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SERVICE DATE – OCTOBER 7, 2019

SURFACE TRANSPORTATION BOARD

Docket No. EP 759

DEMURRAGE BILLING REQUIREMENTS

Decided: October 4, 2019

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) proposes changes to the Board's regulations governing demurrage liability. Specifically, the Board proposes certain requirements regarding Class I carriers' demurrage invoices, as well as a requirement that a Class I carrier directly bill the shipper if the shipper and warehouseman agree to that arrangement and have so notified the rail carrier.

DATES: Comments are due by November 6, 2019. Reply comments are due by December 6, 2019.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 759, 395 E Street, S.W., Washington, DC 20423-0001. 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: This notice of proposed rulemaking (NPRM) arises, in part, as a result of the testimony and comments submitted in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754. The Board commenced that docket by notice served on April 8, 2019, following concerns expressed by users of the freight rail network (rail users)¹ and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring. Specifically, in Oversight Hearing on Demurrage & Accessorial Charges (April 2019 Notice), EP 754, slip op. at 2 (STB served Apr. 8, 2019), the Board announced a May 22, 2019 public hearing, which was later extended to

¹ As used in this proposed rule, the term "rail users" broadly means any person that receives rail cars for loading or unloading, regardless of whether that person has a property interest in the freight being transported.

include a second day;² directed Class I carriers to appear at the hearing; and invited shippers, receivers, third-party logistics providers, and other interested parties to participate. The notice also directed Class I carriers to provide specific information on their demurrage and accessorial rules and charges and required all hearing participants to submit written testimony, both in advance of the hearing. April 2019 Notice, EP 754, slip op. at 2-4. Comments were also accepted from interested persons who would not be appearing at the hearing. The Board received over 90 pre-hearing submissions from interested parties; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments.

The purpose of the hearing was “to receive information from railroads, shippers, receivers, third-party logistics providers, and other interested parties about their recent experiences with demurrage and accessorial charges, including matters such as reciprocity, commercial fairness, the impact of operational changes on such charges, capacity issues, and effects on network fluidity.” April 2019 Notice, EP 754, slip op. at 2. The April 2019 Notice invited stakeholders to comment on, among other things, whether the tools available to manage demurrage and accessorial charges provide adequate data for shippers and receivers to evaluate whether charges are being properly assessed and to dispute the charges when necessary. Id. at 3. Participants in the hearing included railroads and rail users. Among the participants were third-party intermediaries, commonly known as warehousemen or terminal operators,³ which accept freight cars for loading and unloading but have no property interest in the freight being transported. In oral testimony at the hearing and written submissions before and after the hearing, shippers and warehousemen (or their representatives) expressed dissatisfaction with their recent experiences with demurrage and accessorial charges. As is pertinent to this NPRM, parties from a broad range of industries raised concerns about demurrage billing practices, including issues with the receipt of invoices with insufficient information and issues arising from the experiences of warehousemen following the Board’s adoption of the final rule in Demurrage Liability (Demurrage Liability Final Rule), EP 707 (STB served April 11, 2014), codified at 49 C.F.R. part 1333.

The Board now proposes rules intended to address several issues with demurrage billing practices raised by many stakeholders. Specifically, the Board proposes: (1) certain requirements regarding Class I carriers’ demurrage invoices, such as minimum information to be included on or with those invoices, and (2) a requirement that Class I carriers send any demurrage invoice related to transportation involving a warehouseman to the shipper if the shipper and warehouseman have agreed to that arrangement and have so notified the rail carrier. The Board also invites comments on this proposal and any other measures that might be appropriate to help further clarify demurrage billing practices; to ensure that the party responsible for causing the delays that result in demurrage charges is the party that pays for such charges; and to promote timely resolution of related disputes.

² Oversight Hearing on Demurrage & Accessorial Charges, EP 754, slip op. at 1 (STB served May 3, 2019).

³ This NPRM uses the terms “warehousemen” or “third-party intermediaries” to refer to these entities.

