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SERVICE DATE – APRIL 11, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 707

DEMURRAGE LIABILITY

Digest:¹ Demurrage is a charge incurred when rail cars are detained by the party receiving delivery of the cars beyond a specified period of time for loading or unloading. The Board is adopting final rules pertaining to who may charge demurrage and who is subject to demurrage. The Board is also clarifying that it construes the provisions of 49 U.S.C. § 10743 as governing liability for payment of rates applying to carriers' line-haul rates, but not to carriers' charges for demurrage.

Decided: April 9, 2014

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Final Rules.

SUMMARY: The Board is adopting final rules establishing that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the "free time" provided in the carrier's governing tariff will generally be responsible for paying demurrage, if that person has actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. The Board also clarifies that it construes the provisions of 49 U.S.C. § 10743, titled "Liability for payment of rates," as applying to carriers' line-haul rates, but not to carriers' charges for demurrage.

DATES: *Effective date*: These rules will be effective on July 15, 2014.

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).

FOR FURTHER INFORMATION CONTACT: Amy 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: Demurrage is a charge for detaining rail cars for loading or unloading beyond a specified amount of time called “free time.” Demurrage has compensatory and penalty functions. It compensates rail carriers for the use of railroad equipment and assets; and, by penalizing those who detain rail cars for too long, it also encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system. See 49 U.S.C. § 10746.

The Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), provides that demurrage is subject to Board regulation. Specifically, 49 U.S.C. § 10702 requires railroads to establish reasonable rates and transportation-related rules and practices, and 49 U.S.C. § 10746 requires railroads to compute demurrage and to establish demurrage-related rules “in a way that fulfills the national needs related to” freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed 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 carrier at destination.²

This agency has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.³ The

² The Interstate Commerce Act does not define “consignor” or “consignee.” 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.” Black’s Law Dictionary 327 (8th ed. 2004). The Federal Bills of Lading Act defines these terms in a similar manner. 49 U.S.C. § 80101(1) & (2).

³ E.g., Springfield Terminal Ry.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42108 (STB served June 16, 2010); Capitol Materials Inc.—Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry., NOR 42068 (STB served Apr. 12, 2004); Unger ex rel. Ind. Hi-Rail Corp.—Pet. for Declaratory Order—Assessment & Collection of Demurrage & Switching Charges, NOR 42030 (STB served June 14, 2000); South-Tec Dev. Warehouse, Inc.—Pet. for Declaratory Order—Ill. Cent. R.R., NOR 42050 (STB

(continued . . .)

disputes between railroads and parties that originate or terminate rail cars can involve relatively straightforward application of the carrier's tariffs⁴ to the circumstances of the case. Complications can arise, however, in cases involving warehousemen or other third-party intermediaries who handle the goods but have no property interest in them. A consignee that owned the property being shipped had common-law liability (for both freight charges and demurrage) when it accepted cars for delivery. See Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577, 581 (1919). Warehousemen, however, are not typically owners of the property being shipped (even though, by accepting the cars, they are in a position to facilitate or impede car supply). Under the legal principles that developed, in order for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability beyond the mere fact of handling the goods shipped. See, e.g., Smokeless Fuel Co. v. Norfolk & W. Ry., 85 I.C.C. 395, 401 (1923).

What became the most important factor under judicial and agency precedent was whether the warehouseman was named the consignee on the bill of lading.⁵ Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff may not lawfully impose such demurrage charges on a warehouseman who is not the owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation. 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) (three-judge court sitting under the then-effective provisions of 28 U.S.C. § 2321 et seq.).

(. . . continued)

served Nov. 15, 2000); Ametek, Inc.—Pet. for Declaratory Order, NOR 40663, et al. (ICC served Jan. 29, 1993), aff'd, Union Pac. R.R. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997).

⁴ Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called “filed rate doctrine.” See Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICCTA. Nevertheless, although tariffs are no longer filed with the agency, rail carriers may still use them to establish and announce the terms of the services they hold out.

