Articles

Mind the Gap: Why The Current Case Law on Demurrage Makes Little Sense and Undermines the Federal Statute

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A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall 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]

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1. 49 U.S.C. § 10746 (2006) (originally enacted as Act of Dec. 29, 1995, Ch. 107, § 10746, 109 Stat. 803, 821).

In 2010, at the urging of the United States Solicitor General in consultation with the United States Surface Transportation Board ("Board"), the United States Supreme Court declined to hear argument in a case that created a circuit split as to the application of demurrage rules to warehousemen and other intermediaries in rail transportation.[2] As a result, a lower court ruling that highlighted and expanded a regulatory gap that undermines the purpose of 49 U.S.C. 10746 was permitted to stand.[3] The Solicitor General contended that the Board could resolve the demurrage gap through a proceeding that the Board opened after the Supreme Court requested the views of the Solicitor General on Norfolk Southern's then-pending petition for certiorari.[4]

It is time to plug the regulatory gap that results from the antiquated reliance on designations such as "consignee" and "in care of"— designations in which the railroads do not participate. The courts' continued reliance on these terms and the common law of contracts ignores the adoption of Section 10746 and undermines that federal statute. In fact, that continued reliance prevents a rail carrier from adopting demurrage rules "in a way that fulfills" the twin goals of the

2. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273 (11th Cir. 2009), *cert denied*, 131 S. Ct. 993 (2011).

3. Norfolk S. Ry. Co. v. Brampton Enters., LLC, No. CV407-155, 2008 WL 4298478, at *1-6, *5 (S.D. Ga. Sept. 15, 2008).

4. Brief for U.S. as Amicus Curiae Supporting Petitioner at 9-10, Groves, 586 F.3d 1273 (No. 09-1212), 2010 WL 5069532.

statute. The Board must act in a way that makes the statute paramount and provides guidance to the courts so that the common law no longer impedes the statute.

I. BACKGROUND

A. 49 U.S.C. § 10746 – DEMURRAGE IS FOR THE NATIONAL INTEREST

In Section 10746 of Title 49, Congress gave railroads the statutory responsibility to establish and collect "demurrage charges" so as to advance the "national needs" relating to both "an adequate supply of freight cars" and the efficient "use and distribution" of those cars.[5] This formulation is the modern version of Justice Brandeis's classic statement that "[a]ll demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention."[6]

To further these goals, railroads establish rules and charges for demurrage. Demurrage is "the assessment of charges for holding railroad-owned rail freight cars for loading or unloading beyond a specified amount of time" and "has compensatory and penalty functions."[7] Section 10746 commands railroads to establish demurrage rules "in a way that fulfills" the twin goals of the statute.[8] Importantly, the statute does not limit or restrict in any way the participants in the transportation chain to whom the demurrage rules may be applied.[9]

Both purposes of demurrage that are stated in 49 U.S.C. 10746 are of vital importance to the efficiency of the rail network as a whole.[10] As the Board's predecessor—the Interstate Commerce Commission ("ICC")—held long ago, "[t]he necessity for demurrage is well recognized. Such charges serve the best interests of the railroads, the users of rail transportation, and the public in the maintenance of an adequate transportation service."[11] The merits of these goals are not disputed even by in-

5. 49 U.S.C. § 10746.

6. Turner Lumber Co. v. Chi., Milwaukee & St. Paul Ry., 271 U.S. 259, 262 (1926); *see also* S.C. Rys. Comm'n v. Seaboard Coast Line R.R., 365 I.C.C. 274, 277 (1981) (quoting *Turner Lumber* with approval); Commerce & Indus. Ass'n of N.Y., Inc. v. Balt. & Ohio R.R. Co., 281 I.C.C. 655, 659 (1951) (demurrage charges are "designed to compensate the carriers for the shippers' use of cars for storage and, of equal importance as applied in rail transportation, are an incentive to compel release of carrier equipment").

7. Demurrage Liability, No. EP 707 (proposed Dec. 6, 2010) (hereinafter Demurrage Liability).

8. 49 U.S.C. § 10746.

9. *Id.*

10. *Id.*

11. *Commerce & Indus. Ass'n of N.Y.*, 281 I.C.C. at 659; *see also* T.M. Kehoe & Co. v. Charleston & W. Carolina Ry. Co., 11 I.C.C. 166, 170 (1905) ("The consequences to the railway

termediaries who have sought to avoid damages.[12]

"As a result, the Board and its predecessor have also long recognized the important role the agency plays in enabling the collection of demurrage charges. In the mid-1970s, for example, the ICC explored revisions to its regulations aimed at ensuring that demurrage charges were collected from the responsible parties."[13] "As the ICC explained, we cannot ignore the fact that if carriers habitually fail to assess or collect demurrage charges or detention fees, an important economic incentive for shippers and consignees promptly to release cars is destroyed."[14] As explained below, after two recent court decisions, the Board cannot ignore that the two goals of Section 10746 are being circumvented by a regulatory or demurrage gap that prevents railroads from collecting demurrage from certain key participants in the rail transportation chain.

1. Norfolk Southern Railway Co. v. Groves

In *Norfolk Southern Ry. Co. v. Groves*, the United States Court of Appeals for the Eleventh Circuit considered whether a warehouseman was liable for demurrage charges assessed by Norfolk Southern for the warehouseman's delay in unloading and returning railcars to the railroad.[15] Norfolk Southern was instructed by the shippers[16] in that case to deliver loaded railcars to a designated intermediary, known as Savannah Re-Load.[17] That receiver was at times listed on the bill of lading as the "consignee," at times as the "care of" party, and at times in other ways –

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of neglect to do this are not merely in case of carload freight the loss of the use of a car. The uncertainty arising from the fact that cars are sometimes unloaded promptly and sometimes not is embarrassing. The congestion of its terminals is often and perhaps usually a more serious matter than the loss of its cars. It would be not only much more expensive but often impossible for the railways of this country to handle their traffic at many points unless they required the prompt removal of the freight from the car. To permit one person to use the cars of a railroad company for a storehouse and to deny that privilege to another creates a discrimination between shippers which is often serious.").

12. International Warehouse Logistics Association Comments on the Surface Transportation Board Decision on Demurrage Liability, at 2 (Jan 21, 2011) ("[T]here is a purpose for demurrage," which "contribute[s] towards making [the transportation system] more efficient."); Reply Comments of Norfolk So. Ry. Co., at 7 (May 20, 2011) (citing Savannah Re-Load Comments: "[D]emurrage serves a dual role of compensating car owners for the use of their equipment and encouraging prompt return of railcars into the transportation network . . . [with] this latter goal ensur[ing] the smooth functioning of the rail system.").

