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**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

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**DOCKET NO. EP 760
EXCLUSION OF DEMURRAGE REGULATIONS FROM
CERTAIN CLASS EXEMPTIONS**

NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The American Short Line and Regional Railroad Association (“ASLRRA”) is a non-profit trade association representing the interests of approximately 500 small railroads and 500 railroad supply company members in legislative and regulatory matters. Small railroads operate 50,000 miles of track in 49 states, or approximately 38% of the national railroad network, originating or terminating one out of every four railcars moving on the national railroad network, serving customers who otherwise would be cut off from the network.

Background

On October 7, 2019, the STB issued a Notice of Proposed Rulemaking in Docket No. EP 760, Exclusion of Demurrage Regulation from Certain Class Exceptions, (“Exclusion NPRM”), in which it proposes to clarify its regulations governing exemptions for certain miscellaneous commodities and boxcar transportation to ensure those regulations clearly state that demurrage continues to be subject to Board regulation. This Exclusion NPRM is a companion proceeding with the STB’s decision in Docket No. EP 757, Policy Statement on Demurrage and Accessorial Rules and Charges, that was served on the same day as this notice and its Notice of Proposed Rule Making in Docket No. EP 759, Demurrage Billing Requirements.

In this proceeding, the Board said that it issued the Exclusion NPRM as a result of the testimony and comments in the Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754. The Board asserted that numerous parties, including those involved in rail transportation subject to class exemptions, submitted evidence and testified at the hearing. As a result of considering that testimony, the Board determined to propose clarification of its

regulations governing exemptions for certain miscellaneous commodities and boxcar transportation to ensure that they state that demurrage continues to be subject to Board regulation. It said it proposed to partially revoke the exemption for the transportation of certain agriculture commodities to permit the regulation of demurrage concerning them.

Proposed Changes

The Board states that the current regulatory exemption of the involved commodities does not encompass the issue of demurrage. This is so, alleges the STB, because the regulations state that the exemption for miscellaneous commodities are not to be construed as affecting the regulation of the use of equipment, including car hire, per diem, and mileage allowances pursuant to 49 C.F.R. § 1039.11(a). It says that similarly, under the boxcar exemption, the Board retains jurisdiction over car hire and car supply pursuant to 49 C.F.R. § 1039.14(b)(1), (4). Neither of these quoted code sections, however, mention the words demurrage or accessorial charges so the Board is, through the Exclusion NPRM, trying to clarify its jurisdiction to cover demurrage and accessorial charges even though the commodities are otherwise exempt from regulation. As part of this proposal, the Board also proposes to revoke, in part, the exemption for the rail transportation of certain agricultural products.

ASLRRA Comments

ASLRRA is concerned about the proposed changes for two reasons. First, while the Board faithfully recites the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (“RFA”), it does not reference the Small Business Regulatory Fairness Act of 1996 (Pub. L. 104-121) (“SBREFA”) that requires regulatory agencies to maintain policies concerning small entities subject to regulation by the STB. These required policies apply along with the RFA and the “excessive demand” provisions of the Equal Justice Act (5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D). Class III railroads meet the economic criteria established for inclusion in 49 CFR 1201.1. and as the Board itself recognizes on pages 7 and 8 of the Exclusion NPRM, the proposed rule could have a significant adverse economic impact on substantial number of small entities.

The RFA, as amended by SBREFA, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272 requires federal agencies to notify the Small Business Administration Office of Advocacy of any

proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by the Small Business Administration of Advocacy.

The STB gives rather short shrift to these requirements. It appears to largely dismiss them by stating that only six cases involving demurrage related to Class III carriers have been filed at the STB. However, with the changes proposed in this case as well as those in EP 757, Policy Statement on Demurrage and Accessorial Rules and Charges, and its Notice of Proposed Rule Making in Docket No. EP 759, Demurrage Billing Requirements, that would likely change. Small railroads could be subject to complaints by rail users related to demurrage like they never have in the past given the breadth of the proposed regulations and changes. They would then be required to spend scarce resources defending themselves even when they are not the cause of the dispute.

