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SERVICE DATE – MAY 28, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 707

DEMURRAGE LIABILITY

Digest:¹ The Board is publishing an initial regulatory flexibility analysis to aid the public in commenting on the impact on small rail carriers, if any, of the proposed rules on demurrage liability.

Decided: May 21, 2013

AGENCY: Surface Transportation Board.

ACTION: Initial Regulatory Flexibility Analysis and Request for Comments.

SUMMARY: The Board is publishing this initial regulatory flexibility analysis to aid the public in commenting on the impact on small rail carriers, if any, of the proposed rules on demurrage liability.

DATES: Comments are due by June 27, 2013.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: By decision served on May 7, 2012, the Surface Transportation Board (the Board) issued a notice of proposed rulemaking (NPR) regarding demurrage liability. Specifically, the Board announced a proposed rule providing that any

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond a specified period of time may be held liable for demurrage if that person has actual notice of the terms of the demurrage tariff providing for such liability prior to the carrier's placement of the rail cars. Demurrage Liability, EP 707, slip op. at 10 (STB served May 7, 2012). The NPR did not include an initial regulatory flexibility analysis (IRFA) pursuant to the Regulatory Flexibility Act, but instead included a certification that the proposed rules would not have a significant economic impact on a substantial number of small entities. Id., slip op. at 17-18. The certification was based on the fact that rail carriers would be required to provide a one-time notice (electronic or written) to their customers,² and the Board noted that these types of notices are generally already provided, often electronically. A review of the 2011 Waybill Sample reveals that small rail carriers, as defined by the Small Business Administration,³ have an average of 10 terminating stations, which generally equates to 10 customers. As such, the burden imposed would be to provide approximately 10 notices of a carrier's demurrage tariff, either electronically or in writing, which is not significant. Additionally, to the extent that their existing tariffs conflict with the proposed rules, rail carriers would need to update their demurrage tariffs to conform to the proposed rules.

In response to the NPR, the American Short Line and Regional Railroad Association (ASLRRRA) submitted comments in which it questioned the necessity of imposing the actual notice requirement on small carriers. ASLRRRA summarily argued that "small railroads . . . often communicate with shippers by telephone," that Class III carriers are "sometimes less electronically sophisticated," and that "small railroads, particularly those who are acting as handling lines, may not even know who the receiver is."⁴

² The Paperwork Reduction Act and Regulatory Flexibility Act sections of the NPR assumed that rail carriers would only need to provide a one-time notice. See, e.g., NPR at 21 (calculating burden hours by assuming that it would take "railroads eight hours to provide initial notice to its customers"). Many commenters asked for clarification on whether rail carriers would need to provide notice with each delivery of rail cars, or whether a one-time notice would suffice. In this IRFA, we are not deciding this issue, but only noting that the analyses contained in the NPR were based on the assumption that rail carriers would only need to provide a one-time notice.

³ The Small Business Administration's Office of Size Standards has established a size standard for rail transportation, pursuant to which a "line-haul railroad" is considered small if its number of employees is 1,500 or less, and a "short line railroad" is considered small if its number of employees is 500 or less. 13 C.F.R. § 121.201 (industry subsector 482).

⁴ ASLRRRA's Comments 3-4.

The Board continues to believe that its certification in the NPR is appropriate because the impact of the proposed rules would not be significant. Nevertheless, the Board has decided to publish the following analysis to provide further information and opportunity for public comment on the impact on small rail carriers, if any, of the rules. The Board notes that it already afforded a period of public comment on the proposed rules and that this solicitation of comments is limited to the impact on small rail carriers, if any, of the rules.

In particular, we encourage ASLRRA to provide comments in response to this IRFA. Although we appreciate that ASLRRA submitted comments regarding the impact on small carriers, its comments were general in nature. To fully evaluate ASLRRA's comments, the Board seeks more specific information with which to evaluate the concerns raised by ASLRRA. Specifically, we seek further comment on the number of small carriers that would find electronic or written communication of notice more difficult than communication of notice by phone, and why; and information on small carriers that deliver rail cars but are unaware of the receiver's identity. Additionally, we seek comment on the number of customers served by small carriers. We also encourage any other information that is relevant to the burden, if any, the proposed rules would have on small rail carriers.

Description of the reasons that action by the agency is being considered.

The Board instituted this proceeding in order to reexamine its existing policies on demurrage liability and to promote uniformity in the area in light of conflicting opinions from the United States Courts of Appeals. In reviewing the decisions from the Courts of Appeals, the Board determined that it was necessary to revisit its demurrage precedent to consider whether the agency's policies accounted for current statutory provisions and commercial practices. For a more detailed description of the agency's historical regulation of demurrage, the conflicting opinions from the Courts of Appeals, and the Board's reasons for considering the proposed rules, see the NPR.

Succinct statement of the objectives of, and legal basis for, the proposed rule.

The objectives are to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area by defining who is subject to demurrage. The legal basis for the proposed rule is 49 U.S.C. § 721.

Description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

In general, the rule would apply to any rail carrier providing rail cars to a shipper at origin or delivering them to a receiver at end-point or intermediate destination who wishes to charge demurrage for the detention of rail cars beyond the free time. See Proposed Rule § 1333.3. The rule will apply to approximately 562 small rail carriers.

Description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The proposed rules would require that rail carriers make certain third-party disclosures, i.e., provide persons receiving rail cars for loading or unloading with notice of the demurrage tariff in order to hold that person liable for demurrage charges. See Proposed Rule § 1333.3. The Board is seeking, pursuant to the Paperwork Reduction Act, approval from the Office of Management and Budget for this requirement. See NPR Appendix B (description of collections). To provide this initial notice, rail carriers would need to update their demurrage tariffs to conform to the proposed rules to the extent that their existing tariffs conflict with the proposed rules. In the NPR, the Board estimated approximately eight hours to provide initial notice to the railroads' customers. However, the Board seeks further comment on the actual time, or costs or expenditures, if any, of providing a one-time notice of the demurrage tariff and updating the demurrage tariff to conform to the proposed rules, and the extent to which these costs may differ or vary for small entities.

Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

The Board is unaware of any duplicative, overlapping, or conflicting federal rules. The Board seeks comments and information about any such rules.

Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered, such as: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; (4) any exemption from coverage of the rule, or any part thereof, for such small entities.

Under the proposed rule, rail carriers would be free to choose between providing notice electronically or in writing. In response to the NPR, many commenters suggested that notice be fulfilled by providing a link to the notice, rather than the complete text of the notice of demurrage tariff. Additionally, as noted earlier, some commenters also argued that a one-time notice should fulfill the notice requirement, as opposed to providing notice with every shipment. Both of these suggestions are potential alternatives to minimize the burden on rail carriers.

Although the stated goal of the rulemaking is to “promote uniformity in the area,” ASLRRRA has suggested establishing a different notice requirement for small carriers. An alternative to the proposed rule, as suggested by ASLRRRA, would be to eliminate the notice requirement for small carriers that publish their demurrage tariffs on the carriers’ website. Other alternatives include eliminating the notice requirement for small carriers altogether or permitting small carriers to provide notice in different forms (e.g., by telephone). Commenters should, if they advance any of these alternatives in their comments, address how such alternatives would be consistent or inconsistent with the goal of uniformity envisioned by the proposed rules.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Comments are due by June 27, 2013.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.