BACKGROUND

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 national needs related to freight car use and distribution and maintenance of an adequate car supply.⁴ Demurrage is a charge that both compensates rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (i.e., “free time”) for loading and unloading and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network. See 49 C.F.R. § 1333.1; see also 49 C.F.R. pt. 1201, category 106.⁵

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.⁶ Demurrage can also, however, involve warehousemen that accept freight cars for loading and unloading but have no property interest in the freight being transported. Warehousemen are not typically owners of property being shipped (even though, by accepting the cars, they could be in a position to facilitate or impede car supply).

In addition to the concerns the Board heard about the adequacy of railroad demurrage invoices generally, the Board also heard—before, during, and after the hearing in Docket No. EP 754—concerns specific to warehousemen involving application of the Board’s regulations at 49 C.F.R. part 1333, which were adopted in 2014 in Demurrage Liability, Docket No. EP 707. Below, the Board provides a brief background of the rules at part 1333, summarizes pertinent comments relating to invoice issues, and proposes new regulations addressing these issues.

⁴ In Demurrage Liability Final Rule, EP 707, slip op. at 15-16, the Board clarified that private car storage is included in the definition of demurrage for purposes of the demurrage rules established in that decision. The Board uses the same definition of demurrage for purposes of this NPRM.

⁵ Accessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges. See Revisions to Arbitration Procedures, EP 730, slip op. at 7-8 (STB served Sept. 30, 2016) (describing a variety of charges that are considered accessorial charges).

⁶ As the Board noted in Demurrage Liability Final Rule, 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 (1995), 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.” Id. (citing Black’s Law Dictionary 327 (8th ed. 2004)). The Federal Bills of Lading Act defines these terms in a similar manner. Demurrage Liability Final Rule, EP 707, slip op. at 2 n.2 (citing 49 U.S.C. § 80101(1) & (2)).

Overview of Docket No. EP 707

Before 2014, agency precedent had held that a tariff could not lawfully impose demurrage charges on a warehouseman that was not the owner of the freight, that was not named as a consignor or consignee in the bill of lading, and that was not otherwise party to the contract of transportation.⁷ In the years prior to the Board instituting the proceeding in Docket No. EP 707, questions arose in the courts as to who should bear liability for demurrage charges when a warehouseman that detains rail cars for too long is named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee. In instituting the proceeding in Docket No. EP 707, the Board noted that there was a split among the U.S. courts of appeals regarding that issue.⁸ The Board reviewed those court decisions and determined that it needed to reexamine its policies to assist in providing clarification.

After reviewing the comments responding to an advance notice of proposed rulemaking and an NPRM, the Board issued its final rule in 2014. Demurrage Liability Final Rule, EP 707. Consistent with the NPRM, the final rule established that a person receiving rail cars for loading or unloading that 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. Id. at 1, 17, 25.⁹ Under the final rule, the identification of a party in the bill of lading no longer controls; as the Board explained, it was "adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading." Id. at 15. The Board explained that its rule was "based on the theory that responsibility for demurrage should be placed on the party in the best position to expedite the loading or unloading of rail cars at origin or destination." Id. at 8. In response to comments asserting that "warehousemen have no control over car movement as a result of railroad actions at the time of delivery or release," the Board said that "warehousemen are free to bring a complaint to the Board if they believe that they have been unfairly charged demurrage." Id. at 8-9. In response to comments asserting that the actions of shippers might also deprive warehousemen of control over car movement, the Board said that "these rules should encourage warehousemen and shippers to address demurrage liability in their commercial arrangements." Id. at 9.

⁷ See Responsibility for Payment of Detention Charges, E. Cent. States (Eastern Central), 335 I.C.C. 537, 541 (1969) (involving liability for detention, the motor carrier equivalent of demurrage), aff'd, Middle Atl. Conference v. United States (Middle Atlantic), 353 F. Supp. 1109, 1114-15 (D.D.C. 1972).

⁸ Demurrage Liability, EP 707, slip op. at 4-5 (STB served Dec. 6, 2010) (citing CSX Transp. Co. v. Novolog Bucks Cty., 502 F.3d 247 (3d Cir. 2007) & Norfolk S. Ry. v. Groves, 586 F.3d 1273 (11th Cir. 2009)).