13. Opening Comments of Norfolk So. Ry. Co., at 10 (March 7, 2011).

14. *Id.*

15. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273, 1275 (11th Cir. 2009), *cert denied*, 131 S. Ct. 993 (2011).

16. *Id.* As used here, the term "shippers" refers to the party who tendered the freight to the railroad and was responsible for paying for the freight.

17. *Id.*

but Norfolk Southern did not participate in that designation.[18] Because Norfolk Southern was not a party to any agreement between the shippers and Savannah Re-Load, Norfolk Southern lacked any knowledge of the legal relationships—if any—between Savannah Re-Load and the shipper, or between Savannah Re-Load and the freight itself.[19] What Norfolk Southern knew was that (1) 49 U.S.C. § 10746 commands railroads to establish and apply demurrage charges in a way that promotes freight car use and distribution and helps maintain an adequate supply of freight cars to be available for transportation of property;[20] (2) Savannah Re-Load accepted those railcars;[21] and (3) Savannah Re-Load's conduct caused delays that resulted in railcars being unavailable for an extended period of time for other loads of freight.[22] Nonetheless, Norfolk Southern was unable to collect demurrage charges from Savannah Re-Load because the Eleventh Circuit concluded that, despite the receiver having been listed as the consignee for many of the shipments, Norfolk Southern had not established any *contractual* basis for collecting demurrage from Savannah Re-Load.[23]

The *Groves* court began by noting that "[b]efore such transportation-related assessments such as detention charges can be imposed on a party . . . there must be some legal foundation for such liability outside the mere fact of handling the goods shipped."[24] The demurrage charges could "be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom."[25]

The court then stated that a "consignee is the party designated to receive a shipment of goods. But, consignee status is more than a mere designation."[26] The court described how the term consignee takes on a legal significance by creating a quasi-contract between the railroad and the party named consignee.[27] Quoting a prior state court case, the court wrote that "[a]lthough a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such."[28] The court then followed contract law to the con-

18. *Id.* at 1276.

19. *Id.* at 1280.

20. *Id.* at 1276.

21. *Id.* at 1277.

22. *See generally id.* at 1276.

23. *Id.* at 1282.

24. *Id.* at 1278 (quoting Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1118 (D.D.C. 1972) (three-judge panel)).

25. *Id.*

26. *Groves*, 586 F.3d at 1281.

27. *Id.*

28. *Id.* (quoting Consol. Rail Corp. v. Com., Pa. Liquor Control Bd., 90 Pa. Cmwlth 595, 496 A.2d 422, 424 (Pa. Cmwlth. 1985)).

clusion that "there must be a meeting of the minds between the parties" on all essential terms and obligations of the contract.[29] Furthermore, the court reminded that "a third-party cannot be bound by a contract to which it was not a party."[30] The court's conclusion was that

Savannah was not a consignee, and thus not liable for demurrage charges. Savannah did not agree to be named as consignee on the bills of lading between Norfolk and the various shippers, and was not aware of its designation as such. Savannah cannot be made a party to shipping contracts without its consent or notice of such.[31]

In summary, although Norfolk Southern played no role in naming Savannah Re-Load the consignee and had no way to indentify whether Savannah Re-Load had consented to the shipper naming it as consignee, Norfolk Southern and the efficiency of the national rail system suffered the consequences of the court's ruling. In addition, Norfolk Southern could not collect demurrage from any other party because it did not know who any other party involved with the shipment was. Indeed, such parties often are foreign entities. Thus, the efficiency of the national railcar supply was undermined.

2. CSX Transportation v. Novolog Bucks County

In *Novolog*, the United States Court of Appeals for the Third Circuit also examined the liability of intermediaries for demurrage charges.[32] The intermediary objected to the assessment of demurrage and argued that "it could not be subjected to charges under an agreement-namely, the transportation contract-to which it was not a party."[33] Accordingly, the issue before the court was whether an intermediary

[C]an become subject to liability for demurrage charges by being listed as the consignee in a bill of lading and accepting delivery of the freight listed therein, even if it does not have a beneficial interest in the freight and has not authorized the shipper or the carrier to list it as the consignee.[34]

The court began its substantive discussion of the issue by reciting two principles. The first was that "liability for freight charges, including demurrage charges, may be imposed against a consignor, consignee, or

29. *Id.*

30. *Id.* at 1281-82.

31. *Groves,* 586 F.3d at 1282; *but see* Payment of Detention Charges, Eastern Central States, 335 I.C.C. 537, 545 (1969) (Bush, dissenting)(stating that warehousemen who do not avail themselves of Section 233 of the Interstate Commerce Act – which provided a process for them to avoid liability as an agent similar to Section 10743 – are parties to the transportation contract when named in the bills of lading as receivers of freight).

32. CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 250 (3d Cir. 2007).

33. *Id.*

34. *Id.* at 254.

owner of the property, or on others by statute, contract, or prevailing custom."[35] Second, "the consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision."[36]

To resolve the matter, the *Novolog* court looked to another statutory provision. The court concluded that Novolog had been named "consignee" and had not availed itself of 49.U.S.C. § 10743.[37] The court determined that Section 10743 provided the escape hatch for a party improperly named consignee or named consignee without its consent. Accordingly, the court held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1)."[38]

Whereas the *Groves* court absolved from liability an exception for an intermediary that claimed that it did not consent to being named the consignee, the *Novolog* court concluded that

[T]o hold, as Novolog asks us to do, that the designation in the relevant bills of lading should not be given effect without some further evidence of consent or involvement would also frustrate the plain intent of Section 10743, which is to facilitate the effective assessment of charges by establishing clear rules for liability.[39]

3. *Surface Transportation Board Advance Notice of Proposed Rulemaking*

While the appeal from the Eleventh Circuit was pending at the United States Supreme Court, the Board issued a notice of proposed rulemaking to reexamine the demurrage regime.[40] In its Ex Parte 707

35. *Id.*

36. *Novolog*, 502 F.3d at 254-55 (citing Louisville & Nashville Ry. Co. v. Central Iron & Coal Co., 265 U.S. 59, 70, 44 S. Ct. 441, 68 L. Ed. 900 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); Erie R. Co. v. Waite, 62 Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); Gage v. Morse, 94 Mass. 410, 12 Allen 410, 90 Am. Dec. 155 (Mass. 1866) ("[i]f the consignee will take the goods, he adopts the contract")).

