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SERVICE DATE – APRIL 30, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 759

DEMURRAGE BILLING REQUIREMENTS

Decided: April 30, 2020

AGENCY: Surface Transportation Board.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In response to comments received in the notice of proposed rulemaking (NPRM) in this docket, the Surface Transportation Board (STB or Board) invites parties, through this supplemental notice of proposed rulemaking (SNPRM), to comment on certain modifications and additions to the minimum information requirements proposed in the NPRM.

DATES: Comments are due by June 5, 2020. Reply comments are due by July 6, 2020.

ADDRESSES: Comments and replies may be filed with the Board via e-filing. Written comments and replies will be posted to the Board's website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245-0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: On October 7, 2019, the Board issued a notice of proposed rulemaking to propose changes to its existing demurrage regulations to address several issues regarding carriers' demurrage billing practices. See Demurrage Billing Requirements (NPRM), EP 759 (STB served Oct. 7, 2019).¹ Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply.² Demurrage is a charge that serves principally as an incentive to prevent

¹ The proposed rules were published in the Federal Register, 84 Fed. Reg. 55,109 (Oct. 15, 2019).

² In Demurrage Liability, EP 707, slip op. at 15-16 (STB served Apr. 11, 2014), the Board clarified that private car storage is included in the definition of demurrage for purposes of

undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (i.e., “free time”) for loading and unloading. See Pa. R.R. v. Kittaning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920) (“The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.”); 49 C.F.R. § 1333.1; see also 49 C.F.R. pt. 1201, category 106.

In the simplest demurrage case, a railroad assesses demurrage on the consignor (the shipper of the goods) for delays in loading cars at origin and on the consignee (the receiver of the goods) for delays in unloading cars and returning them to the rail carrier at destination.³ Demurrage, however, can also involve third-party intermediaries, commonly known as warehousemen or terminal operators,⁴ that accept freight cars for loading and unloading but have no property interest in the freight being transported. Warehousemen do not typically own the property being shipped (although, by accepting the cars, they could be in a position to facilitate or impede car supply).

In the NPRM, the Board proposed requirements for minimum information to be included on or with Class I carriers’ demurrage invoices and proposed that the serving Class I carrier be required to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. NPRM, EP 759, slip op. at 8-11, 14-15. In response, the Board received a significant number of comments from stakeholders.⁵ In light of

the demurrage regulations established in that decision. The Board uses the same definition of demurrage in this decision.

³ As the Board noted in Demurrage Liability, EP 707, slip op. at 2 n.2, the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, does not define “consignor” or “consignee,” though both terms are commonly used in the demurrage context. Black’s Law Dictionary defines “consignor” as “[o]ne who dispatches goods to another on consignment,” and “consignee” “as [o]ne to whom goods are consigned.” Demurrage Liability, EP 707, slip op. at 2 n.2 (citing Black’s Law Dictionary 327 (8th ed. 2004)). The Federal Bills of Lading Act defines these terms in a similar manner. Id. (citing 49 U.S.C. § 80101(1) & (2)).

⁴ This decision uses the terms “warehousemen” and “third-party intermediaries” to refer to these entities. This decision uses “rail users” to broadly mean any person or business that sends goods by rail or receives rail cars for loading or unloading, regardless of whether that person has a property interest in the freight being transported.

⁵ The Board received comments and/or replies from the following: American Chemistry Council (ACC); American Forest & Paper Association; American Fuel & Petrochemical Manufacturers (AFPM); American Iron and Steel Institute (AISI); American Short Line and Regional Railroad Association (ASLRRA); ArcelorMittal USA LLC (AM); Association of American Railroads (AAR); Barilla America, Inc.; Canadian National Railway Company (CN); Canadian Pacific Railway Company (CP); Corn Refiners Association (CRA); CSX Transportation, Inc. (CSXT); Daniel R. Elliott; Diversified CPC International, Inc. (CPC); Dow, Inc. (Dow); The Fertilizer Institute (TFI); Freight Rail Customer Alliance; Industrial

the comments received, the Board is issuing this SNPRM to invite comment on certain modifications and additions to the proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices, as discussed in more detail below.⁶

BACKGROUND

This proceeding arises, in part, as a result of the testimony and comments submitted in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754. In that proceeding, parties from a broad range of industries raised concerns about demurrage billing practices, including issues involving the receipt of invoices containing insufficient information. See NPRM, EP 759, slip op. at 5-6 (providing overview of comments received in Docket No. EP 754 related to the adequacy of demurrage invoices). Warehousemen also raised concerns related to Class I carriers' billing practices as applied to them following the Board's adoption of the final rule in Demurrage Liability, EP 707 (STB served Apr. 11, 2014), codified at 49 C.F.R. part 1333, which established that a person receiving rail cars for loading or unloading who detains the cars beyond the free time provided in the rail carrier's governing tariff may be held liable for demurrage if that person had actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. See NPRM, EP 759, slip op. at 6-8 (providing overview of comments received in Docket No. EP 754 relating to warehousemen).