⁹ The Board also clarified that the provisions of 49 U.S.C. § 10743, titled "Liability for payment of rates," apply to rail carriers' line-haul rates but not to rail carriers' charges for demurrage. Demurrage Liability Final Rule, EP 707, slip op. at 10.

Overview of Comments in Docket No. EP 754 Regarding Adequacy of Demurrage Invoices

Shippers, warehousemen, and railroads provided comments and/or testimony in Docket No. EP 754 regarding the adequacy of demurrage invoices generated by Class I carriers.

Shippers (or their representatives) stated repeatedly that invoices from some rail carriers often lack information needed to assess the validity of demurrage charges. For example, the National Coal Transportation Association (NCTA) said that “invoices contain woefully inadequate documentation specific to the charges to allow assessment and evaluation of [the] validity of the charges,” which “increases the burden on the [s]hipper to document and track any remotely possible situation that might result in charges to allow a means for identifying and disputing charges applied.” NCTA Comments 8-9, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754. The National Industrial Transportation League (NITL) said that “some railroads have failed to include both the date and time that a car was constructively placed in demurrage or storage invoices, which also hinders efficient dispute resolution.” NITL Comments 8, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754. The American Chemistry Council (ACC) asked the Board to “establish minimum information requirements that enable shippers to audit demurrage and storage charges.” ACC Comments 9, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

Likewise, several warehousemen (or their representatives) expressed dissatisfaction with the adequacy of demurrage invoices. Kinder Morgan Terminals (Kinder Morgan), a terminal operator, and the International Liquid Terminals Association (ILTA), an organization representing third-party intermediary liquid terminal operators, said in their written submissions and oral testimony that the demurrage invoices received from rail carriers do not include sufficient detail or information, making it difficult to challenge the charges or seek compensation from shippers when appropriate.

For example, in its May 8, 2019 written testimony, ILTA stated:

Most terminals include clauses in their contracts requiring shippers to pay any demurrage fees that were incurred by no fault of the terminal operators. However, terminal operators now often find they are unable to verify the basic validity of demurrage charges levied on them by the railroad, making it impractical to compel shippers to reimburse them for the charges.

The demurrage invoices provided by the railroads to terminals include railcars related to numerous shippers. The limited detail provided makes it difficult or even impossible to determine which specific railcars and shippers were at issue in each case of demurrage. The individual shippers are often not listed, and the railcars and commodities are frequently in error. While the railroads have access to the appropriate information related to the demurrage charges, the terminal – lacking a contractual relationship with the railroad – has no access to information it would need to confirm or dispute the charges.

ILTA Comments 1-2, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754; see also Oral Test. of Kathryn Clay, Tr. of Oversight Hr'g on Demurrage & Accessorial Charges (Hr'g Tr.) 792, May 23, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (“in practice, . . . we lack the detailed information to make clear that that charge belongs to that shipper, of the many shippers that might be on the terminal.”).

Similarly, Kinder Morgan stated that demurrage invoices issued to warehousemen are inadequate to allow warehousemen to allocate costs to shippers:

The railroads send numerous pages of computer-generated invoices each month. The invoices are not separated by railroad customer, and in fact do not identify the individual shippers associated with the shipment, significantly impeding Kinder Morgan’s ability to orderly review and attempt to pass through charges to our responsible customers. Reviewing each of the numerous line items for billing and car errors imposes significant costs and burdens on receivers for tariff compliance, review, and objection. Moreover, to adequately review the invoices, a party receiving the bills needs additional train movement and other traffic data which the railroads do not make public.