⁵ A bill of lading is the transportation contract between the shipper and the carrier for moving goods between two points. Its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

In recent years, however, a question arose as to who should bear liability when an intermediary that accepts rail cars and detains them 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. On that issue, the United States Courts of Appeals for the Third and Eleventh Circuits have split.⁶

In Norfolk Southern Railway v. Groves, a warehouseman denied liability for demurrage charges despite being named as a consignee on the bill of lading, claiming that it did not consent to being named as a consignee and that it was never informed that it was designated as such. 586 F.3d 1273, 1275-76 (11th Cir. 2009), cert. denied, 131 S. Ct. 993 (2011). Relying on contract principles, the Eleventh Circuit concluded that “a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.” As such, the court concluded that the warehouseman was not a consignee and thus not liable for demurrage. Id. at 1278.

On virtually identical facts, in CSX Transportation Co. v. Novolog Bucks County (Novolog), the Third Circuit rejected the notion that a warehouseman’s designation as consignee in the bill of lading, without permission and where the warehouseman is not the ultimate consignee of the freight, cannot establish its status as consignee for purposes of demurrage liability. 502 F.3d 247, 257 (3d Cir. 2007). Rather, the court held that “recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the notification procedures established in ICCTA’s consignee-agent liability provision, 49 U.S.C. § 10743(a)(1).” Id. at 254.⁷

⁶ Additionally, the United States Court of Appeals for the Seventh Circuit indicated a predilection toward the Eleventh Circuit’s decision, though it did not directly decide the issue. See Ill. Cent. R.R. v. S. Tec Dev. Warehouse, Inc. (South Tec), 337 F.3d 813, 820-21 (7th Cir. 2003).

⁷ The statutory notice provision of § 10743(a)(1), which is also referred to in Groves, states, among other things, that a person receiving property as an agent for the shipper or consignee will not be liable for “additional rates” that may be found due beyond those billed at the time of delivery, if the receiver notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.

The legal debate and resulting conflicting opinions prompted the Board to reexamine its existing policy and to assist in providing clarification. In reviewing these decisions, 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. On December 6, 2010, the Board published an Advance Notice of Proposed Rulemaking (ANPR) that raised a series of specific questions about how the demurrage process works and sought public input on whether the Board should consider a new rule that would place demurrage liability on the receivers of rail cars, regardless of their designation in the bill of lading, if the carrier had provided the receiver with notice of its demurrage tariff. Demurrage Liability, EP 707 (STB served Dec. 6, 2010), 75 Fed. Reg. 76,496 (Dec. 10, 2010). Shortly thereafter, the United States Supreme Court denied a request that it review the split in the circuits. Norfolk S. Ry. v. Groves, 131 S.Ct. 993 (2011) (mem.).

After reviewing the comments received in response to the ANPR, the Board issued a Notice of Proposed Rulemaking (NPR) on May 7, 2012, in which the Board announced proposed rules whereby any person receiving rail cars who detains the cars beyond the free time may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff. Demurrage Liability, EP 707 (STB served May 7, 2012). The Board also announced a new construction of the provisions of 49 U.S.C. § 10743, under which those provisions would apply to carriers' line-haul rates, but not to demurrage charges. The proposed rules were published in the Federal Register, 77 Fed. Reg. 27,384 (May 10, 2012), and comments were submitted in response to the NPR.⁸

After receiving comments, the Board, by decision served May 28, 2013, issued an initial regulatory flexibility analysis (IRFA) and request for comments regarding the impact of the proposed rules on small rail carriers. Demurrage Liability, EP 707 (STB served May 28, 2013).

⁸ The Board received comments and replies from the following: the Fertilizer Institute; the Independent Fuel Terminal Operators Association (IFTOA); the International Liquid Terminals Association (ILTA); the International Warehouse Logistics Association (IWLA); the National Industrial Transportation League (NITL); Continental Terminals, Inc. (CTI); Kinder Morgan Terminals (Kinder Morgan); Adam Stern; the American Short Line and Regional Railroad Association (ASLRRA); Minnesota Commercial Railway (MCR); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); Canadian Pacific Railway Company (CP); CSX Transportation, Inc. (CSXT); the Kansas City Southern Railway Company (KCS); Norfolk Southern Railway Company (NSR); and Union Pacific Railroad Company (UP).

The Board received comments from ASLRRA and the Small Railroad Business Owners Association of America.

Final Rules

We now adopt final rules based on suggestions made in the parties' comments and on the Board's review of the issues raised. We address below the comments received on the proposed rules and our revisions made in response to the comments. The attached Appendix A contains the final rules in full.