After carefully considering the comments and testimony in Docket No. EP 754, the Board issued the NPRM in this docket. As relevant here, the Board proposed requirements for certain minimum information to be included on or with Class I carriers' demurrage invoices. Specifically, the Board proposed the inclusion of:

- the unique identifying information (e.g., reporting marks and number) of each car involved;
- the following shipment information, where applicable:

Minerals Association – North America; The Institute of Scrap Recycling Industries, Inc. (ISRI); International Association of Refrigerated Warehouses; International Liquid Terminals Association; International Paper; International Warehouse Logistics Association; The Kansas City Southern Railway Company (KCS); Kinder Morgan Terminals (Kinder Morgan); Lansdale Warehouse Company; National Association of Chemical Distributors); The Mosaic Company; National Coal Transportation Association; The National Industrial Transportation League (NITL); North American Freight Car Association (NAFCA); Norfolk Southern Railway Company (NSR); Peabody Energy Corporation; The Portland Cement Association (PCA); Private Railcar Food and Beverage Association, Inc. (PRFBA); Quad, Inc.; Union Pacific Railroad Company (UP); Valley Distributing & Storage Company; Western Coal Traffic League and Seminole Electric Cooperative, Inc.; and Yvette Longonje.

⁶ In the NPRM, the Board also proposed that the serving Class I carrier be required to directly bill the shipper for demurrage (instead of the warehouseman) when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. See NPRM, EP 759, slip op. at 11, 14-15. The direct-billing proposal, and the comments on that proposal, will be addressed in a separate decision.

- the date the waybill was created;
- the status of each car as loaded or empty;
- the commodity being shipped (if the car is loaded);
- the identity of the shipper, consignee, and/or care-of party, as applicable; and
- the origin station and state of the shipment;
- the dates and times of:
 - actual placement of each car;
 - constructive placement of each car (if applicable and different from actual placement);
 - notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable); and
 - release of each car; and
- the number of credits and debits attributable to each car (if applicable).

NPRM, EP 759, slip op. at 9-10. The Board also proposed to require Class I carriers, prior to sending demurrage invoices, to take “appropriate action to ensure that the demurrage charges are accurate and warranted, consistent with the purpose of demurrage.” NPRM, EP 759, slip op. at 10 (footnote omitted). Under the NPRM, both the minimum information requirements and the “appropriate action” requirement would be added in a proposed new regulation at 49 C.F.R. § 1333.4.

In the NPRM, EP 759, slip op. at 10, the Board invited stakeholders to comment on the proposed rules and on any additional information that Class I carriers could reasonably provide on or with demurrage invoices to help shippers and warehousemen effectively evaluate those invoices. In response to the NPRM, the Board received a significant number of comments from stakeholders. While rail users generally support the minimum information requirements proposed by the Board, they identify additional information that they argue would allow them to evaluate demurrage invoices more effectively. Class I carriers largely oppose the proposed minimum information requirements, arguing that they already provide most (or all) of the required information on their web platforms and urging the Board to consider a more flexible standard. In addition, both rail users and Class I carriers ask the Board to clarify the “appropriate action” requirement.

DISCUSSION AND REQUEST FOR COMMENTS

In the NPRM, the Board explained that the requirements proposed there were

intended to ensure that the recipients of demurrage invoices will be provided sufficient information to readily assess the validity of those charges without having to undertake an unreasonable effort to gather information that can be provided by the railroad in the first instance, to properly allocate demurrage responsibility, and to modify their behavior if their own actions led to the demurrage charges.

NPRM, EP 759, slip op. at 10. After reviewing the comments received, the Board is now considering modifying the proposed regulations at 49 C.F.R. § 1333.4 to require certain additional information on or with demurrage invoices from Class I carriers beyond that discussed

in the NPRM. These additions would include: (1) the date range (i.e., the billing cycle) covered by the invoice; (2) the original estimated date and time of arrival (ETA) of each car (as established by the invoicing carrier) and the date and time each car was received at interchange (if applicable), either on or with each invoice or, alternatively, upon reasonable request from the invoiced party; and (3) the date and time of each car ordered in (if applicable). Finally, the Board is considering requiring that Class I carriers provide access to demurrage invoicing data in machine-readable format.

Below, the Board discusses these additional items, which are in response to various stakeholders' comments, and invites stakeholders to comment on their inclusion in § 1333.4(a), the Board's proposed regulations regarding requirements for demurrage invoices. In addition, and as discussed below, the Board invites further comment on the Board's proposed demurrage regulations at § 1333.4(b), which would require Class I carriers to take "appropriate action" to ensure that demurrage charges are accurate and warranted prior to sending demurrage invoices.⁷

Billing Cycle. CPC asks the Board to require carriers to include on demurrage invoices the dates covered by the invoice, which the Board construes to mean the billing cycle. (CPC Comments 4-5.) Class I carriers did not respond to this specific request. The information sought by CPC is standard invoice information that would allow invoice recipients to easily identify the period covered by the invoice. To assess the validity of demurrage charges, recipients of demurrage invoices may need to evaluate the timing of the charges with their own record of events, and clearer information on the billing cycle would assist in this assessment. Given the basic nature of the information, which may already be provided by some carriers, compiling the information to include it on or with demurrage invoices would not appear to be burdensome. The Board invites comment on requiring Class I carriers to include on or with all demurrage invoices the billing period covered by the invoice.