37. *Novolog*, 502 F.3d at 259.

38. *Id.* at 254.

39. *Id.* at 258; *see* 49 U.S.C. § 10743 (2006) ("gives *written notice* to the delivering carrier *before delivery of the property* - (A) *of the agency and absence of beneficial title*; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.") (emphasis added).

40. Demurrage Liability, *supra* note 8.

decision, the Board attempted to summarize what it thought the state of the law had become:

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. Thus, our predecessor, the [ICC], held that a tariff may not lawfully assess such charges on a warehouseman who is not the beneficial owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation, "e.g., a warehouseman who receives the freight pursuant to an 'in care of' designation."[41]

Even this summary of the state of the law highlights how disconnected the current regime has become from the goals of the statute and reality.

First, why does a designation made by a non-railroad determine whether the railroad can collect demurrage to "fulfill" the goals of Section 10746?

Second, should acceptance of the cars directly from the railroad be a sufficient act to create a legal relationship between the railroad and the intermediary whose business is dependent on its voluntary participation in the rail system?[42]

Third, does the rule that prevents a railroad from collecting demurrage charges from an intermediary "who is not the beneficial owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation"[43] make any sense in the modern world where receivers who accept railcars have easy access to demurrage tariffs via the Internet and cannot deny that they are participants in the rail transportation system?

Fourth, what basis might be applicable for making demurrage apply to all parties who send, receive, load, unload, handle, or otherwise take possession of railcars?[44]

41. *Id.* (citing *see, e.g., Smokeless Fuel Co. v. Norfolk & W. Ry.*, 85 I.C.C. 395, 401 (1923)) (footnotes omitted).

42. The term "voluntary" is appropriate here because there is no legal requirement that a warehouseman or other intermediary participate in that line of business or interact with the rail network.

43. Demurrage Liability, *supra* note 8.

44. *Id.*; Evans Prods. Co. v. Interstate Commerce Comm'n, 729 F.2d 1107, 1113 (7th Cir.

Fifth, how can the statutory goals be met when the regime permits some participants in the rail transportation system to avoid demurrage because they fall in the demurrage gap that the *Groves* and *Novolog* decisions highlighted and expanded?

4. *"Consignee" and "Care of Party"— Why Those Designations Should Not Matter*

As shown by the Board's summary of what it sees as the state of the law and the most recent cases, these designations have an inflated importance. The Board's description emphasizes that how the receiver of the railcar is listed by the shipper is what matters most.[45] "In the simplest case, demurrage is assessed on the "consignor" for delays at origin" and on the party named the "consignee" on the bill of lading "for delays at destination."[46] The Board notes that a party designated by the shipper as an "in care of party" is not liable for demurrage even if it is the only party to handle the railcars on the receiving end of the shipment.[47] Like the Board, the *Novolog* and *Groves* courts both start the analysis with how the receiver was listed by the shipper in the bill of lading.[48]

For purposes of advancing the twin goals of Section10746, these terms are a fiction. The common law has established that the description of the receiver as the "consignee" by the shipper is essentially a prerequisite to establishing a legal relationship between the railroad and an inter-

1984); *see also* S. Pac. Transp. Co. v. Matson Navigation Co., 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("The obligation to pay demurrage arises either out of contract, statute or prevailing custom"); Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1118 (D.D.C 1972) (finding that liability for demurrage "must be founded either on contract, statute or prevailing custom").

45. Demurrage Liability, *supra* at note 8.

46. *Id.*

47. "The 'in care of' designation refers to the principle of agency law under which a consignee—although presumed to be an owner generally liable for freight charges upon acceptance of goods—could be relieved of such liability if the carrier were made aware that the receiver of the goods was accepting the goods only as an agent for the actual owner," which is a concept reflected today in Section 10743.. Demurrage Liability, *supra* at note 8. As happened with Savannah Re-Load in the *Groves* case, a shipper can designate an intermediary, such as a warehouseman, either a "consignee" or an "in care of party" on different shipments. *Groves*, 586 F.3d at 1276.

48. Other cases also start with the designation. *See* Ill. Cent. R.R. Co. v. S. Tec Dev. Warehouse, 337 F.3d 813, 821 (7th Cir. 2003) ("[B]eing listed by third parties as a consignee on some bills of lading is not alone enough to make South Tec a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render South Tec a consignee."); Union Pac. R.R. Co. v. Carry Transit, Inc., No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *14 (N.D. Tex. Oct. 27, 2005) ("The Court agrees with the principle enunciated in *Matson* and *CSX* that a party's (here, the shippers') unilateral decision to name a non-party to the transportation contract (here, Carry Transit) as a consignee without its consent does not render the non-party a consignee liable for demurrage charges.") (citing CSX Transp., Inc. v. City of Pensacola, Fla., 936 F.Supp. 880, 884 (N.D. Fla. 1995); *S. Pac. Transp. Co.*, 383 F.Supp. at 157.

mediary.[49] Apparently, it stems from the fact that the consignee becomes liable for freight charges by accepting the shipment or from the fact that the consignee may have an ownership interest in the shipment.[50] However, neither of those facts—being designated "consignee" by the consignor or owning the goods in the railcar—creates any more of a legal relationship between the receiver of the railcar and the railroad than the act of accepting the railcars. Indeed, the railroad does not make the designation and likely does not know who owns the goods in the railcar. The obvious act that creates any relationship between the railroad and any receiver (absent an express contract between them) is the receiver's acceptance of the railcar when delivered by the railroad.

The reliance on these terms evolved then from two early lines of cases. The first line of cases focused the legal analysis on whether the demurrage charges were akin to transportation charges. These cases concluded that demurrage charges are part of the total transportation cost, and accordingly, demurrage charges could be assessed against the shipper or consignee.[51] The early cases that started this line of reasoning implicated the scope of the ICC's power (sometimes relative to a state commission)—finding demurrage to be part of the transportation meant the ICC had the power to regulate or had exclusive jurisdiction over an issue presented.[52]

The second line of cases arose in the context of whether steamship companies could be liable for demurrage charges assessed by railroads. Essentially, these cases were trying to determine whether one transportation company could charge another transportation company for demurrage. Those cases held that the consignee could not avoid liability for the demurrage charges.[53] Relying on these two lines of cases, it seems that the common law then inflated the importance of who was consignee

49. *Carry Transit*, 2005 U.S. Dist. LEXIS 45568 at *8 (citing *South Tec*, 337 F.3d at 820). Of course, an express contract between the railroad and the intermediary could also establish liability for demurrage.

