that “some evidence that complainant [the customer] made special efforts to avoid or abate the accrual of demurrage is required.” *Prince*, 356 I.C.C. at 707.

²¹ *Prince*, 356 I.C.C. at 708.

²² See, e.g., *North American Freight Car Association v. STB*, 529 F.3d 1166, 1178 (D.C. Cir. 2008) (citing *Dana Corp. v. ICC*, 703 F.2d 1297 (D.C. Cir. 1983)). In a “straight” demurrage plan “[w]hat the law does require, as we have already observed, is that a shipper be allowed to demonstrate before the Commission that erratic service is the fault of the railroad and that the shipper should therefore not be assessed a charge for idle track time caused thereby.” *Id.*

which it penalizes in order to insure the prompt release of a carrier's equipment.²³

In contrast to “straight” demurrage plans, “average” demurrage plans addressed the possibility of railroad-caused delays through a system of credits. And since credits could be used by shippers to avoid the consequences of railroad-caused delays, shippers would not be able to seek relief from demurrage by showing railroad fault. “The ICC determined that its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied where the parties, by terms of the average agreement, had otherwise provided for a credit system for minimizing demurrage by assigning values to the shipper's favor in case of early release of freight cars The ICC has consistently determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantages of either.”²⁴ Further, the Board has observed that “[m]any railroad tariffs assign demurrage charges to the shipper on a no-fault basis. In other words, the shipper is liable for demurrage charges regardless of which party was at fault for the delay.”²⁵

B. Demurrage Evaluation Impacted by Subsequent Changes to the Regulatory Framework

Prior to the Staggers Act, the terms of railroads' “straight” and “average” demurrage plans were heavily regulated. But in keeping with the deregulatory reforms of the 1970s and 1980s, collective action subject to rigid oversight by the agency was eventually replaced by

²³ *Pennsylvania R. Co. v. Moore-McCormack Lines Inc.*, 246 F. Supp. 143, 146 (S.D.N.Y. 1965). Though the court noted that “if the failure to release is brought about through the carrier's default, demurrage would not accrue to it.” *Id.*

²⁴ *Monongahela Power Co. v. Interstate Commerce Commission*, 640 F.2d 504, 506-07 (4th Cir. 1981).

²⁵ *Capitol Materials Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway*, NOR 42068, slip op. at 2 (STB served Apr. 12, 2004).

individual carrier responsibility and flexibility to adopt different forms of demurrage tariffs. The rate bureau agreement approved by the ICC in *Railroads, Per Diem, Mileage, Demurrage—Agreement*, 358 I.C.C. 481 (1978) provided for the collective action of the railroad industry with respect to car compensation, or per diem, car mileage allowances for non-railroad equipment, and demurrage and storage charges. In 1985, the ICC approved the continuation of antitrust immunity for car hire and mileage allowances, but disapproved immunity for demurrage and storage.²⁶ The ICC concluded that “the need for uniform demurrage and storage charges has been overstated, that such charges clearly can be established on a unilateral basis, and that a free market approach to such charges will more effectively foster the goals of the national transportation policy.”²⁷ After Staggers, it was no longer necessary or appropriate to require railroads to use uniform demurrage tariffs that included prescribed terms, compensatory and penalty elements, and regulated rates.

In 1992, the ICC proposed to substantially remove demurrage from regulatory scrutiny through an exemption.²⁸ Four years later, the STB ultimately decided not to deregulate demurrage, but rather to leave demurrage disputes to be resolved in fact-specific proceedings.²⁹ The Board quoted the ICC as noting:

[T]he primary purpose of demurrage ... charges is ... to enhance efficient car use by ensuring the prompt turnaround of equipment. These charges are paid

²⁶ *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924 (1985).

²⁷ *Id.* at 934.

²⁸ *Exemption of Demurrage from Regulation*, EP 462 (STB served Mar. 29, 1996).