Original ETA and Date and Time Cars Received at Interchange. Several commenters identify the original ETA and, if applicable, the date and time that cars are received at interchange, as information that would give rail users greater visibility into how carrier-caused bunching,⁸ which has been of concern to the Board,⁹ and other delays affect demurrage charges.

⁷ Comments on the NPRM that are not specifically discussed in this SNPRM will be considered in a subsequent decision.

⁸ Recently, the Board has described bunching as "rail car deliveries that are not reasonably timed or spaced." See Demurrage Liability, EP 707, slip op. at 23.

⁹ In Docket No. EP 754, the Board invited stakeholders to comment on their recent experiences with demurrage and accessorial charges pertaining to bunching, including bunching that may be attributable to upstream rail carriers. See Oversight Hearing on Demurrage & Accessorial Charges, EP 754, slip op. at 3 (STB served Apr. 8, 2019). In response, rail users across a broad range of industries described issues related to bunching, including that they regularly experience demurrage charges associated with bunched deliveries. See Policy Statement on Demurrage & Accessorial Rules & Charges, EP 757, slip op. at 13 n.38 (STB served Oct. 7, 2019) (describing comments received in Docket No. EP 754 relating to bunching). Some rail carriers in that proceeding stated that they award credits for bunching in some

First, commenters state that, if the original ETA were included on carriers' demurrage invoices, rail users could compare that ETA to the car placement information in order to better recognize if carrier-caused problems, including bunching, may have impacted the timing of a car's placement. (ACC Comments 1; Dow Comments 5-6.) With this information, commenters assert that they would know when to dispute demurrage charges attributable to carriers' actions and could verify credits when applicable. For example, ISRI alleges that one Class I carrier, which provides credits for early or late arrivals, will occasionally replace the original ETA if delays occur. (ISRI Comments 9.) ISRI contends that, if rail users have access to the original ETA on demurrage invoices, they would be able to avoid the "burdensome and unfair administrative process" of tracking original ETAs, thereby mitigating the risk that rail users do not receive the number of credits they are "entitled to receive." (*Id.*) Furthermore, AFPM and PRFBA argue that requiring carriers to provide original ETA information on demurrage invoices would encourage them to apply increased scrutiny to demurrage invoices before sending them. (AFPM Comments 6; PRFBA Comments 1-2.) Dow reasons that this additional requirement would not be unreasonably burdensome for carriers because they already generate this information in the normal course of business in order to account for delays when assessing demurrage. (Dow Comments 6.)

Second, commenters identify the date and time at which a delivering carrier received rail cars at interchange, if applicable, as useful information that would help rail users identify upstream carrier-caused bunching. (ACC Comments 2; Dow Comments 6.) ACC and Dow explain that delivering carriers do not award demurrage credits for delays caused by upstream carriers and, without interchange information, rail users cannot identify these delays themselves. (ACC Comments 2; Dow Comments 6.) Dow argues that having interchange information would allow rail users to calculate the transit time on an upstream carrier's line and credibly approach the upstream carrier about assuming responsibility for any demurrage it causes. (Dow Comments 6.) Dow contends that this requirement would not be unreasonably burdensome for carriers since they must generate this information already in order to account for delays on joint-line shipments. (*Id.* at 7.)

Several Class I carriers briefly reference these proposed additions in their replies, generally suggesting that it is unnecessary to require this information on invoices. For example, CSXT states that its web platform currently provides rail users with the original ETA and date and time of interchange, and that requiring carriers to include the additional items requested by commenters would add to the "burdensome paperwork requirements" that, according to CSXT, would be created by the NPRM. (CSXT Reply 2, 4.) UP contends that the date and time at

instances but did not describe with specificity how these credits are awarded or otherwise address the concerns expressed by rail users. See id. at 13-14 (describing comments submitted in Docket No. EP 754).

Additionally, the Board provides guidance on the general principles it expects to consider when evaluating the reasonableness of demurrage and accessorial rules and charges in future cases, including those that involve claims of carrier-caused bunching, by separate decision. See Policy Statement on Demurrage & Accessorial Rules & Charges, EP 757 (STB served Apr. 30, 2020).

which rail cars were received at interchange is information that “only applies to a subset of shippers’ operations” and would not be useful for a majority of “customers [for whom] the invoice acts as an end-of-month summary of charges.” (UP Reply 3.)¹⁰

As discussed in the NPRM, the purpose of the Board’s proposed rule is to ensure that the recipients of demurrage invoices will be provided sufficient information in demurrage invoicing so that they can more easily determine the cause of demurrage charges, verify the validity of those charges, properly allocate demurrage responsibility, and modify their behavior if their own actions led to the demurrage charges. NPRM, EP 759, slip op. at 10. Based on the comments and replies received in response to the NPRM, it appears that the inclusion of the original ETA of each car (as established by the invoicing carrier) and the date and time at which cars are received at interchange, if applicable, on or with invoices may further these objectives by helping recipients identify sources of delay and carrier-caused bunching and assess the validity of any resulting demurrage charges. Moreover, this information appears to be readily available to carriers as it is used in the ordinary course of business to track car movement and place cars.¹¹ Accordingly, the Board invites comments on revisions to proposed § 1333.4 that would require Class I carriers to provide on or with their demurrage invoices (1) the original ETA of each car (as established by the invoicing carrier)¹²; and (2) the date and time at which each car was received at interchange, if applicable. The Board also invites comment on whether the requirement that Class I carriers provide the date and time at which each car was received at interchange, if applicable, should be limited to the last interchange with the invoicing carrier.