50. *Novolog*, 502 F.3d at 254-55; *see Cent. Iron & Coal*, 265 U.S. at 70 ("[I]f a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *Morse*, 94 Mass. (12 Allen) at 411, (1866) ("[I]f the consignee will take the goods, he adopts the contract").

51. *See e.g.*, Payment of Detention Charges, Eastern Central States, 335 I.C.C. 537, 540 (1969) (citing Davis v. Timmonsville Oil Co., 285 F. 470 (1922) and Milne Lumber Co. v. C., C., C. & St. L. Ry. Co., 146 I.C.C. 332, 334 (1928)).

52. Cleveland, Cincinnati, Chi. & St. Louis. Ry. Co. v. Dettlebach, 239 U.S. 588, 593-94 (1916); Wilson Produce Co. v. Pa. R.R. Co., 14 I.C.C. 170, 173 (1908).

53. *See, e.g.*, Cent. R.R. Co. of N.J. v. Anchor Line, 219 F. 716, 717 (2d Cir. 1914); N.Y. Bd. of Trade and Transp. v. Dir. Gen., Cent. R.R. Co. of N.J, 59 I.C.C. 205, 209 (1920) (affirming that consignee is liable for demurrage even if caused by the steamship company, which was an agent of the consignee).

which later evolved into an inquiry of whether the receiver was listed as the "consignee" by a third party in a bill of lading.

However, a third line of cases focused on the fact that the consignee was the receiver of the shipment. In one case, the ICC went so far as to describe the obligations thusly:

[I]t is the duty of the railroad to deliver freight to its destination and there deliver it to the consignee; that it is the duty of the consignee *to receive* such freight with a reasonable time, and that if he neglects to do so the liability of the railroad as a common carrier ceases and it becomes a warehouseman."[54]

In a 1905 case, the ICC said the railroad "is under no legal liability to continue to discharge the duty of a warehouseman but may insist that the consignee shall *receive and remove* [from the railcar] his freight."[55] Similar to these ICC cases, in 1920, the Supreme Court stated the rationale behind demurrage when it said, "[t]he purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."[56] The Court then noted that the "duty of loading and of unloading carload shipments rests upon the shipper or consignee."[57] Here the link is between who has the duty to load and unload a car –who actually touches the car – and the effectiveness of the demurrage system. In both instances the ICC and the Court arguably use the term consignee to mean only receiver or party entitled to receive the freight because what mattered was the consignee was the party "unloading" the railcar.

In these cases, the characterization of the consignee as the receiver is consistent with the Black's Law definition of consignee. A consignee is "one to whom a consignment is made."[58] The term consignment means "the transportation of goods consigned."[59] Therefore, the consignee is the one to whom goods are transported. In the rail context, goods are transported to the receiver. And from the perspective of the railroad that moves cars to a destination, the receiver is the one who accepts the railcar – regardless of how others designate it.

This third line of cases also was moored more securely to the efficiency and car supply rationales underlying demurrage charges. Early

54. In the Matter of the Investigation and Suspension of Advances in Demurrage Charges on Interstate Traffic by Carriers Operating in the State of California, 25 I.C.C. 314, 315 (1912) (emphasis added).

55. T.M. Kehoe & Co. v. Charleston & W. Carolina Ry. Co., 11 I.C.C. 166, 170 (1905) (emphasis added).

56. Pa. R.R. Co. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920).

57. *Id.*

58. *Definition of Consignee*, BLACK'S LAW DICTIONARY, http://blackslawdictionary.org/consignee/ (last visited Feb. 20, 2012).

59. *Definition of Consignment*, BLACK'S LAW DICTIONARY, http://blackslawdictionary.org/consignment/ (last visited Feb. 20, 2012).

ICC cases examining demurrage charges also used the term consignee. But their focus was on the party whose failure to unload the railcar timely was an "inconvenience to the public."[60] Because the cases involved situations where the railcar was being used as the warehouse, the issue of intermediaries did not arise squarely. The focus was nevertheless clear: "[t]he public needs will be best subserved by compelling the prompt unloading of cars upon arrival at destination."[61] These cases, like Section 10746, are concerned about the railcar as an instrument of conveyance.

The current rail system and regulatory regime do not support the continued reliance on how the receiver is designated. There are simply more actors in the transportation chain. One commenter described this evolution:

[T]he traditional structure or transportation role of service providers is disappearing or has disappeared. The transportation market between an asset-based direct transportation provider and the beneficial owner of goods who wants to sell them to an ultimate consumer is now very fluid. Intermediaries have generally interjected themselves into this historically simple economic relationship. The parties to each such comprehensive transportation transaction are no longer the consignor, carrier, and consignee where the economic relationships were defined by a single bill of lading. The market is now known as the supply chain and each movement in the supply chain can have a number of different actors functioning in different interlocking capacities depending upon perceived economic benefits that will accrue to each actor.[62]

In a filing at the Board, a warehouseman similarly described the relationship today between intermediaries and the rail system.

Product that moves in and out of a third-party warehouse depends on an integrated freight delivery system. The warehouse-based third-party logistics industry depends on rail as one mode for goods movement. The industry is *fully integrated into the national rail system*, heavily reliant on both intermodal and box car moves.[63]

A return to the third line of cases is needed. These cases advanced the goals of demurrage and recognized that the receiver of the freight cars is the party that affects those goals. Reliance on third party designa-

60. *N.Y. Hay Exch. Assoc. v. Pa. R.R. Co.*, 14 I.C.C. 178, 185 (1908) (holding that hay and straw dealers who sold from the railcar to buyers in New York City liable for demurrage).

61. Wilson Produce Co. v. Pa. R.R. Co., 14 I.C.C. 170, 175 (1908).

62. Daniel C. Sullivan & Matthew P. Barrette, *Special Symposium Edition: Third Party Surface Transportation - Common Issues and Recent Trends: Transportation Tort Liability Travels Up the Supply Chain*, 34 TRANSP. L. J. 289, 293 (2007).