²⁹ *Id.* The STB removed antitrust immunity for the collective establishment of demurrage charges, but rejected the previous ICC proposals to: (1) deregulate demurrage charges by exempting demurrage from regulation following the first 24-hour period after a car is tendered for loading and following the first 48-hour period after a car is tendered for unloading; and (2) to exempt demurrage as a separate and distinct area of regulation, but to allow shippers to include demurrage charges as a consideration in actions to determine maximum reasonable rates.

only to the delivering railroad or the one on whose property the car is stored. Since their impact is localized, the need for nationwide uniformity is by no means apparent.³⁰

The Board also noted that the national rail transportation policy requires that, to the maximum extent practicable, rates be set individually, rather than collectively.³¹

C. Demurrage Disputes Are Fact Specific and Relief Requires Proof of Railroad Fault

The ICC Termination Act of 1995 eliminated the requirement that railroads file tariffs with the agency. ICCTA continued to require that railroad practices be reasonable, but instead of large regulatory proceedings to approve changes to tariffs, reasonableness inquiries were to be the product of individual complaint. Such an approach allowed the agency to focus on the facts and circumstances of individual disputes.³² As stated by the Board, “. . . in section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable; instead, it gave the Board ‘broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.’”³³ The Board has stated that this “discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts.”³⁴

Accordingly, adjudication of railroad demurrage practices is resolved on a case-by-

³⁰ *Id.* (citing *Railroads Per Diem*, 1 I.C.C.2d at 934.).

³¹ *Id.*

³² *Capitol Materials*, slip op. at 6 (“ . . . whether a particular practice is unreasonable typically turns on the particular facts.”).

³³ *North American Freight Car Association et al. v. BNSF Railway Co.*, NOR 42060, slip op. at 8 (STB served Jan. 26, 2007) (citing *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) and *WTL Rail Corp.—Petition for Declaratory Order and Interim Relief*, NOR 42092, slip op. at 6 (STB served Feb. 17, 2006)).

³⁴ *Id.*

case basis. The agency and the courts have embraced the principle that shippers should have an opportunity to avoid responsibility for demurrage charges if they can show to the agency that the delays leading to the demurrage charges were the fault of the railroad.³⁵ But delays that are not attributable to the fault of the railroad provide no basis for relief.³⁶ “In light of the complexity and variety of many private car movements, it would be inappropriate to hold that a railroad’s tariffs are unlawful because they do not penalize the railroad for service variability unrelated to fault.”³⁷ These principles have been applied consistently for the last several decades without attempting to identify or distinguish between “compensation” and “penalty” components of demurrage.

II. Demurrage and Storage Charges Have Long Been Applied to Private Cars

Private car storage charges have long been recognized as appropriate under the statute. Private cars were included in the 1909 Uniform Demurrage Code, which specifically states that “[p]rivate cars while in railroad service, whether in carrier’s or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.”³⁸ The ICC ruled that carriers were “within their lawful rights in establishing and maintaining” the rule for

³⁵ *Capital Materials*, slip op. at 2 (“Equally simple, however, is the notion that a shipper should not be required to compensate a railroad for delay in returning the asset if the reason for the delay is not the shipper’s, but the railroad’s fault.”); *North American Freight Car Association v. STB*, 529 F.3d 1166, 1178 (D.C. Cir. 2008).

³⁶ See, e.g., *Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates and Practices Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (STB Served May 29, 2008) (permitting demurrage charge because “the reason Capital’s cars were not switched more quickly is that Capital’s track was not adequate for Capital’s traffic volume.”).

³⁷ *NAFCA*, slip op. at 11; see also *Capitol Materials*, slip op. at 7 (“[G]iven the many variables outside a railroad’s control that may affect delivery . . . a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.”).

³⁸ *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 283 (1917).

demurrage on private cars and was affirmed by the courts.³⁹ The Board has observed that “[t]he elimination of demurrage charges on private cars would very seriously and adversely affect the utilization of privately owned cars and would thus decrease the savings and car-days that may be gained in the overall national car fleet.”⁴⁰

Storage charges differ from demurrage in that detained cars are held for purposes other than loading or unloading.⁴¹ The ICC has recognized that,

Different storage rules and charges are designed to discourage: (a) stockpiling of equipment in shippers’ exclusively assigned fleets, (b) holding explosives and hazardous materials on railroad property after loading is completed or the carrier is ready to deliver a shipment, and (c) car manufacturers, repair shops, or scrap companies from causing cars moving empty on their own wheels as freight at tariff rate being held on railroad-owned tracks not leased to shippers.⁴²

“Storing empty private cars imposes costs on the railroad, including the loss of system fluidity and the opportunity cost associated with using track for long-term car storage that instead could be used to facilitate the efficient movement of freight.”⁴³ Thus, storage is properly evaluated as compensation for the use of a carrier’s capacity, rather than with respect to the equipment itself.