The Board also recognizes, however, that bunching information may not be relevant to every invoice recipient in all circumstances. Accordingly, the Board also invites comment on whether Class I carriers should instead be required to provide these items to the invoiced party

¹⁰ NSR also indicates that its web platform does not provide users with information about “bunching events” because they are subjective, though it is unclear precisely what type of bunching information NSR is referencing here. (NSR Reply 1.)

¹¹ See CSXT Reply 4 (explaining that it already provides this information on its web platform).

¹² The Board also invites comment on how to define “original ETA,” which was not defined by commenters, and whether the original ETA may differ depending on whether the rail car is loaded or empty. The Board notes that NSR’s current tariff states the following with respect to original ETA: “Following interchange or release of shipment and complete billing to final destination, the first reported movement on [NSR] will generate the NSR Original Estimated Time of Availability (ETA). Though the time of availability may change during transit due to delays or advances en route, it is the original NSR ETA against which an early or late shipment will be measured.” NSR Tariff 6004-D, Item 200 (effective Sept. 1, 2019). The Board seeks comment on whether, for example, original ETA should be generated promptly following interchange or release of shipment to the invoicing carrier and be based on the first movement of the invoicing carrier.

upon reasonable request, but not include them on or with every invoice.¹³ A request for this information might be reasonable when the invoiced party has reason to believe that carrier-caused bunching occurred and cannot otherwise easily access the requested information. A request might not be reasonable if a carrier already provides the information to the invoiced party through other means, including the carrier’s web-based platform, so long as it is easily accessible and remains easily accessible on or with the demurrage invoice. Comment is invited on what would constitute a reasonable request.

Ordered-In Date and Time. Several commenters ask the Board to require carriers to specify, if applicable, the date and time that cars were ordered into a rail user’s facility. (ACC Comments 2; Dow Comments 4; CPC Comments 4-5.) Dow explains that, at closed-gate facilities, carriers cannot place cars until they receive approval from those facilities, at which time demurrage stops accruing. (Dow Comments 4 & n.4.) Both Dow and ACC argue that ordered-in information would allow rail users to “validate demurrage charges, alter their practices to prevent similar demurrage events, and hold railroads accountable for railroad-caused delays.” (ACC Comments 2; see also Dow Comments 4.) Dow acknowledges that many rail users would have ordered-in information in their own records, reflecting the date on which the rail user believes it ordered the car. (Dow Comments 4.) However, Dow argues that requiring carriers to provide ordered-in information on demurrage invoices would allow rail users to “quickly ascertain whether the carrier has used the correct dates for calculating demurrage” and validate invoices more efficiently. (Id.) Dow also argues that requiring the ordered-in date and time, at which the accrual of demurrage stops, would be consistent with the Board’s proposal to require the date and time of constructive placement, at which the accrual of demurrage starts. (Id. at 5.) Dow maintains that providing this information would not place an unreasonable burden on carriers since they already have this information readily available to calculate demurrage charges. (Id.) ACC and Dow also note that one carrier already provides this information on demurrage invoices. (ACC Comments 2; Dow Comments 5.) Class I carriers did not respond specifically to this proposed addition.

Because the ordered-in date and time is essential to the calculation of demurrage at closed-gate facilities, such information would be valuable on or with demurrage invoices for both demurrage accrual and verification purposes. As stakeholders explain, the ordered-in date and time stops the accrual of demurrage at closed-gate facilities and also impacts how certain carriers calculate credits. For example, UP has stated that it issues “one credit per day from the time a rail car is ordered into a customer’s facility until it is delivered,” as well as “one credit per rail car not supplied” if UP “fails to supply a rail car that the customer ordered and the customer

¹³ Many commenters support requiring Class I carriers to provide supporting information, upon request from the invoiced party, to help recipients verify that the demurrage charges are accurate and warranted. While these commenters’ suggestions for information that should be available upon request vary in scope, they all ask that invoice recipients be allowed to request information that can provide more visibility into bunching. (See, e.g., Kinder Morgan Comments 14; AISI Comments 9-10; AM Comments 6; ISRI Reply 13.) In response to one of these comments, NSR argues that providing specific information upon request would essentially force the carrier to prove its case to a rail user, allow that user to still refuse to pay the railroad, and then require the railroad to sue and prove its case all over again in court. (NSR Reply 3.)

has capacity within its facility to take the rail car.”¹⁴ The Board also understands that disagreements over the ordered-in date and time may be the source of some demurrage disputes. In Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754, rail users described issues with demurrage charges accruing after cars had been ordered into a facility.¹⁵ If rail users have easy access to the carriers’ ordered-in date and time to compare against their own records, then they may be better equipped to verify demurrage invoices and spot any discrepancies. Because rail carriers use this information in the ordinary course of business to compute demurrage invoices, compiling this information to provide it on or with demurrage invoices would not appear to be burdensome. Accordingly, the Board invites comment on a modification to proposed § 1333.4 that would require Class I carriers to provide the ordered-in date and time on or with demurrage invoices.