63. Letter from John Menzies, Chairman, The Terminal Corporation, to the Surface Transportation Board (Nov. 29, 2011), *available at* http://www.stb.dot.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/7bad32a5cd250f6685257957005e5616/$FILE/231355.PDF (last visited Feb. 20, 2012) (emphasis added).

tions in a bill of lading has created the opportunity for parties to undermine the national goals in Section 10746. After *Groves*, at least in the Eleventh Circuit, the railroad may not even rely on the fact that an intermediary was listed as the "consignee" because the case held that the named consignee is liable for demurrage only if it at least knew that it had been—and maybe even needed to assent to being—designated by the shipper as the "consignee."[64] A practical problem with the *Groves* decision is that an intermediary can always claim it did not know the shipper designated it as the "consignee," and it is often hard for a railroad to prove otherwise—short of discovery through litigation.

Section 10746 requires railroads to establish demurrage rules to fulfill the twin national goals.[65] But the railroads cannot fulfill this requirement when the system for determining liability turns on how a third-party designates the receiver's status. The railroad does not participate in designating a party as the "consignee" or "care of party." Moreover, the intermediary's relationships, if any, with the shipper or owner of the freight—and the intermediary's ownership interest in the freight itself—are irrelevant to the efficiency-based goals of demurrage. The connection between the railroad and the intermediary is only in the physical act of delivering and accepting the railcars.

5. *Acceptance of Railcars Is Objectively Determinable and What Matters for Fulfilling the Statutory Goals*

Acceptance of railcars does not turn on terminology that attaches to a party because of a label applied by a third-party. The *Novolog* court noted that one of the often-repeated principles was "that the consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus, it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision."[66] But, being named by a third-party as "consignee" adds nothing to the relationship between the railroad and the intermediary. But, being named by a third-party as "consignee" adds nothing to the relationship between the railroad and the intermediary. Being the party that unloads the freight is what mattered to the Supreme Court in 1920[67] and is what should matter today.

64. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273, 1275 (11th Cir. 2009), *cert denied*, 131 S. Ct. 993 (2011).

65. 49 U.S.C. § 10746.

66. CSX Transp. v. Novolog Bucks Cnty., 502 F.3d 247, 254-55 (3rd Cir. 2007); *see Cent. Iron & Coal*, 265 U.S. at 70 ("[I]f a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *Morse*, 94 Mass. (12 Allen) at 411, (1866) ("[I]f the consignee will take the goods, he adopts the contract").

67. Pa. R.R. Co. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920).

Who received and handled the railcars can be objectively determined; the party that receives and handles the railcars cannot deny knowing that it is receiving and handling the railcars. A further examination of the *Groves* and *Novolog* decisions reinforces the need for a standard that is not based on some designation in which the railroad does not participate. In particular, given the importance the *Groves* court appears to attach to the existence of a "meeting of the minds between the parties,"[68] there is uncertainty whether an intermediary who is aware of its designation could still escape liability merely by asserting that it *did not agree* to become a "consignee" and thereby assume liability for demurrage.[69] *Groves* also suggests that the railroad might be required in such cases to offer proof that the intermediary was in fact the true "consignee," not someone merely misidentified as such on the bill of lading.[70]

This ruling could considerably undermine demurrage. Absent discovery against the intermediary in a legal proceeding,[71] the only basis for the railroad's knowledge regarding the intermediary receiver's role and legal relationships with the shipper or owner of the freight typically is the bill of lading submitted to the railroad. No litigation and no discovery are needed, however, to know who the railroad and the receiver of the railcar are.

"Demurrage seeks to compensate railroads for the use of the *railcar*, and to encourage rapid return of the *railcar* to the network."[72] "Once a carrier has delivered a railcar to an intermediary—and even before that when the receiver is notified that the railcar is available for delivery—the intermediary is the party who has control over the efficient handling of the railcar."[73] "To achieve Congress's goals for the system of demurrage that carriers are required to implement, such charges should be assessed

68. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273, 1281 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 993 (2011).

69. *Id.* at 1282 ("Thus, a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.").

70. *Id.* at 1280-81. Further complicating the potential issues created by *Groves* are arguments by intermediaries to the effect that they cannot be true "consignees" unless they have a beneficial ownership interest in the freight. These arguments draw force from the historic role played by the bill of lading as a receipt for the freight itself. One step the Board could take to help reduce the burdens carriers face in collecting demurrage would be to clarify that, in the modern transportation world, a "consignee" is the designated receiver of the freight regardless of its ownership interest in that freight.

71. *Id.* at 1281 (alluding to the potential for proving consignee status using "interrogatories or deposition testimony.").

72. SURFACE TRANSP. BD., Ex Parte No. 707, OPENING COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY (2011), *available at* http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/e0f1eef66e3fb57f8525784c00783893/$FILE/228957.PDF.

73. *Id.*

against all those who are responsible for 'return[ing] freight cars to the system.'"[74] The *Groves* rule[75]—however interpreted and applied—undermines the national need for demurrage because it gives the party who has actual control of the railcar a potential avenue for avoiding demurrage by claiming ignorance or lack of assent.

6. *In the Modern World, Receivers Cannot Claim That They Could Not Know the Terms of Participating in the National Transportation System By Accepting Cars from a Railroad*

Intermediary receivers cannot—and do not—dispute that they are participants in the rail transportation system.[76] They know that they receive railcars. They know the identity of the railroad that delivers those cars to them. They know how to contact that railroad to order cars for the railroad for delivery to their facilities.

Moreover, the demurrage rules established by railroads pursuant to Section 10746 are well known. As required by federal law, they are publicly available on the Internet.[77] In many instances, those rules are listed or at least referenced in documents exchanged between the railroad and the intermediary receiver.[78] Therefore, when an intermediary receiver accepts cars from a railroad, it is well aware of the applicable terms of participating in the national transportation system, which would include liability for demurrage. Any attempt by the intermediary receiver to claim otherwise is simply a ruse to avoid payment.

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74. *Id.*

75. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273, 1282 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 993 (2011).

76. *See, e.g.*, Letter from Trudy McCleary, Manager of Bus. Dev. for Freeport Logistics, to Surface Transportation Board (April 14, 2011), *available at* http://www.stb.dot.gov/FILINGS/all.nsf/WEBUNID/EAB7CE025F7ABA9A85257873004FDFFF?OpenDocument (indicating that they have paid demurrage when they have been at fault); Letter from William S. R. Groves, President of Savannah Re-Load, to Surface Transportation Board (Jan. 24, 2011), *available at* http://www.stb.dot.gov/FILINGS/all.nsf/WEBUNID/DDD46BC5B6E4B6468525782200709A32?OpenDocument ("[T]he warehouseman certainly has a role to play in the accumulation of demurrage."); Letter from John T. Menzies, Chairman of The Terminal Corporation, to the Surface Transportation Board in Ex Parte 526 (Sub-No. 3) (Nov. 22, 2011), *available at* http://www.stb.dot.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/7bad32a5cd250f6685257957005e5616/$FILE/231355.PDF.