A. Legality of the NPR

In its comments, Kinder Morgan argues that the NPR, if adopted, “would violate the [Administrative Procedure Act (APA)] in that it is ‘not in accordance with law,’ ‘contrary to constitutional right,’ ‘in excess of statutory jurisdiction, authority, or limitations,’ and ‘unsupported by substantial evidence.’”⁹ Additionally, ILTA argues in its comments that the Board failed to provide an adequate factual basis for the proposed rules, although it does not specifically allege a violation of the APA.¹⁰ We reject each of Kinder Morgan's arguments, as well as ILTA's argument, as explained more fully below.

Kinder Morgan first argues that the Board exceeded its jurisdiction because, according to Kinder Morgan's reading of 49 U.S.C. § 10746, Congress reserved the authority to create rules on demurrage to rail carriers, not the Board. We reject Kinder Morgan's argument that this rulemaking is outside of the Board's jurisdiction for several reasons.

Section 10746, which was carried forward as part of ICCTA,¹¹ states as follows:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—(1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

⁹ Kinder Morgan's Comments 5.

¹⁰ ILTA's Comments 3-4.

¹¹ The pre-ICCTA version of this section was contained in 49 U.S.C. § 10750.

49 U.S.C. § 10746. Kinder Morgan is correct that, under this section, the railroads are tasked in the first instance with the role of establishing terms related to demurrage. That does not mean, however, that this agency lacks authority to regulate demurrage, or that the long line of agency decisions on demurrage were *ultra vires*.¹² Rather, as with other practices initiated by rail carriers pursuant to provisions of the Interstate Commerce Act, the Board has the regulatory authority to ensure that demurrage practices are reasonable. That the Board maintains regulatory authority over demurrage is made explicit in the legislative history behind § 10746, which states “this provision retains the agency’s authority over demurrage charges and related rules.” H.R. Rep. No. 104-311, at 100 (1995); H.R. Rep. No. 104-422, at 178 (1995) (Conf. Rep.). Moreover, this understanding of § 10746 is consistent with another, comparable statutory provision. Under 49 U.S.C. § 10702, which provides that “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable rates . . . and rules and practices,” the Board also maintains the authority to determine the reasonableness of railroad-established rates and practices. And 49 U.S.C. § 721(a) authorizes the Board to “prescribe regulations in carrying out . . . subtitle IV.” As such, this rulemaking is within the Board’s jurisdiction.¹³

Next, Kinder Morgan argues that this rulemaking violates the APA because the Board failed to present “substantial evidence” in support of the proposed rules. Although Kinder Morgan fails to cite to any authority for this argument, it presumably is in reference to the “substantial evidence” test for reviewing courts found in 5 U.S.C. § 706(2)(E). By its terms, however, the substantial evidence test is applicable only to adjudicatory proceedings such as those conducted under 49 U.S.C. § 556 or § 557. This proceeding, by contrast, involves notice and comment rulemaking pursuant to 5 U.S.C. § 553 and is not one “reviewed on the record of an agency hearing provided by statute.” See 5 U.S.C. § 706(2)(E); see also Baltimore & Ohio Chicago Term. R.R. v. United States, 583 F.2d 678, 684-85 (3d Cir. 1978). As such, Kinder Morgan’s objection is not applicable to this proceeding.

¹² See, e.g., Cleveland Elec. Illuminating Co. v. ICC, 685 F.2d 170, 172 n.3 (6th Cir. 1982) (confirming ICC authority to regulate demurrage).

¹³ Kinder Morgan also implies that the Board exceeded its jurisdiction in the NPR when it proposed an agency exception similar to that found in 49 U.S.C. § 10743 to the proposed rules governing demurrage. (Kinder Morgan’s Comments 8-9.) This argument is now moot, as we are removing the agency exception from our rules for unrelated reasons. See infra at 16.

Similarly, ILTA argues that the Board failed to provide an adequate factual basis for the proposed rules, though it does not specifically allege a violation of the APA. First, ILTA argues that the Board assumed, without a factual basis, that warehousemen have an economic incentive to detain rail cars beyond the free time. In support of this allegation, ILTA claims that the Board asserted in the ANPR that warehousemen can reap financial gain by accepting as many cars as possible and sometimes holding them too long. ILTA misconstrues the Board's statements in the ANPR. Specifically, the Board posed the following question to commenters:

Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

ANPR at 7. Thus, prior to the publication of our proposed rules, the Board specifically sought comment on whether or not receivers have an economic incentive to hold rail cars, and whether or not the Board should consider an unjust enrichment theory of liability. In response, certain commenters argued that warehousemen may have a business incentive to hold rail cars, while others (including IWLA) argued that warehousemen have no such incentive. Ultimately, as is evident in the NPR, the Board chose not to pursue a theory of liability based on unjust enrichment, but instead proposed rules 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. We therefore conclude that IWLA's objection is without merit.