Machine-Readable Data. Many commenters express a preference for “machine-readable” data.¹⁶ Certain commenters define this term as “a structured data file format that is open and capable of being easily processed by a computer,” including “Comma Separated Values (CSV), Office Open XML ([XLSX]), and OpenDocument Spreadsheet (ODS).” (Joint Reply (ACC, CFA, TFI, and NITL) 2 n.2; see also Dow Reply 2 n.3.) They state that “a format is open if it is not limited to a specific software platform and not subject to restrictions on re-use.” (Joint Reply (ACC, CFA, TFI, and NITL) 2 n.2; see also Dow Reply 2 n.3.) Commenters explain that most railroads currently provide invoices in PDF or paper format, which necessitates manual and resource-intensive review, the burden of which may cause rail users to pay large amounts in erroneous charges that are difficult to detect. (Joint Reply (ACC, CFA, TFI, and NITL) 2, 4-6; Dow Reply 2, 6.) They argue that, conversely, machine-readable data would allow users to efficiently and effectively audit the invoices through coding and automation. (Joint Reply (ACC, CFA, TFI, and NITL) 4-5; Dow Reply 6.) Commenters reference NSR as the only Class I carrier that currently invoices in a machine-readable format. (Joint Reply (ACC, CFA, TFI, and NITL) 4; Dow Reply 6.) Commenters state that many Class I carriers do not allow access to machine-readable data on their web-based platforms, and, to the extent that carriers do allow

¹⁴ UP Comments 2-3, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

¹⁵ Hr’g Tr. 387:2-387:17, May 22, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (Ag Processing, Inc., stating that it had experienced demurrage charges accruing on cars that were ordered into a facility after more conveniently-placed cars were switched instead); Brainerd Chemical Company, Inc., Comments 4, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (describing being charged demurrage for two cars that had been previously ordered into its facility and not switched as scheduled); Packaging Corporation of America Comments 4-5, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (asserting that five missed switches resulted in demurrage charges of \$15,500 at one location in one month).

¹⁶ AISI Comments 10; Joint Reply (ACC, CFA, TFI, and NITL) 4; Dow Reply 6; ISRI Reply 13.

such access,¹⁷ commenters say that this information is not easily accessible, is cumbersome to download, or is available only for a limited time period. (Joint Reply (ACC, CFA, TFI, and NITL) 3-4; Dow Reply 5-6.)

Machine-readable invoicing may be one way to make the process of verifying demurrage charges less burdensome for invoice recipients and thereby further the Board's objective to make demurrage invoices more transparent and information related to demurrage charges more accessible. However, as some advocates note, electronic auditing may involve coding and require upfront costs, (Joint Reply (ACC, CFA, TFI, and NITL) 5), and the Board expects that some smaller rail users would not have the resources to use machine-readable data. Furthermore, while NSR states that it currently offers machine-readable formatting,¹⁸ the Board does not have information about how large of an undertaking machine-readable formatting would be for those Class I carriers that do not currently offer this data format.¹⁹ For these reasons, the Board invites comments on matters that may be associated with modifying § 1333.4 to require Class I carriers to provide machine-readable data, such as through a machine-readable invoice, a separate electronic file containing machine-readable data, or a customized link so the rail user could directly download the data in a machine-readable format. It would be at each rail carrier's discretion to select how to provide rail users access to the machine-readable data. With this potential modification, the Board does not intend that invoice information would be available to rail users only in a machine-readable format that would render it inaccessible to rail users without resources for coding or new upfront costs. The Board invites comment on ways to prevent such inaccessibility. The Board also invites comment from smaller rail users on whether machine-readable data would provide them with greater access to information, and on any other issues pertaining to the accessibility of machine-readable data for smaller rail users. Furthermore, the Board invites comment on how to define "machine-readable," including the following definition proposed by commenters: "a structured data file format that is open and capable of being easily processed by a computer. A format is open if it is not limited to a specific software platform and not subject to restrictions on re-use." (Joint Reply (ACC, CFA, TFI, and NITL) 2 n.2; see also Dow Reply 2 n.3.)

Appropriate Action to Ensure Demurrage Charges Are Accurate and Warranted.

Section 1333.4(b) of the rule proposed in the NPRM would require Class I carriers to "take appropriate action to ensure that the demurrage charges are accurate and warranted" prior to

¹⁷ Commenters cite CSXT and UP as carriers that allow access to machine-readable data on their web-based platforms. (Joint Reply (ACC, CFA, TFI, and NITL) 3; Dow Reply 6.) CP also states that it allows users to download some data from its web portal into a Microsoft Excel spreadsheet for analysis purposes. (CP Comments, V.S. Melo 4, 6, 11, 13.)

¹⁸ See NSR Reply 1-2 (also requesting that "the Board clarify that the information specified in the [NPRM] need not appear on physical demurrage invoices and instead need only be readily accessible via web-based applications in machine-readable format").