The Exclusion NPRM states that the proposed rule might have a significant economic impact on a substantial number of small entities and invites comment on anything a party believes is relevant to this issue. On pages 8 and 9 of the Exclusion NPRM, the Board discusses some potential adverse effects it believes may result from the adoption of these rules. The STB does not, however, perform any significant analysis to determine the impact of the proposed rules on small railroads. Nor is there any indication in this record that the STB notified the Small Business Administration Office of Advocacy of the proposed rules. ASLRRRA respectfully submits that both steps must be undertaken before any final rules are promulgated or face the possibility that a court would later reject any rules the STB adopts.

The proposed rule here would indeed have significant adverse effects on small entities. Small railroads would be required to spend scarce resources defending an allegation that they were not in compliance with the demurrage or accessorial rules proposed by the STB in Docket No. EP 759, Demurrage Billing Requirements. Notwithstanding the claim by the Board that the proposed rule would not require new reporting requirements on small entities, the fact is that if the STB adopts its proposed rules and applies them to small railroads, they will indeed have to engage in more paperwork and record keeping. Contrary to the statement in the Exclusion NPRM that these type of demurrage notices are already provided by small entities, often electronically, many small railroads do not issue such notices today and many do not have the capacity to send notices electronically. To start doing so would require large expenditures to gear up to comply.

The second reason ASLRRA is concerned about the proposed rule is that it could lead to the removal of the exemptions that are under consideration in Docket No. Ex Parte 704 – the proverbial slippery slope. If that should occur, small railroads would be exposed to other regulatory oversight on compliance with the STB regulations, which would require them to expend time and money addressing those issues where they do not have to do that now. While Class III carriers are exempt from some reporting and recordkeeping requirements, if the proposed rules are made applicable to small railroads, they would still have to bear the cost of maintaining additional reports and records. For example, approximately 100 ASLRRA members have 10 or fewer employees, all of whom perform multiple functions on their railroads. Imposing additional burdens to address a spurious issue would either necessitate hiring or adding new duties to already multi-tasking employees that do not further rail infrastructure investment of rail service. Such requirements of small railroads would be costly both financially and operationally and would divert resources better spent on small railroad infrastructure and service to customers.

Further, there is no evidence or data to support the proposition that Class II or Class III railroad demurrage practices involving exempt commodities are problematic and require regulatory oversight. At its recent hearing on demurrage practices, the Board heard not a single complaint about Class II or Class III abuse of demurrage or other assessorial charges involving exempt commodities (or any other commodities for that matter). Similarly, ASLRRA is not aware of a single informal complaint brought to the Board's attention concerning Class II or Class III exempt commodity demurrage practices. Given the potential added burden to their already fragile cost structures, there is a real reason not to impose additional regulatory costs where none is needed. With all the complexities in the freight transportation landscape and all of the natural push and pull between various railroads and rail uses in the STB arena, ASLRRA suggests that there is no reason for the STB to propose a solution to a problem that does not exist.

ASLRRA asserts the best alternative in this matter is for the Board to take no action. If, however, the STB decides to adopt its proposed rule in this proceeding, ASLRRA states that the Board should exempt all Class II and III railroads from coverage or compliance with the rule. Contrary to the statement of the Board that such an exemption would complicate cases involving demurrage disputes, it is likely that small railroads would play little or no substantive part in any such case, so a case could easily proceed without the small railroad participating and could address the same substance without unnecessarily drawing a small railroad with insufficient resources into

a costly and time-consuming process. ASLRRA also asserts that fewer parties in a case would simplify the case, not complicate it. Balancing the cost to the small railroads if the rule is adopted against the benefits of including them in the coverage of it results in no other choice but to exempt them.

Respectfully submitted,

A handwritten signature in cursive script that reads "Keith T. Borman". The ink is dark and the signature is fluid, with a large initial 'K' and a stylized 'B'.

Keith T. Borman
Senior Vice President and General Counsel
American Short Line and Regional Railroad Association