ILTA also argues that the Board assumed, without a factual basis, that warehousemen are able to control car movements. Kinder Morgan advances a similar argument, contending that it is unfair to place the responsibility for demurrage on a party that cannot control the return of rail cars to the rail carrier. For example, ILTA states that "terminals generally do not regulate the volume of cars delivered to terminals, nor do they control the timing or the pace of the deliveries," while Kinder Morgan argues that it "does not control the readiness of the ultimate customer to receive the goods [or] the readiness of the rail carrier to pick up the empty cars," and that in such circumstances, it cannot minimize demurrage charges.¹⁴ To the extent that ILTA and Kinder Morgan argue that warehousemen have no control over car movement as a result of

¹⁴ ILTA's Comments 4; Kinder Morgan's Comments 10.

railroad actions at the time of delivery or release, warehousemen are free to bring a complaint to the Board if they believe that they have been unfairly charged demurrage. With respect to actions by shippers, these rules should encourage warehousemen and shippers to address demurrage liability in their commercial arrangements.

Finally, Kinder Morgan argues that this rulemaking is “not in accordance with law” because it violates the principles of judicial review. Specifically, Kinder Morgan argues that this proceeding improperly attempts to resolve a circuit split and thus reverse and vacate federal appellate decisions. But there is nothing wrong with the agency’s determination to review matters within its primary jurisdiction, even matters that may arise out of judicial proceedings. Thus, as the Board stated in the ANPR, “[o]ur attention became focused on the possible need to examine *our policies* . . . when some tension developed in the federal courts of appeals regarding the liability of warehousemen and similar third-party receivers for railroad demurrage.” ANPR at 2 (emphasis added). This review of the agency’s policies led the Board to reevaluate its interpretation of 49 U.S.C. § 10743, and whether the provisions of that section perhaps should be interpreted as not applying to demurrage notwithstanding an ICC decision from 1969 which summarily concluded that its provisions embraced demurrage. NPR at 14. As the United States Supreme Court has explained, “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations [of ambiguities in statutes within an agency’s jurisdiction to administer] and the wisdom of its policy on a continuing basis.” Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 863-64 (1984); see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005). This proceeding was instituted for that very reason—“to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.” ANPR at 2.¹⁵

¹⁵ We also note that one of the main arguments advanced by the United States in its amicus curiae brief in opposition to granting certiorari was that the Board had instituted this proceeding. Brief for United States as Amicus Curiae at 12-13, 17, Norfolk S. Ry. v. Groves, 131 S. Ct. 993 (2011) (mem.) (No. 09-1212). Notwithstanding the split in the circuits, the Supreme Court denied the petition for writ of certiorari.

B. Interpretation of § 10743

In the NPR, we explained our view that § 10743 does not apply to demurrage charges, and addressed its legislative history and the related case law surrounding that provision. NPR at 14-16. CSXT, however, contends that § 10743 does apply to demurrage charges, and offers several arguments in support of that contention.

First, CSXT argues that, because “transportation” is defined at 49 U.S.C. § 10102(9) to include “car[s], vehicle[s], . . . , instrumentalit[ies], [and] equipment of any kind,” the term “rates for transportation” in § 10743 includes demurrage charges for the undue detention of rail cars.¹⁶ CSXT’s comment focuses on the fact that the term “transportation” *under § 10102(9)* encompasses demurrage. Indeed, much of CSXT’s argument focuses on the history of the *definition* of “transportation.” As we pointed out in the NPR, however, § 10743 has a specific and narrow focus—namely, the liability for charges related to the movement of goods, as opposed to accessorial charges. NPR at 14. We explained that the adoption and amendments to this section were intended to address issues unrelated to accessorial charges. *Id.* That § 10743 now refers to “rates for transportation for a shipment of property” underscores that this section focuses on shipping or line-haul charges.