¹⁹ See Publ'n Requirements for Agricultural Prods., EP 528 (Sub-No. 1) et al., slip op. at 8 (STB served June 30, 2017) (indicating that the Board did not yet have enough information about the burden that would be associated with a requested machine-readability requirement for agricultural rate and service information).

sending demurrage invoices. Several commenters support this provision,²⁰ but some express concern that it will create more uncertainty and potential litigation over its meaning.²¹ In order to clarify this requirement, certain commenters offer their own definitions for actions that would qualify. For example, NAFCA suggests a revision to proposed § 1333.4(b) that would require Class I carriers to provide “a concise explanation of how the charge was calculated and the carrier’s reasons for the charge being assessed.” (NAFCA Comments 3.) AFPM asks the Board to compel carriers, as part of this requirement, to furnish specific types of documentation, such as signed and certified documents, photographs, and original trip plans to confirm the accuracy of the charges. (AFPM Comments 7.)

CN expresses concern that if the proposal “were interpreted to require that every single invoice be manually double-checked before it is sent, significant additional resources would have to be deployed to perform busy work of reviewing invoices that already have a high degree of accuracy,” which would only slow down the invoicing process. (CN Comments 8.) CN states that it already dedicates a team of ten employees to review the accuracy of demurrage invoices “using a highly structured process, with the focus being proactive adjustment of optional services invoices before they are issued.” (*Id.*) Likewise, KCS states that it believes it already takes appropriate action to ensure that its demurrage bills are accurate as evidenced by the fact that “only a very small fraction” of the invoices are disputed. (KCS Comments 6.)

Whether a carrier has taken appropriate action to ensure that demurrage charges are accurate and warranted depends on the particular facts and circumstances of a situation. Since Class I carriers utilize different invoicing systems, one carrier may be able to ensure accuracy in its invoicing system by different methods than another. ISRI calls upon Class I carriers to explain the actions they currently take to ensure the accuracy of their demurrage invoices, as those responses could “assist the Board in determining and clarifying steps the railroads may need to take to achieve this important objective.” (ISRI Reply 13.) The Board agrees that such information would be useful in its consideration of proposed § 1333.4(b) and, accordingly, invites further comments from the Class I carriers regarding what actions they currently take, and from all stakeholders on what actions Class I carriers reasonably should be required to take, to ensure that demurrage invoices are accurate and warranted.

Conclusion

For the reasons discussed above, the Board invites comments on the additions to proposed 49 C.F.R. § 1333.4 discussed in this decision, as well as further comment on the Board’s proposal that Class I carriers be required to take “appropriate action to ensure that demurrage charges are accurate and warranted.” Comments will be due by June 5, 2020; replies will be due July 6, 2020.

²⁰ See, e.g., NITL Comments 10; TFI Comments 4; CRA Comments 4; NACD Comments 4; PCA Comments 5.

²¹ See, e.g., NAFCA Comments 3; KCS Comments 6; CSXT Comments 11; CN Comments 8.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board limited its proposal to Class I carriers and does not modify that proposal here.²² Accordingly, the Board again certifies under 5 U.S.C. § 605(b) that this rule would not have a significant economic impact on a substantial number of small entities as defined by the RFA.²³ A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this decision, the Board invites parties to comment on possible revisions to its proposed rule that would require Class I carriers to include certain additional information on or with their demurrage invoices. In the NPRM, the Board sought comments, pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, Office of Management and Budget (OMB) regulations, 5 C.F.R. § 1320.8(d)(3), and Appendix B, about the impact of the proposed rule on the currently approved collection of the Demurrage Liability Disclosure Requirements (OMB Control No. 2140-0021). Specifically, the Board sought comments regarding: (1) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the

²² Arguments that the Board should require Class II and III carriers to comply with proposed § 1333.4 will be addressed in a future decision.

²³ For the purpose of RFA analysis, the Board defines a "small business" as only including those rail carriers classified as Class III carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars (\$39,194,876 or less when adjusted for inflation using 2018 data). Class II carriers have annual operating revenues of less than \$250 million in 1991 dollars (\$489,935,956 when adjusted for inflation using 2018 data). The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1; Indexing the Annual Operating Revenues of R.R.s., EP 748 (STB served June 14, 2019).

Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

In the NPRM, the Board estimated that the proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices would add a total one-time hourly burden of 280 hours (or 93.3 hours per year as amortized over three years) because, in most cases, those carriers would likely need to modify their billing systems to implement some or all of these changes. NPRM, EP 759, slip op. at 13. The Board also estimated that the proposed requirement that Class I carriers take appropriate action to ensure that demurrage charges are accurate and warranted would add a total one-time hourly burden of 560 hours (or 186.7 hours per year as amortized over three years) because Class I carriers would likely need to establish or modify appropriate demurrage invoicing protocols and procedures. Id.²⁴

The Board received comments from CSXT and CN pertaining to the collection of this information under the PRA.²⁵ CSXT and CN both argue that the Board's 280-hour estimate of the time it would take Class I carriers to modify their invoicing systems is too low for those Class I carriers that would need to make modifications to comply with the proposed rule. CSXT contends that, if the Board requires Class I carriers to provide the required information on demurrage invoices (rather than solely on their web platforms), then it would need nine months to implement a software redesign. (CSXT Reply Comments 6.) CN does not believe that it would need to adjust its invoicing system to comply with the proposed requirements; however, it argues that the time necessary to implement invoicing system changes, including "software development," "internal training," and "communications with customers about changes" could "easily encompass hundreds of hours." (CN Comments 20-21.) Moreover, CN maintains that the Board's 560-hour estimate of the time it would take Class I carriers to establish or modify appropriate demurrage invoicing protocols and procedures to ensure that demurrage charges are accurate and warranted is "significantly understated" because the NPRM appears to propose an ongoing review requirement for every individual invoice, which would require ongoing time and effort. (Id. at 21.)