Kinder Morgan Comments 17-18, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

Rail carriers generally asserted that their customers have access to the information they need to assess the basis of demurrage charges, either in the invoices or in other tools that the rail carriers offer. For example, CSX Transportation, Inc. (CSXT), stated that it “does not have the current technology in place” to provide the date and time of constructive placement on individual invoices but instead makes the information available through its ShipCSX tool. CSXT Suppl. 12, June 6, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754. CSXT added, however, that it “recognizes the value of providing this information on invoices” and is “actively exploring the feasibility of adding placement times to invoices.” Id. at 12-13. Similarly, BNSF Railway Company (BNSF) said that its Customer Demurrage Management Tool permits customers to see “underlying operational details” of demurrage charges “such as time of actual and constructive placement.” BNSF Comments 6, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

Overview of Comments Regarding Issuance of Demurrage Invoices Directly to Shippers Instead of Warehousemen

The warehousemen (or their representatives) also addressed the circumstances under which, in their view, a rail carrier should bill shippers directly for demurrage without requiring warehousemen to assume responsibility for any charges left unpaid by the shipper. Some cited the regulations previously adopted by the Board in Docket No. EP 707 as the source of their inability to effectively address the problems described in their submissions.

Kinder Morgan asked the Board to clarify that, if requested by a shipper and warehouseman, a rail carrier “shall agree to bill the shipper directly for demurrage, and without requiring the [warehouseman] to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.” Kinder Morgan Comments 4, 19, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754. Kinder Morgan characterizes this as “an important matter that has effectively gridlocked reasonable discussion and resolution of individual disputes.” Id. at 4. After the hearing, Kinder Morgan sent letters to each of the Class I carriers asking them to agree voluntarily “that, if requested by a shipper and Kinder Morgan, the railroad will (i) provide separate invoices for each shipper that controls a railcar on which a demurrage charge is sought to be assessed, and (ii) agree to bill the shipper directly for demurrage, without requiring Kinder Morgan to assume responsibility for any unpaid demurrage assessments as a condition of such agreement.” Kinder Morgan Comments 2, Attach. 2, June 6, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

In response to Kinder Morgan’s letters,¹⁰ some of the rail carriers expressed a willingness to bill the shipper directly, but none said that they would do so without requiring Kinder Morgan to assume responsibility for unpaid amounts. For example, BNSF said that it already honors Kinder Morgan’s request to bill shippers directly, but it “looks to Kinder Morgan as the receiving facility for payment.” Kinder Morgan Comments, Attach. 3 at 1-2, June 6, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.¹¹ Similarly, CN explained that it has been working with Kinder Morgan to explore whether such agreements were “feasible,” but in the “few instances where Kinder Morgan’s smaller customers express interest, Kinder Morgan refused CN’s request that Kinder Morgan be responsible in the event its customer did not pay the demurrage invoice.” Id., Attach. 3 at 13. Moreover, several of the rail carriers indicated that there are downsides to Kinder Morgan’s proposal. For example, BNSF said that “[p]arsing out which bills go to which shippers/Kinder Morgan facilities is a highly manual job for BNSF personnel” that BNSF has “undertaken in good faith and in an effort to work with Kinder Morgan and Kinder Morgan’s customers.” Id., Attach. 3 at 1. KCS said that Kinder Morgan’s “requested change involves multiple parties and may result in complications to other parties beyond a specific shipper and Kinder Morgan.” Id., Attach. 3 at 17. CN cast doubt on the

¹⁰ Responses from BNSF, Canadian National Railway Company (CN), Canadian Pacific, CSXT, and Kansas City Southern Railway Company (KCS) are attached, as Attachment 3, to Kinder Morgan’s comment dated June 6, 2019 in Docket No. EP 754. Union Pacific Railroad Company (UP) filed its response to Kinder Morgan in Docket No. EP 754 on June 6, 2019 (filing ID 247898).

¹¹ BNSF’s letter added:

From February 2016 to May 2019, at Kinder Morgan’s request, BNSF billed Kinder Morgan shippers approximately \$3.4M out of a total of approximately \$5.4M in demurrage charges incurred at Kinder Morgan terminals; the remaining \$2M in charges were invoiced directly to Kinder Morgan entities who presumably own the receiving locations, and those Kinder Morgan entities paid \$1.96M of the charges.