Next, CSXT argues that the Uniform Bill of Lading evidences the original intent of § 10743 and the connection between demurrage and the named consignee. CSXT contends that “Section 10743 and the Uniform Bill of Lading have always been intended to be consistent with one another” and that “[a]ny reading of Section 10743 that expressly conflicts with the clear meaning of the Uniform Bill of Lading [is] counter to the intent of both.”¹⁷ In support of this contention, CSXT points to, among other things, the language of Section 7 of the Uniform Bill of Lading. To address CSXT’s arguments, we look to the history of the Uniform Bill of Lading and § 10743.

The Uniform Bill of Lading, which appears in our regulations at 49 C.F.R. pt. 1035, was first prescribed by the ICC in 1919. *In re Bills of Lading*, 52 I.C.C. 671 (1919). As described in that decision, the ICC had begun a proceeding to investigate practices in connection with bills of lading several years earlier, and the principal questions that it sought to address revolved around

¹⁶ CSXT’s Comments 7-8. A similar argument was also offered by AAR in response to the ANPR. AAR’s Comments 20 (March 7, 2011).

¹⁷ CSXT’s Comments 8-9.

the efforts by carriers in case of loss, damage, or injury to the goods transported by contract to limit their liability in accordance with terms stated in their bills of lading. *Id.* at 678, 687. The ICC concluded that, in order to prevent unreasonable or unjustly discriminatory practices, it had the authority over the issuance, form, and substance of bills of lading, thus permitting it to prescribe a Uniform Bill of Lading. The Uniform Bill of Lading prescribed in that decision (the “1919 Uniform Bill of Lading”) includes, under Section 7, language pertaining to the payment of freight charges. Specifically, Section 7 began: “The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery.” CSXT assigns this language much importance in its comments, arguing that “average” refers to the method of computing demurrage on an average basis (as opposed to “straight” demurrage).¹⁸

Soon after the ICC issued the 1919 Uniform Bill of Lading, however, Congress passed the Transportation Act of 1920, which added § 3(2) (the predecessor to § 10743) requiring the payment of freight charges prior to delivery. The ICC, aware that changes would be required in the 1919 Uniform Bill of Lading to conform it to that Act, reopened the proceeding for further hearing. On October 21, 1921, the ICC issued a decision regarding the modifications necessary and prescribed a revised Uniform Bill of Lading (the “1921 Uniform Bill of Lading”). *In re Bills of Lading*, 64 I.C.C. 357 (1921). The 1921 Uniform Bill of Lading, modified to conform to the Transportation Act of 1920, made several changes, including replacing the first sentence of Section 7 with: “Except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid.” This language mirrors the language of § 3(2), adopted in the Transportation Act of 1920.

Several months later, the ICC made a final revision to Section 7, to render its language substantially the same as that which currently exists in the Uniform Bill of Lading in our current regulations. The ICC had received a petition by the carriers to modify the language of Section 7 by inserting language similar to that which had existed in the 1919 Uniform Bill of Lading. Specifically, they asked that the ICC include at the beginning of Section 7: “The owner or

¹⁸ CSXT’s Comments 9. It is not evident that the ICC meant for Section 7 to refer to average demurrage agreements, and the term “average” has also been used to refer to a method of assigning the cost of loss or damaged cargo, particularly with respect to water carriers. Our conclusions here, however, do not turn on an interpretation of the meaning of this term as originally used by the ICC in the Uniform Bill of Lading, but rather on the history behind the Uniform Bill of Lading and § 10743 generally.

consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but. . . .” In re Bills of Lading, 66 I.C.C. 63, 63 (1922). The ICC accepted the proposed language, noting that “it was not our intention . . . to attempt to relieve consignees from the obligations imposed upon them by law” and that there was no objection to the language. Id. at 64.

Read together, these decisions indicate that the ICC removed the first sentence of Section 7 from the 1919 Uniform Bill of Lading because it included the language “*if required, shall pay the same before delivery.*” Once § 3(2) was enacted expressly prohibiting delivery without payment, the ICC chose to conform Section 7 by replacing that language with language mirroring § 3(2). By omitting the phrase “[t]he owner or consignee shall pay the freight and average,” however, it may have inadvertently suggested that owners and consignees were not required to pay freight charges at all. To avoid confusion, the ICC was thus willing, upon petition, to reinsert the requested language in the absence of any objection.