³⁹ *Proctor & Gamble Co. v. Cincinnati, Hamilton & Dayton Ry. Co.*, 19 I.C.C. 556 (1910), *aff’d* *Proctor & Gamble Co. v. United States*, 188 Fed. Rep. 221, 227.

⁴⁰ *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 800 (1975).

⁴¹ *Railroads Per Diem, Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924, 933 & n. 16.

⁴² *Id.* at 933 & n. 18.

⁴³ *NAFCA*, slip op. at 6.

III. EP 707, *Demurrage Liability*

The Board's decision in EP 707 explicitly held that third-parties like warehouses are liable for demurrage, if they accepted and held rail cars contrary to the terms of a carrier's tariff and had notice of the terms of that tariff. That decision was the result of several rounds of notice and comment rulemaking. In 2010, the Board initiated a proceeding to address a specific area of controversy related to demurrage. In an ANPRM issued on December 6, 2010, the Board noted that "[a]n important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other "intermediate" stops in the transportation chain before reaching their ultimate destination."

Further,

Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery, the issue was more complicated for warehousemen, who typically are not "owners" of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped. And what became the most important "other basis" was whether the warehouseman was shown as the consignee on the bill of lading.⁴⁴

The Board reviewed the approaches taken by the Eleventh Circuit in *Groves*⁴⁵ and the Third Circuit in *Novolog*⁴⁶ to resolve the issue of liability when a warehouseman accepts rail cars and holds them too long and is named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee. The Board expressed dissatisfaction with aspects of each approach and asked for

⁴⁴ *Demurrage Liability*, EP 707, slip op. at 3 (STB served Dec. 6, 2010) (internal citations omitted).

⁴⁵ *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009).

⁴⁶ *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007).

public comment on several issues, including a possible rule that “would place liability for demurrage on the receiver of the rail cars, regardless of the designations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability.”⁴⁷

The Board received comments from several parties, including AAR.⁴⁸ After reviewing the comments received in response to the ANPRM, the Board issued an NPRM on May 7, 2012, in which the agency announced proposed rules whereby any person receiving rail cars who detains the cars beyond the free time may be held liable for demurrage if the carrier has provided the person actual notice of the demurrage tariff. The Board also announced a new construction of the provisions of 49 U.S.C. § 10743, under which those provisions would apply to carriers’ line-haul rates, but not to demurrage charges.⁴⁹

The Board concluded in Final Rules that third parties may be subject to demurrage even if they are not named in the bill of lading as a shipper, consignor, consignee, so long as they have actual notice of the tariff provision that expressly applies to third parties. The Board declined to expand the scope of the proceeding to consider either issues related to constructive placement of cars or issues regarding delays attributable to the carrier. The Board concluded that changes to its rules were not necessary. The Board noted that “[i]f a receiver believes that it has been unfairly charged demurrage because of a rail carrier’s conduct, and it is unable to resolve the dispute informally with the carrier, it is free to avail

⁴⁷ *Demurrage Liability*, EP 707, slip op. at 6 (STB served Dec. 6, 2010).

⁴⁸ See AAR Comments, EP 707, *Demurrage Liability* (filed Mar. 7, 2011) at 7-23 (arguing that the Board should adopt the rule in *Novolog* and noting that “the *Novolog* and *Groves* court actually agreed on most of the fundamental principles that govern the application of the demurrage system to the named consignee in a bill of lading. The AAR believes that the Board should not disturb those principles.”).

⁴⁹ *Demurrage Liability*, EP 707 (STB served May 7, 2012).

itself of the Board's alternative dispute resolution options or to pursue a complaint with the Board."⁵⁰

* * *

The AAR respectfully submits the foregoing in the interest of a complete record and to provide legal context in this proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Kathryn D. Klimayer', with a long horizontal flourish extending to the right.

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⁵⁰ *Demurrage Liability*, EP 707 (STB served Apr. 11, 2014) (citing *Capitol Materials Inc.*, 7 S.T.B. 576, 584 (2004) (unreasonable practice claim relating to, among other things, car placement).