Kinder Morgan Comments, Attach. 3 at 1, June 6, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

willingness of most shippers to agree to direct billing, noting that it had explored this option with Kinder Morgan and its shippers, but “[d]espite the efforts of the parties, most of Kinder Morgan’s customers either refused or did not respond.” Id., Attach. 3 at 13.

ILTA also argued that direct billing of shippers is a possible solution, but it said that terminal operators, shippers, and railroads had been unable to reach an agreement along these lines:

In other cases, terminal operators have joined with shipping customers in asking the railroads to return to the previous practice of assessing demurrage charges to the shipping customer, with whom they have a direct contractual relationship. Unfortunately, to our knowledge, none of these negotiations have met with success.

ILTA Comments 2, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754. At the hearing, ILTA expressed the view that “the shipping community would welcome a return” to direct billing of shippers, adding: “I know that our terminal members that have gone to their shippers and have asked them, would you go with us to the railroad and ask them to return to the practice of billing directly, when asked [the shippers] have been willing to do that.” Oral Test. of Kathryn Clay, Hr’g Tr. 800, May 23, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

PROPOSED CHANGES

The Board proposes two changes to its existing demurrage regulations. First, the Board proposes certain requirements regarding Class I carriers’ demurrage invoices, such as minimum information to be included on or with those invoices, that would enable invoice recipients to verify the validity of the demurrage charges; that would permit shippers and warehousemen to properly allocate demurrage responsibility amongst themselves; and that would assist shippers and receivers in determining how to modify their behavior to encourage the efficient use of rail assets, thereby fulfilling the purpose of demurrage. Second, the Board proposes a requirement for Class I carriers that if a shipper and warehouseman agree that the shipper should be responsible for paying demurrage invoices, the rail carrier must, upon receiving notice of that agreement, send the invoices directly to the shipper, and not require the warehouseman to guarantee payment.

A. Requirements for Demurrage Invoices

The overarching purpose of demurrage is to encourage the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those resources beyond a specified period of time. See, e.g., Pa. R.R. v. Kittanning 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.”). If demurrage invoices are so vague that they effectively preclude shippers from determining what happened, then shippers are unable to challenge the invoices if they believe the demurrage charges were improper or to take appropriate actions to avoid future demurrage charges if they were responsible for the delays.

The same holds true for warehousemen. Warehousemen, which typically work with multiple shippers, argued in Docket Nos. EP 707 and EP 754 that they should be able to pass the costs on to shippers (without resorting to litigation) when the shippers were the cause of the delay.¹² In issuing the final rule in EP 707, the Board encouraged warehousemen and shippers to address demurrage liability in their commercial arrangements (which, the Board notes, would enable the party responsible for the delay to modify its actions). Demurrage Liability Final Rule, EP 707, slip op. at 9 (“[w]ith respect to actions by shippers, these rules should encourage warehousemen and shippers to address demurrage liability in their commercial arrangements”). Yet, if railroad billing practices effectively preclude the warehouseman from knowing which rail cars were involved or otherwise determining the cause for the demurrage charge, the responsible party may not be incentivized to modify its actions, and the demurrage charges may not achieve their purpose.

Accordingly, the Board proposes a requirement applicable to Class I carriers that the following minimum information be provided on or with any demurrage invoices:¹³

- The unique identifying information (e.g., reporting marks and number) of each car involved;
- The following shipment information, where applicable:
 - 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;
 - The origin station and state of the shipment;
- The dates and times of (1) actual placement of each car, (2) constructive placement of each car (if applicable and different from actual placement), (3) notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable), and (4) release of each car; and

¹² See, e.g., Kinder Morgan Comments 9, Aug. 24, 2012, Demurrage Liability, EP 707 (arguing that the rule would make railroads more likely to bill warehousemen for demurrage “even when the shipper is the party at fault”); ILTA Comments 4, Aug. 24, 2012, Demurrage Liability, EP 707 (arguing that the rule would be inconsistent with the principle that “[t]he party that causes the delay should be the party that is held liable for payment of the demurrage charge”); Kinder Morgan Comments 11-12, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (providing an example of a railroad billing Kinder Morgan even though, according to Kinder Morgan, the shipper was responsible for the delay); ILTA Comments 1, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754 (arguing that the rule makes it “impractical to compel shippers to reimburse” warehousemen for demurrage charges).