Contrary to CSXT’s arguments, this history does not suggest that § 10743 and the Uniform Bill of Lading are inextricably linked. The ICC had been contemplating the issuance of a Uniform Bill of Lading, and indeed the 1919 Uniform Bill of Lading was prescribed, before § 3(2) was enacted by Congress. Moreover, that the ICC made modifications to the Uniform Bill of Lading to conform any conflicting provisions to the Transportation Act of 1920 does not mean that the two must be read with reference to one another. Rather, the history behind § 3(2) and the Uniform Bill of Lading issued by Congress and the ICC, respectively, make clear that each was meant to address different concerns. While the Uniform Bill of Lading was prescribed due to a history of concerns regarding unjust practices in the issuance of bills of lading, especially with regard to carrier liability for damage or loss, the Transportation Act of 1920 was passed to end federal control over the railroads and make changes relevant to that transition. The Conference Report accompanying H.R. 10453, which was to become the Transportation Act of 1920, notes that the provision of § 3(2) stating that no railroad “shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid” was enacted to “virtually continue[] the operation of General Order No. 25 of the Railroad Administration [an order issued by the Director General of Railroads during federal control], as supplemented, relating to the extension of credits by railroads.” Conf. Report at 63.

Therefore, we disagree with CSXT’s contention that § 10743 and the Uniform Bill of Lading must be read together or that the one evidences the intent of the other. We agree that the Uniform Bill of Lading in our regulations should not contain language that conflicts with § 10743, but we do not believe that there is any inconsistency between it and our interpretation

of § 10743. Even if there were, however, this agency's solution to such a problem would be to conform its regulations to the congressionally enacted statute, and not vice-versa.

C. Scope of the Final Rules

Two separate issues were raised regarding the scope of the proposed rules. First, several commenters addressed the issue of whether the proposed rules would apply to all demurrage situations, or whether they would provide an alternate basis for imposing demurrage liability in the narrow situation involving third-party intermediaries.¹⁹ Second, AAR, BNSF, UP, and Kinder Morgan addressed in their separate comments the issue of whether the proposed demurrage rules are limited to railroad-owned cars, or if they apply to privately owned cars as well.²⁰ We will address each issue in turn.

i. Are the demurrage rules generally applicable?

This rulemaking was commenced when the Board became aware of tension in the federal courts of appeals regarding the liability of third-party receivers for railroad demurrage. This tension caused the Board to consider both the narrow situation involving third-party receivers at issue in the federal courts of appeals and, more generally, its policies governing demurrage. ANPR at 2. Thus, in the ANPR, the Board sought comment on several questions, some of which pertained exclusively to intermediaries and others of which pertained to all receivers and demurrage generally. ANPR at 7.

In the NPR, we proposed rules governing demurrage that would allow rail carriers to impose demurrage liability on “[a]ny person receiving rail cars from a rail carrier” if the carrier had provided actual notice of the demurrage tariff to that person. Several commenters argued that the language of the proposed rule was too broad, and that we should clarify that it applies only to a narrow subset of receivers—namely, warehousemen.

¹⁹ AAR's Comments 11-12; BNSF's Comments 3; CP's Comments 11; CSXT's Comments 12; NSR's Comments 7-8; NSR's Reply Comments 15-17; UP's Comments 2; NITL's Reply Comments 4-5; IWLA's Reply Comments 2-3, 10.

²⁰ AAR's Reply Comments 7-8; BNSF's Comments 2; UP's Comments 3-5; UP's Reply Comments 5-6; Kinder Morgan's Comments 16.

We do not believe that such a clarification is appropriate. It is true that much of this proceeding has focused on the liability of warehousemen. This is only natural, given that this proceeding was commenced after various courts drew differing conclusions about the liability of warehousemen for demurrage. The rationales behind these new demurrage rules, however, are generally applicable to all receivers. First, we stated in the NPR that, “[b]ecause warehousemen and other third-party receivers are often not signatories to the bill of lading, we do not believe that the bill of lading should be the contract that establishes demurrage liability.” NPR at 12. This rationale is equally applicable to other receivers (i.e., consignees) of rail cars, as it is the shipper (i.e., consignor) who creates the bill of lading prior to providing it to the rail carrier. Thus, we continue to believe that the bill of lading should not be the contract that establishes demurrage liability, regardless of whether the receiver is a warehousemen or other consignee.²¹

Next, we stated in the NPR that “[o]ur proposed rule would . . . tie demurrage liability to the conduct of the parties directly involved with handling the rail cars and would advance the goals of § 10746 by permitting the carrier to impose charges on the party best able to get the cars back to the carrier.” NPR at 13. In other words, after concluding that demurrage should no longer be based on the bill of lading, we concluded that it should instead be governed by a conduct-based rule. Such a rule is as applicable to traditional consignors or consignees as it is to warehousemen.