CN and CSXT argue that the estimated burden to modify demurrage invoices or establish or modify demurrage invoicing protocols should be larger than the Board estimated in the

²⁴ The Board also provided an hourly burden estimate for the proposal that Class I carriers directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. Id. Comments pertaining to this hourly burden estimate will be addressed in a separate decision.

²⁵ Additionally, ASLRRRA argues that the Board's collection of information under the PRA is deficient because it does not address the hourly burdens on Class II and Class III carriers, should the proposed rule be extended to them. (ASLRRRA Comments 4.) However, such a discussion in the NPRM would have been unnecessary because the proposed rule excludes Class II and Class III carriers from its requirements. Appendix A addresses the burdens to those carriers for the existing collection.

NPRM, but neither provides quantitative analysis or data to support any particular increases. Further, CSXT’s estimate of “nine months” and CN’s estimate of “hundreds of hours” appear overstated in comparison to other software programming requirements recently estimated by the Board or proposed by carriers. See Pet. for Rulemaking to Amend 49 C.F.R. Part 1250, EP 724 (Sub-No. 5), slip op. at 5-6 (STB served Sept. 30, 2019) (noting that rail carriers estimated that it would take 80 hours to make software changes necessary for proposed new performance reporting requirements); Waybill Sample Reporting, EP 385 (Sub-No. 8), slip op. at 13, 16 (STB served Nov. 29, 2019) (proposing a one-time burden of 80 hours to implement programming changes). Nonetheless, based on CSXT’s and CN’s stated concern that Class I carriers would collectively need more than 280 hours to modify their invoicing systems to include the proposed minimum information requirements, the Board will increase its estimate from 280 hours (or 40 hours per Class I carrier) to 560 hours (or 80 hours per Class I carrier). The Board expects that the 560 hours would cover the time Class I carriers would need to include the possible modifications discussed in the SNPRM, especially given that this information appears to be readily available to carriers in the ordinary course of their business. Furthermore, the Board would expect that Class I carriers would only need to undertake one software redesign to incorporate both the proposed minimum information requirements discussed in the NPRM and the proposed revisions discussed in the SNPRM.

Similarly, in response to CN’s contention that the Board’s estimate of the time it would take Class I carriers to establish or modify appropriate demurrage invoicing protocols and procedures is “significantly understated,” the Board will increase its estimate from 560 hours (or 80 hours per Class I carrier) to 840 hours (or 120 hours per Class I carrier). However, with respect to CN’s argument that the requirement that Class I carriers take appropriate action to ensure that demurrage charges are accurate and warranted necessitates both a one-time hourly burden to establish or modify invoicing procedures and an additional hourly burden for continuing review of demurrage invoices, the Board declines to adjust the hourly burden for an ongoing review requirement since, as Class I carriers have indicated, they review invoices in the ordinary course of business.²⁶

The Board welcomes comments on the estimates of actual time and costs of compliance with the possible modifications to its proposed invoicing requirements for Class I carriers. Information pertinent to these issues is included in Appendix A and will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11(b). Once the comment period ends, comments received by the Board regarding the information collection will also be forwarded to OMB for its review.

²⁶ See CSXT Comments 5, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (stating that CSXT has a team dedicated to reviewing demurrage matters); CN Comments 8, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (stating that invoices go through “internal validating processes that include both system and manual processes to validate that the charges are accurate”); BNSF Railway Company Comments 6, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (stating that “BNSF independently undertakes a rigorous review of demurrage pre-bills to ensure that billing is occurring in appropriate circumstances before a bill ever leaves the building”).

List of Subjects

49 C.F.R. part 1333

Penalties, Railroads.

It is ordered:

1. The Board requests comments on revisions to its proposed rule as set forth in this decision. Notice of this request for comment will be published in the Federal Register.
2. The procedural schedule is established as follows: comments on this decision are due by June 5, 2020; replies are due by July 6, 2020.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Appendix A

INFORMATION COLLECTION

Title: Demurrage Liability Disclosure Requirements

OMB Control Number: 2140-0021

Form Number: None

Type of Review: Revision of a currently approved collection

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Demurrage Liability Disclosure Requirements, OMB Control No. 2140-0021. The requested revision to the currently approved collection is necessitated by the NPRM (which proposed requirements for certain minimum information to be included on or with Class I carriers' demurrage invoices and proposed that serving Class I carriers be required to directly bill the shipper, instead of the warehouseman, for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier) and this SNPRM (which invites parties to comment on certain modifications and additions to the minimum information requirements proposed in the NPRM). All other information collected by the Board in the currently approved collection is without change from its approval, except for an update to the number of non-Class I carriers (currently expiring on June 30, 2020).