¹³ The Board invites comment on the extent to which other billing or supply chain visibility tools or platforms (other than an invoice or documentation accompanying an invoice) that provide rail users with access to this information would satisfy this requirement.

- The number of credits and debits attributable to each car (if applicable).

In addition, the Board proposes that prior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that the demurrage charges are accurate and warranted,¹⁴ consistent with the purpose of demurrage.

These proposed requirements are 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.¹⁵ The Board expects that rail carriers have access to this information because it is used in the ordinary course of business.

The Board does not propose at this time to require Class II or Class III carriers to comply with the requirements for demurrage invoices described above, as the issues identified before, during, and after the hearing predominantly pertained to Class I carriers, and given that any compliance costs may be more difficult for some smaller rail carriers. Should the rule be adopted, the Board would strongly encourage Class II and Class III carriers to comply with these requirements to the extent they are capable of doing so.

The Board invites comment on this proposal, including the exclusion of Class II and Class III carriers. The Board also specifically invites comment on whether there is additional information that rail carriers could reasonably provide on or with demurrage invoices and that would enable recipients to more effectively evaluate those invoices.

¹⁴ Shippers and receivers have raised concerns about demurrage charges that are difficult, time-consuming, and costly to dispute; invoices that include inaccurate information; and erroneous invoices that are issued even when the tariff expressly provides for relief or the rail carrier has acknowledged its responsibility for the problem. See, e.g., NCTA Comments 8-9, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754; NITL Comments 8, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754; Packaging Corporation of America Comments 4-5,7-8, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754; Brainerd Chemical Company Comments 4, May 8, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754; International Paper Comments 4, May 7, 2019, Oversight Hearing on Demurrage & Accessorial Charges, EP 754.

¹⁵ The Board notes that “[w]here a railroad has initiated a proceeding to collect assessed demurrage charges, it has the burden of proof and therefore must provide evidence to establish actual or constructive dates of car placement and release and to show how the assessed charges were computed.” Utah Cent. Ry.—Pet. for Declaratory Order—Kenco Logistic Servs., LLC, FD 36131, slip op. at 6 n.13 (STB served Mar. 20, 2019) (citing R.R. Salvage & Restoration, Inc. —Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42102 et al., slip op. at 6 (STB served July 20, 2010)).

B. Issuing Demurrage Invoices Directly to Shippers Instead of Warehousemen

The Board also proposes a requirement that serving Class I carriers send demurrage invoices directly to the shipper instead of the warehouseman if the shipper and warehouseman agree to such an arrangement and notify the rail carrier of the agreement. As noted above, the Board's rules at part 1333, adopted in Demurrage Liability Final Rule, EP 707, reflect the view that demurrage charges should be borne by the party responsible for the delay, which, in some cases, may be the shipper rather than the warehouseman, as the Board was informed during the EP 754 proceeding. But the Board also notes that warehousemen and shippers are in the best position to determine which party should bear responsibility for demurrage charges, and they should be able to make agreements for payment of demurrage charges that reflect this determination. Imposing the charges on the responsible party would incentivize that party to modify its actions in a way that promotes the efficient use of rail assets, thereby fulfilling the purpose of demurrage. Because such arrangements better effectuate the purpose of demurrage, the Board proposes a requirement that Class I carriers send demurrage invoices to the shipper when the shipper and warehouseman agree to such an arrangement and inform the rail carrier of the agreement. When an invoice is sent to the shipper rather than the warehouseman, the railroad may not require the warehouseman to guarantee payment.¹⁶

Although this proposed rule would amend the Board's current regulations to require Class I carriers to issue invoices to shippers and to treat shippers as the ultimate guarantors of payment (when the shipper and warehouseman agree to that arrangement and have so notified the rail carrier), the Board points out that rail carriers are already permitted to do so under the current rule. Neither the letter nor the purpose of the rules at part 1333 is inconsistent with a rail carrier billing the shipper directly without requiring the warehouseman to assume responsibility for any unpaid demurrage. The rule adopted in Docket No. EP 707 states, in permissive terms, that parties who receive cars "may be held liable for demurrage," see 49 C.F.R. § 1333.3 (emphasis added), and the Board expressly stated in the final rule that the demurrage liability rules promulgated in that docket "are default rules only, meant to govern demurrage in the absence of a privately negotiated contract." Demurrage Liability Final Rule, EP 707, slip op. at 25.