Finally, the NPR noted that tariffs play a different role today than they did in the past, when they were filed at the agency and parties were deemed to have constructive knowledge of their terms. NPR at 13. As a result, we concluded that “a shipper or receiver of rail cars to whom the rail carrier has given *actual* notice of its own demurrage tariff will be deemed to have accepted the rail carrier’s demurrage terms whenever it accepts the cars.” *Id.* at 13 (emphasis in original). Again, the logic behind this rule is applicable to both warehousemen and other receivers. Because neither is deemed to have constructive notice of a tariff’s terms now that the tariff is no longer filed at the agency, we concluded that any person receiving rail cars must be provided with actual notice in order to be held liable for demurrage.

We therefore reject the requests to narrow the scope of these rules to third-party receivers. We also reject the requests to clarify that the demurrage rules we are adopting here

²¹ Additionally, demurrage charges can accrue at loading, prior to the creation of the bill of lading. This is yet another reason why the bill of lading should not govern demurrage liability.

provide an alternative legal basis for collecting demurrage in addition to the bill of lading.²² As stated above, we are adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading. As such, part 1333 governs demurrage generally and 49 C.F.R. § 1333.3 will continue to refer to “[a]ny person receiving rail cars.”

ii. Are the demurrage rules applicable to railroad-owned and privately owned cars?

Several commenters point out that, although the NPR initially described demurrage as being “a charge for detaining railroad-owned rail freight cars,” the proposed rules themselves speak only of “rail cars.” NPR at 2, 20. We have been asked to clarify whether the rules are limited to railroad-owned cars or if they apply to privately owned cars as well.²³

The final rules will continue to refer to “rail cars,” and we clarify here that this term encompasses both railroad-owned cars and privately owned cars when such privately owned cars are held on railroad property. This is consistent with Board precedent, which has previously stated that demurrage charges may be applied to privately owned cars when held on railroad property because such charges “compensate the railroad for use of its assets (i.e., the space on its track or at its yards), and they encourage more efficient use of freight cars on its system.” N. Am. Freight Car Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 9 (STB served Jan. 26, 2007), aff’d, 529 F.3d 1166 (D.C. Cir. 2008); see also R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42102, slip op at 4 (STB served July 20, 2010).

To clarify that the goals of demurrage apply equally to railroad-owned cars and privately owned cars when held on railroad property, UP suggests that the Board modify the end of the proposed rule at 49 C.F.R. § 1333.1 to read as follows: “to encourage the efficient use of rail cars and the rail network.”²⁴ We do not believe that such a change is necessary. Under the rule as written, when privately owned cars are held beyond the free time on railroad property, demurrage will apply both to “compensate[] rail carriers for the expenses incurred [for the use of

²² See AAR’s Comments 11-12; BNSF’s Comments 3; CSXT’s Comments 12; NSR’s Comments 4-5; NSR’s Reply Comments 15-17; UP’s Comments 2.

²³ BNSF’s Comments 2; UP’s Comments 3-5; UP’s Reply Comments 5-6; Kinder Morgan’s Comments 16.

²⁴ UP’s Comments 4-5 (emphasis in original to show change).

railroad assets]” and “to encourage the efficient use of rail cars” on the railroad system. See § 1333.1. Thus, we do not believe any change to the language of § 1333.1 is warranted.