77. 49 U.S.C. § 10746.

78. Demurrage rules will usually be an express condition in the contract. Absent an express condition, demurrage rules will be included in the conditions of carriage document. This document is mandated by 49 U.S.C. § 11101(b) (2006) to be publically available as it is a tariff document. Intermediaries have access to this document and the included demurrage rules that apply to the applicable shipment of goods.

7. Other Bases for Imposing Liability for Demurrage on Any Receiver Who Accepts Railcars from a Railroad

Courts have held that there are other bases for imposing demurrage liability. In *Evans Prods. Co. v. Interstate Commerce Commission*, the Seventh Circuit held that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or *others by statute*, contract, or prevailing custom."[79] *Evans* was clear that liability could arise by statute.[80] Indeed, the *Groves* court quoted this very sentence.[81] However, the *Groves* court then ignored the applicable statute – Section 10746;[82] relying instead on *Middle Atlantic*.[83]

Middle Atlantic is the case often cited in the modern era as establishing the rules for demurrage.[84] "Before such transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside the mere fact of handling the goods shipped."[85] However, the case *Middle Atlantic* cites for support is *Smokeless Fuel Company v. Norfolk & Western Railway Company*, which does not stand for this proposition.[86] In that case, the railroad and shippers of coal to Lamberts Point entered into an agreement to create the Lamberts Point Coal Exchange.[87] That agreement specifically stated the shippers would be responsible for demurrage on coal cars.[88] Thus, when the shippers argued the Exchange should be liable for demurrage, the Commission held that the Exchange could not be liable under the agreement.[89] Thus, *Middle Atlantic* did not address what was required for an intermediary receiver to become liable for demurrage.

Moreover, *Middle Atlantic* arose in the trucking industry.[90] Cases

79. Evans Prods. Co. v. Interstate Commerce Comm'n, 729 F.2d 1107, 1113 (7th Cir. 1984) (emphasis added).

80. *Id.* at 1114. ("Repair facilities, neither consignor, consignee, or owner, nor obligated by statute, contract, or prevailing custom, may not be named as liable for repair switching charges in [a] tariff.").

81. Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273, 1278 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 993 (2011).

82. *See generally id.* at 1276.

83. *Id.* at 1278-81 (citing Middle Atl. Conference v. United States, 353 F. Supp. 1109 (D.D.C 1972)).

84. *See, e.g., Middle Atl.*, 353 F. Supp. at 1118.

85. *Id.* (citing Smokeless Fuel Co. v. Norfolk & W. Ry. Co., 85 I.C.C. 395 (1923)).

86. *See generally Norfolk*, 85 I.C.C. 395 (1923).

87. *Id.* at 395-96.

88. *Id.* at 396-97.

89. *Id.* at 401. By contrast, the Commission did not address who was liable for demurrage related to shipments made outside the Exchange contract. However, the railroad owner of Lamberts Point certainly would not have been liable for demurrage for those shipments, either.

90. *See generally Middle Atl.*, 353 F. Supp. at 1109.

which address other industries, such as trucking, that do not have a statute that governs demurrage, are also of little use. Even after the adoption of the statutory provision in the 4R Act,[91] the ICC continued to rely on its own case law from the motor carrier world regarding liability for demurrage. For example, in *Middle Atlantic*, the court reviewed the application of detention charges by truckers.[92] The court held that it agreed with the ICC's determination "that the proposed tariff was unlawful insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to the contract of transportation. This finding of unlawfulness was adequately supported by the history of demurrage, the common law and ICC precedent."[93] However, there was no analogous statute in the trucking world.

Finally, *Middle Atlantic*, which was decided in 1972, was decided before the enactment of Section 10746.[94] Its relevance is therefore further undermined. The ICC had statutory power to establish a process for enhancing car supply in emergencies pursuant to the Esch Car Service Act of 1917.[95] Under the provisions of that Act, the ICC could act "(a) to suspend . . . rules, regulations, or practices then established with respect to car service" and "(b) to make . . . directions with respect to car service . . . during such emergency as . . . will best promote . . . service . . . [and provide compensation as between carriers]."[96] This ICC regulatory power over demurrage charges was changed by the enactment of the Rail Revitalization and Reform Act of 1976 ("4-R Act"),[97] which added the following provision as Section 10750 to the Interstate Commerce Act:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.[98]

That section exists today as Section 10746; however, the introductory language was changed to command railroads to establish demurrage

91. Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 (2006).

92. *Middle Atl.*, 353 F. Supp. at 1113.

93. *Id.*

94. *See generally* 49 U.S.C. § 10746.

95. I.C.C. v. Or. Pac. Indus., 420 U.S. 184, 190-91 (1975). Prior to the Esch Act, national demurrage rules were adopted by a commission and ratified by the ICC. The provisions provided that "[c]ars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows . . ." Procter & Gamble Co. v. United States, 225 U.S. 282, 286 (1912).

96. *Or. Pac. Indus.*, 420 U.S. at 186-87.

97. Atchison, Topeka & Santa Fe Ry. Co. v. I. C. C., 687 F.2d 912, 915 (7th Cir. 1982).

98. *Id.*; Rail Revitalization and Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31(codified in scattered sections of 49 U.S.C.).

rules.[99]

This legislative evolution is significant. First, cases that address demurrage prior to the enactment of the 4-R Act and that undermine this statute are likely of little continuing relevance. One court has observed that the policy that an entity that is not party to the contract of transportation over the rail lines and cannot be held liable by the rail carrier for demurrage goes back to the 1920's.[100] Even with the statutory addition of the 4R Act, courts and the agency have continued to cite *Middle Atlantic* and other pre-Act cases as the applicable precedent.[101]

What changed after *Middle Atlantic* held that "but where they have not become contractually obligated to pay demurrage because common law principles exonerate them from liability, and they are not made liable by statute or custom, liability cannot then be imposed upon them legislatively through the device of a tariff"[102] Congress enacted Section 10746 in the 4R Act.[103]

Section 10746 is agnostic as to who pays demurrage. It does not use the words "consignee" or "in care of party" because those terms have no bearing on the goals of the section. That section seeks the twin goals of efficient use and distribution of freight cars and maintenance of an adequate supply of freight cars,[104] which can only result from the party who actually sends, receives, loads, unloads, handles, or otherwise take possession of railcars being subject to the incentives created by the demurrage system. The attempt to perpetuate the common law, as it existed prior to the adoption of the rail demurrage provision of the 4-R Act, has led to distorted results that undermine these twin goals.