For the same reasons described above regarding the requirements for demurrage invoices, the Board does not propose at this time to require Class II or Class III carriers to comply with the requirement that the rail carrier must bill the shipper when the shipper and warehouseman have agreed to that arrangement and have so notified the rail carrier. The Board invites comment on this proposal, including the exclusion of Class II and Class III carriers.

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

¹⁶ The shipper is, after all, the party shown on the bill of lading, and indeed the one that was historically responsible for demurrage. The claim that someone else should guarantee that shippers pay their bills is unsound in law and policy.

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. 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).

The proposed rule would not have a significant impact on a substantial number of small entities within the meaning of the RFA.¹⁷ The Board's proposal is limited to Class I carriers. Accordingly, the Board 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. 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

Pursuant to the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521, Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), and Appendix B, the Board seeks comments about the impact of the revisions in the proposed rules to the currently approved collection of the Demurrage Liability Disclosure Requirements (OMB Control No. 2140-0021) regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the 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.

The proposed rules would modify the hourly burden in the existing, approved information collection in three ways. First, the Board estimates that the proposed invoicing

¹⁷ 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).

requirements for Class I carriers would add a total one-time hour burden of 280 hours (or 93.3 hours per year as amortized over three years) for Class I carriers because, in most cases, those carriers would likely need to modify their billing systems to implement some or all of these changes. Second, the requirement that Class I carriers take appropriate action to ensure that demurrage charges are accurate and warranted would likely require Class I carriers to establish or modify appropriate demurrage invoicing protocols and procedures and would add an estimated total one-time hour burden of 560 hours (or 186.7 hours per year as amortized over three years). Third, the Board estimates that the proposed invoicing requirement that Class I carriers invoice demurrage involving a warehouseman to the shipper if the shipper and warehouseman have agreed to that arrangement and have so notified the rail carrier would add an annual hour burden of 35 hours. All other hour burdens would remain the same as before this modification (except for an update to the number of non-Class I carriers and to the estimate of how frequently Class I carriers choose to update their demurrage tariffs, as reflected in Appendix B). The Board welcomes comment on the estimates of actual time and costs of its proposed invoicing requirements for Class I carriers, as detailed below in Appendix B. The proposed rules will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of Subjects

49 C.F.R. part 1333

Penalties, Railroads.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.
2. Comments are due by November 6, 2019. Reply comments are due by December 6, 2019.
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
Code of Federal Regulations**

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1333 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1333—DEMURRAGE LIABILITY

1. The authority citation for part 1333 continues to read as follows:

Authority: 49 U.S.C. 1321

2. In § 1333.3, redesignate the existing text as paragraph (a) and add paragraph (b) to read as follows:

§ 1333.3 Who Is Subject to Demurrage

(a) * * *

(b) If the rail cars are delivered to a third-party intermediary that has reached an agreement with a shipper (or consignee) that the shipper (or consignee) shall be liable for demurrage, then the serving Class I carrier shall, after being notified of the agreement by the shipper, consignee, or third-party intermediary, bill the shipper (or consignee) for demurrage charges without requiring the third-party intermediary to act as a guarantor, unless and until a party to the agreement notifies the serving Class I carrier that the agreement is no longer in force.