Respondents: Freight railroads subject to the Board's jurisdiction

Number of Respondents: 684 (including seven Class I carriers)

Estimated Time per Response: The estimated hourly burden for demurrage liability notices for new customers remains one hour per notice. The modification sought here for certain minimum information to be included on or with Class I carriers' demurrage invoices is an estimated annualized one-time hourly burden—resulting from an adjustment to the seven Class I carriers' billing systems—of 80 hours per railroad. The modification requiring Class I carriers to take appropriate action to ensure that the demurrage invoices are accurate and warranted is an estimated annualized one-time hourly burden of 120 hours. The modification requiring Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier is an estimated annual hourly burden of one hour per agreement.²⁷

²⁷ In a final rule decision issued on the same day as this decision, the Board increased its estimate of the time Class I carriers would need to implement direct billing from five minutes per agreement to one hour per agreement. See Demurrage Billing Requirements, EP 759, slip op. at 16-17 (STB served Apr. 30, 2020).

Frequency: On occasion. The existing demurrage liability disclosure requirement is triggered in two circumstances: (1) when a shipper initially arranges with a railroad for transportation of freight pursuant to the rail carrier's tariff; or (2) when a rail carrier changes the terms of its demurrage tariff. The modification sought here makes three changes to the existing collection, as follows: (1) one-time adjustments to the Class I railroads' billing systems to (a) include certain minimum information on or with demurrage invoices and (b) take appropriate action to ensure that the demurrage invoices are accurate and warranted; and (2) an annual adjustment to the Class I carriers' billing practices to directly bill the shipper for demurrage when the warehouseman and the shipper agree to that arrangement and so notify the rail carrier (estimated 60 agreements).

Total Burden Hours (annually including all respondents): 1,896.7 hours. Consistent with the existing, approved information collection, Board staff estimates that: (1) seven Class I carriers would each take on 15 new customers each year (105 hours); (2) each of the seven Class I carriers would update its demurrage tariffs annually (2.3 hours); (3) 677 non-Class I carriers (which are already subject to the existing collection requirements, but which will not be subject to the new requirements) would each take on one new customer a year (677 hours); and (4) each of the non-Class I carriers would update its demurrage tariffs every three years (225.7 hours annualized). For the modification to include certain minimum information on or with demurrage invoices, Board staff estimates that, on average, each Class I carrier would have a one-time burden of 80 hours (560 total hours). Amortized over three years, this one-time burden equals 186.7 hours per year. For the modification requiring each Class I carrier to take appropriate action to ensure that demurrage charges are accurate and warranted, Board staff estimates that, on average, each Class I carrier would have a one-time burden of 120 hours (840 total hours) to establish or modify appropriate protocols and procedures. Amortized over three years, this one-time burden equals 280 hours per year. For the modification requiring Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier, Board staff estimates that annually seven Class I carriers would each receive 60 direct-billing agreements per year at one hour per agreement (420 hours).

The total hourly burdens are also set forth in the table below.

Table – Total Burden Hours (per Year)

| <u>Respondents</u> | <u>Existing Annual Burden</u> | <u>Existing Annual Update Burden</u> | <u>Estimated One-Time Burden for Additional Data</u> | <u>Estimated One-Time Burden for Appropriate Protocols</u> | <u>Estimated Annual Burden for Invoicing Agreement</u> | <u>Total Yearly Burden Hours</u> |
|--------------------|-------------------------------|--------------------------------------|--|--|--|----------------------------------|
| 7 Class I Carriers | 105 hours | 2.3 ²⁸ hours | 186.7 hours | 280 hours | 420 hours | 994 hours |

²⁸ In the NPRM, the Board used seven hours for the existing annual update burden for Class I carriers; however, this number has been corrected to 2.3 hours to reflect the average over three years.

| | | | | | | |
|--------------------------|-----------|-------------|-------------|-----------|-----------|---------------|
| 677 Non-Class I Carriers | 677 hours | 225.7 hours | --- | --- | --- | 902.7 hours |
| Totals | 782 hours | 228 hours | 186.7 hours | 280 hours | 420 hours | 1,896.7 hours |

Total “Non-hour Burden” Cost: There are no other costs identified.

Needs and Uses: Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (i.e., “free time”) for loading and unloading. See Pa. R.R. v. Kittaning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920) (“The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.”); 49 C.F.R. § 1333.1; see also 49 C.F.R. pt. 1201, category 106.

Under 49 C.F.R. § 1333.3, a railroad’s ability to charge demurrage pursuant to its tariff is conditional on its having given, prior to rail car placement, actual notice of the demurrage tariff to the person receiving rail cars for loading and unloading. Once a shipper receives a notice as to a particular tariff, additional notices are required only when the tariff changes materially. The parties rely on the information in the demurrage tariffs to avoid demurrage disputes, and the Board uses the tariffs to adjudicate demurrage disputes that come before it.

As described in detail in this SNPRM, the NPRM, and the final rule relating to direct billing issued simultaneously with this SNPRM, the Board is amending the rule that applies to this collection of demurrage disclosure requirements to require Class I carriers to include certain minimum information on or with demurrage invoices, take appropriate action to ensure that demurrage charges are accurate and warranted, and directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. The collection and use of this information by the Board enable the Board to meet its statutory duties.