In essence, the adoption of Section 10746 has been ignored by the agency and the courts. The continued reliance on cases decided prior to enactment and on cases arising in contexts where there was no applicable statute should be readily distinguished. Whereas the *Novolog* court at least acknowledged that Congress adopted Section 10746,[105] most courts

99. *See* 49 U.S.C. § 10746. The introductory language was changed to expressly give railroads the power to establish demurrage rules. Several other minor changes were made as well. The phrase "in a manner" was changed to "in a way" and the word "utilization" was changed to "use." The legislative history reflects the belief of some that these changes were non-substantive.

100. Union Pac. R.R. Corp. v. Ametek, 104 F.3d 558, 563 n.8 (3rd Cir. 1997) (citing N.Y. Bd. of Trade v. Dir. Gen., 59 I.C.C. 205, 209 (1920)). *New York Board of Trade* itself cited *Anchor Line*, which was one of the cases determining whether a railroad could assess demurrage against a steamship company. *See* Cent. R.R. Co. v. N.J. Anchor Line, 219 Fed. 716, 717-18 (1914).

101. *See, e.g., Ametek*, 104 F.3d at 563; S. Pac. Transp. Co. v. Matson Navigation Co., 383 F. Supp. 154, 156 (N.D. Cal. 1974).

102. Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1120 (D.D.C 1972).

103. 49 U.S.C. § 10746.

104. *Id.*

105. CSX Transp. v. Novolog Bucks Cnty., 502 F.3d 247, 258-59 (3rd Cir. 2007).

have ignored it.[106] They fail to even cite it. Instead they try to extrapolate from *Middle Atlantic*, which: (1) invented a principle by misunderstanding a prior ICC case; (2) arose from a different industry and context; and (3) predated the statute.[107] Thus, the law has evolved by ignoring Section 10746 and its purpose and blindly following *Middle Atlantic*.[108]

The Board has the power to interpret and to establish the parameters of Section 10746.[109] This section can and should serve as an independent basis for establishing that the party which actually handles the railcars is liable for demurrage charges. Absent Board action, there is precedent in various courts on which intermediaries can claim that they are not the consignee because (1) they were named by the shipper without knowledge;[110] (2) they were named by the shipper without their assent or consent;[111] (3) they were only made consignee by the railroad's tariff;[112] or (4) they were not made consignee by their acceptance of the railcar.[113] The potential that these arguments could continue to prevail in some courts further illustrates the demurrage gap and the potential for balkanization of the demurrage regime.

Some might argue that Section 10746 does not expressly impose liability on any particular party and therefore cannot be the basis for the intermediary's liability for demurrage.[114] But: (1) the statute's aim is efficient car utilization; (2) only those who actually handle the railcars can affect that utilization; (3) the railroad is uninvolved and often unaware of how the intermediary that actually accepts receipt of railcars has been

106. *See, e.g.*, Union Pac. R.R. Corp. v. Ametek, 104 F.3d 558 (3rd Cir. 1997).

107. *See supra* text accompanying notes 102-03.

108. *See, e.g.*, Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273 (11th Cir. 2009), *cert denied*, 131 S. Ct. 993 (2011); Ill. Cent. R.R. Co. v. S. Tec Dev. Warehouse, Inc., 337 F.3d 813 (7th Cir. 2003); *Ametek*, 104 F.3d at 563 n.8; Canadian Nat'l Ry. Co. v. Matrix Polymers, Inc., No. 05 CIV. 06295, 2009 U.S. Dist. LEXIS 81328 (S.D.N.Y. September 2, 2009); CSX Transp. v. Pensacola, Fla, 936 F. Supp. 880 (N.D. Fla. 1995).

109. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984). Because the issue has not been expressly presented to Congress repeatedly, the Board does not face the congressional ratification exception to the *Chevron* doctrine.

110. *See, e.g.*, *Groves*, 586 F.3d at 1282.

111. *See, e.g.*, *id.*; Union Pac. R.R. Co. v. Carry Transit, Inc., No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *14 (N.D. Tex. Oct. 27, 2005) ("The Court agrees with the principle enunciated in *Matson* and *CSX* that a party's (here, the shippers') unilateral decision to name a non-party to the transportation contract (here, Carry Transit) as a consignee without its consent does not render the non-party a consignee liable for demurrage charges.").

112. *See, e.g.*, Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1112 (D.D.C 1972); *CSX Transp. Inc.*, 936 F. Supp. at 885.

113. *Carry Transit*, 2005 U.S. Dist. LEXIS 45568, at *8 n.3, *13.

114. Ill. Cent. R.R. Co. v. S. Tec Dev. Warehouse, Inc., 337 F.3d 813, 820 (7th Cir. 2003) ("The IC has not indicated any applicable statute holding non-consignees responsible for demurrage charges."). Although in this case, it is difficult to tell from the decision whether Section 10746 was presented to the court at all.

designated by the shipper; and (4) there is no more of a relationship created between railroad and intermediary than the act of delivering and exchanging possession of the railcar. Interestingly, these are the themes relied upon in the third line of cases. Between the absence of any mandate of who should pay demurrage and the statute's insistence on a system that generates efficient car utilization for the national good, it certainly implies that the system should place liability on those whose actions most directly affect the achievement of the statute's twin goals. Under the *Chevron* doctrine, "if the statute is silent . . . with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute."[115] Certainly, a construction that makes the receiver of the car liable for demurrage would advance the twin goals and would be consistent with the expert agency's understanding of how the national rail system works.

Assuming the statute itself is insufficient and the Board does not establish the parameters of Section 10746, then the courts may decide to continue to rely on contract law. The *Middle Atlantic* court observed that "[t]he adjudicated cases do not require that there be a specific contract to pay demurrage but it must arise out of contract."[116] Contracts come into existence in several ways. One such way is through acceptance by performance.[117] The act of accepting railcars from a railroad whose identity is known and whose terms are required by law to be public[118] and often have been provided to the intermediary should be viewed by the Board and the courts as the creation of a contract.

In sum, between the express language of the statute and a closer look at the relationship between the railroad and the intermediary receiver in the modern world, there is more than an adequate legal basis for making the intermediary liable for demurrage.[119]

II. PRACTICAL APPLICATION AND RECOMMENDATIONS

A. The Existing Demurrage Gap Undermines the Twin National Policy Goals of Section 10746

To function in a way that serves the purposes of the statute, demurrage rules must apply to *all parties* whose conduct with respect to the

115. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

116. *Middle Atl.*, 353 F. Supp. at 1118.