3. Add a new § 1333.4 to read as follows:

§ 1333.4 Requirements for Demurrage Invoices

(a) The following information shall be provided on or with any demurrage invoices issued by Class I carriers:

- (1) The unique identifying information (e.g., reporting marks and number) of each car involved;
- (2) The following information, where applicable:
 - (i) The date the waybill was created;
 - (ii) The status of each car as loaded or empty;
 - (iii) The commodity being shipped (if the car is loaded);
 - (iv) The identity of the shipper, consignee, and/or care-of party, as applicable; and
 - (v) The origin station and state of the shipment;
- (3) The dates and times of:
 - (i) actual placement of each car,
 - (ii) constructive placement of each car (if applicable and different from actual placement),
 - (iii) notification of constructive placement to the shipper or third-party intermediary (if applicable); and
 - (iv) release of each car; and

- (4) The number of credits and debits attributable to each car (if applicable).
- (b) Prior to sending a demurrage invoice, Class I carriers shall take appropriate action to ensure that the demurrage charges are accurate and warranted.

Appendix B

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 (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 this NPRM, which proposes to add certain requirements regarding Class I carriers' demurrage invoices, as well as to require that Class I carriers directly bill the shipper if the shipper and warehouseman agree to that arrangement and have so notified the rail carrier. 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 [i.e., large] carriers)

Estimated Time per Response: The estimated hour burden for demurrage liability notices for new customers remains one hour per notice. The modification to Class I carriers' invoicing requirements sought here is an estimated annualized one-time hour burden—resulting from an adjustment to the seven Class I carriers' billing systems—of 40 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 hour burden of 80 hours. The modification requiring Class I carriers to invoice the shipper when the warehouseman and the shipper reach agreement for the serving Class I carrier to invoice the shipper is an estimated annual hour burden of five minutes per agreement.

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 information on demurrage invoices, (b) to take appropriate action to ensure that the demurrage invoices are accurate and warranted, and (2) make an annual adjustment to the Class I carriers'

invoicing practices to invoice the shipper when the warehouseman and the shipper reach agreement for the serving Class I carrier to invoice the shipper (estimated 60 agreements).

Total Burden Hours (annually including all respondents): 1,329.7 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 (7 hours); (3) 677 non-Class I carriers 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 Class I carriers' invoicing requirements, Board staff estimates that, on average, each Class I rail carrier would have a one-time burden of 40 hours (280 total hours). Amortized over three years, this one-time burden equals 93.3 hours per year. For the modification requiring each Class I carrier to ensure that the demurrage charges are accurate and warranted, Board staff estimates that, on average, each Class I carrier would have a one-time burden of 80 hours (560 total hours) to establish or modify appropriate protocols and procedures. Amortized over three years, this one-time burden equals 186.7 hours per year. For the modification adding a shipper invoicing requirement when a warehouseman and shipper have agreed and notified the Class I carrier, Board staff estimates that annually seven Class I carriers would each receive 60 requests per year for additional shipper invoices at five minutes per invoice (35 hours).

The total hour 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	7 hours	93.3 hours	186.7 hours	35 hours	427 hours
677 Non-Class I Carriers	677 hours	225.7 hours	---	---	---	902.7 hours
Totals	782 hours	232.7 hours	93.3 hours	186.7 hours	35 hours	1,329.7 hours

Total “Non-hour Burden” Cost: There are no other costs identified because filings are submitted electronically to the Board.

Needs and Uses: Demurrage is a charge that railroads assess their customers for detaining rail cars beyond a specified amount of time. It both compensates railroads for expenses incurred for that rail car and serves as a penalty for undue car detention to promote efficiency. Demurrage is subject to the Board's jurisdiction under 49 U.S.C. § 10702 and § 10746.

A railroad and its customers may enter into demurrage contracts without providing notice, but, in the absence of such contracts, demurrage will be governed by the railroad's

demurrage tariff. 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 the agency.

As described in more detail above in the NPRM, the Board is amending the rules that apply to this collection of demurrage disclosure requirements to require the inclusion of additional information in the billing invoices issued by Class I carriers, to require Class I carriers to ensure that demurrage charges are accurate and warranted, and to require Class I carriers to invoice the shipper when the warehouseman and the shipper reach agreement for the Class I carrier to do so. The collection by the Board of this information, and the agency's use of this information, enables the Board to meet its statutory duties.