117. 17A Am. Jur. 2d *Contracts* § 96 (2012).

118. 49 U.S.C. § 11101(b) (2006).

119. The other legal relationship to which the railroad is a party is with the shipper. The railroad and the shipper have a contractual relationship by virtue of a bilateral contract for the transportation of goods or by virtue of the shipper tendering traffic for transportation pursuant to the rates and terms of service published by the railroad. Union Pac. R.R. Co. v. Carry Transit, Inc., No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *14 (N.D. Tex. Oct. 27, 2005).

physical handling of railcars might undermine the "efficient use and distribution" of those cars. The "national needs" that motivated Congress to mandate the collection of demurrage are not served if parties who bear responsibility for the inefficient handling of freight cars can escape responsibility for demurrage charges. Under the present common law and its reliance on how the receiver was designated and whether the receiver knew of (or assented to) the designation undermine those needs.

As the ICC explained, "we cannot ignore the fact that if carriers habitually fail to assess or collect demurrage charges and detention charges, an important economic incentive for shippers and consignees promptly to release cars is destroyed."[120] The present rules create a situation in which that economic incentive is regularly destroyed. Some cases, such as *Groves*, regarding whether a railroad can collect the demurrage charges, make it into the public arena whereas others do not because the railroads simply abandon the effort to collect.[121] However, the *Groves* and *Novolog* cases have highlighted and expanded a systematic flaw in the law that can result in habitual failures to collect demurrage from intermediary receivers.

For example, whenever the receiver – the party that actually handles the railcars—is listed as the "care of party," the railroad is unable to collect demurrage.[122] The "care of party" says the railroad cannot collect from them because of the designation and the owner of the freight—to the extent the railroad even knows who that is—claims the railroad cannot collect from it because it did not handle the railcars.[123] In *Groves*, for example, the rail shipments Norfolk Southern delivered to Savannah Re-Load's facility typically were unloaded there and subsequently placed on oceangoing vessels bound for overseas ports of call.[124] When Savannah Re-Load was a "care of" party, the owners of the freight often were foreign firms (located in such distant lands as Jeddah, Saudi Arabia) whose only contractual relationships were presumably with the shipper, and perhaps also Savannah Re-Load, but certainly not directly with Norfolk

120. Maintenance of Records Pertaining to Demurrage, 352 I.C.C. 739, 746 (1976).

121. *See, e.g.*, Norfolk S. Ry. Co. v. Groves, 586 F.3d 1273 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 993 (2011).

122. Norfolk S. Ry. Co. v. Brampton Enters., LLC, No. CV407-155, 2008 WL 4298478, at *3 (S.D. Ga. Sept. 15, 2008) (citing Ill. Cent. R.R. Co. v. S. Tec Dev. Warehouse, Inc., 337 F.3d 813, 820 (7th Cir. 2003)), *aff'd*, 586 F.3d 1273 (11th Cir. 2009); CSX Transp. Co. v. Novolog Bucks Cnty., 502 F.3d 247, 258 n.12 (3d Cir. 2007); *see also supra* text accompanying note 32, 49.

123. Norfolk S. Ry. Co. v. Brampton Enters., LLC, No. CV407-155, 2008 WL 4298478, at *3 (S.D. Ga. Sept. 15, 2008) (citing Ill. Cent. R.R. Co. v. S. Tec Dev. Warehouse, Inc., 337 F.3d 813, 820 (7th Cir. 2003)), *aff'd*, 586 F.3d 1273 (11th Cir. 2009); CSX Transp. Co. v. Novolog Bucks Cnty., 502 F.3d 247, 258 n.12 (3d Cir. 2007); *see also supra* text accompanying note 32, 49.

124. *Groves*, 586 F.3d at 1275.

Southern.[125]

B. The Board Must Act Aggressively to Fill the Demurrage Gap

The Board's responsibility to establish effective demurrage principles is underscored by the fact that the United States, represented in part by the Board's counsel, urged the Supreme Court to deny certiorari in *Groves* on the basis that the Board would be establishing "a default rule (or rules), in the first instance, for demurrage liability," including through the reexamination of old regulatory precedent.[126] The Board's counsel joined the Solicitor General (on behalf of the United States) in advising the Court to decline review in *Groves* because an Board proceeding offered a superior forum for addressing the problem posed by *Groves*, and potentially establishing "a default rule (or rules) . . . for demurrage liability."[127] It noted that the Board had already started a proceeding and reminded the Court of the Board's "longstanding legal and practical expertise in demurrage matters"; its ability to reconsider old administrative precedent; and its ability to adopt, in this proceeding, a solution that could be adapted to evolving market conditions.[128] This position before the Supreme Court, which extinguished Norfolk Southern's effort to close the loophole that was highlighted and expanded by the Eleventh Circuit's misguided decision, magnifies the Board's responsibility to close the regulatory gap that prevents the achievement of the goals in 49 U.S.C. § 10746.[129]

It should not be much of a stretch for the Board to act decisively. In several decisions, the Board has been clearer about what the state of the law should be; courts have simply not heard the message. When the Board examined whether to exempt demurrage from regulation, it did not speak in the foreign language of consignees, consignors, and in care of parties. It spoke in terms of shippers and receivers and the charges they would have to pay "because they must keep the cars for some period of time before they can load or unload them."[130] In this 1996 decision, the Board seemed to encourage a return to the first line of cases and to a system that can achieve the twin goals of the statute.

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125. Surface Transp. Bd., Ex Parte No. 707, Opening Comments of Norfolk Southern Railway Company (2011), *available at* http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/e0f1eef66e3fb57f8525784c00783893/$FILE/228957.PDF.

126. Brief for U.S. as Amicus Curiae Supporting Petitioner at 12-13, 17 Groves, 586 F.3d 1273 (No. 09-1212), 2010 WL 5069532.

127. *Id.* at 12-13.

128. *Id.* at 14, 16-18.

129. *See id.* at 13-14.

130. Surface Transp. Bd., Ex Parte No. 462, Exemption of Demurrage From Regulation (1996).

Reliance by courts on how a third party designates the receiver of a railcar is undermining the twin goals of the statute. The focus must be on the use of the railcar. Accordingly, as the expert agency, the Board should interpret Section 10746 to close the demurrage gap, and accordingly, guide courts to reform the common law to modern railroading and to the statute.