D. Agency Exception

In the NPR, we proposed an agency exception modeled after the one found in 49 U.S.C. § 10743. NPR at 16. Specifically, our proposed rule provided that “if [a person receiving rail cars] is acting as an agent for another party, that person is not liable for demurrage if that person has provided the rail carrier with actual notice of the agency status and the identity of the principal.” Numerous commenters object to this agency exception and argue that such a provision would create uncertainty and prevent the efficient collection of demurrage.²⁵

After further review, we are persuaded that the proposed agency exception in our rules should be eliminated. The commenters persuasively argue that the agency exception would undermine the Board’s attempts to simplify and clarify demurrage. Commenters maintain that, under the rule as proposed, the principal would not be a party to the communication, that there was no demonstration that the principal would actually assume demurrage liability, and, most important, that a third-party receiver need only allege, rather than prove the existence of, a principal-agent relationship to avoid demurrage liability. For example, ILTA points out in its comments that “[t]erminals would uniformly exercise their right to waive demurrage liability by providing the notice,” and rail carriers would be left with the same burden of demurrage collection that they currently face.²⁶

Commenters also note that the proposed exception failed to specify what would constitute actual notice of agency status, what would constitute acceptable proof of such notice, and what constitutes an agent for purposes of demurrage liability. The commenters argue, and we agree, that all of these issues could lead to extensive litigation over the agency exception, which would be both time-consuming and fact-intensive, thus contravening the Board’s attempt to promote uniformity in the area and to resolve demurrage disputes efficiently.

²⁵ AAR’s Comments 8-11; AAR’s Reply Comments 6; ASLRRRA’s Comments 4-5; BNSF’s Comments 1 (joining AAR’s comments); CP’s Comments 9-10; CSXT’s Comments 13; KCS’s Reply Comments 3-4; MCR’s Comments 3-6; NSR’s Comments 14-17; NSR’s Reply Comments 12; UP’s Comments 7; ILTA’s Comments 2-3; NITL’s Comments 4-6; NITL’s Reply Comments 7-9.

²⁶ ILTA’s Comments 3.

Finally, and perhaps most important, a warehouseman who is an agent under state law remains free to avail itself of the remedies available under the traditional principles of state agency law. Therefore, it is not necessary for the Board to adopt an agency exception when remedies exist at the state level. Moreover, this is an area best addressed by the parties themselves by contract. We believe that eliminating the proposed agency exception would have the beneficial result of encouraging warehousemen (agents) and shippers (principals) to address demurrage liability in their commercial arrangements. As such, the final rules adopted here do not include the proposed agency exception.

E. Actual Notice of Demurrage Tariff

The NPR proposed that any person receiving rail cars who detains the cars beyond the free time may be held liable for demurrage “if the carrier has provided that person with actual notice of the demurrage tariff.” Several commenters ask the Board to eliminate this provision,²⁷ or, in the alternative, to modify or clarify the actual notice requirement.²⁸

Although certain commenters argue that the actual notice requirement is unnecessary, we continue to believe that rail carriers should provide actual notice of their demurrage tariffs in order to hold a receiver liable for demurrage charges. As explained in the NPR, tariffs were historically filed with the agency and parties were deemed to have constructive knowledge of their contents. However, tariffs are no longer filed with the Board, and in light of the different role tariffs play today, we do not believe it is appropriate to bind parties to a tariff’s terms simply because they could learn about them if they were to make an effort to do so.

For this reason, we reject UP’s recommendation that we replace the term “actual notice” with the term “notice” to coincide with 49 C.F.R. § 1300.4.²⁹ Although it is true that we have attempted to correlate our actual notice provision here with those in § 1300.4 in some respects, see infra at 2, those “tariff” rules were adopted to apply to the parties directly involved in the

²⁷ AAR’s Comments 5-6; AAR’s Reply Comments 7; BNSF’s Comments 1 (joining AAR’s comments); CP’s Comments 7-8; NSR’s Comments 8-12.

²⁸ AAR’s Comments 6-8; ASLRRRA’s Comments 3-4; BNSF’s Comments 1 (joining AAR’s comments); CP’s Comments 8-9; CSXT’s Comments 12-13; NSR’s Comments 10, 13; UP’s Comments 6-7; IWLA’s Reply Comments 4, 7-8; NITL’s Reply Comments 10-14.

²⁹ UP’s Comments 5.

transportation, whereas here, these procedures apply to warehousemen and others who may or may not be parties to the original shipping contract. To be sure that these parties know what their liability will be, we clarify that, for demurrage purposes, constructive notice of the demurrage tariff is inadequate. Black’s Law Dictionary defines “actual notice” as “notice given directly to, or received personally by, a party.” By contrast, Black’s Law Dictionary defines “notice” more generally, stating that a person has notice of a fact or condition if that person has actual knowledge of it, has received information about it, has reason to know about it, or is considered as having been able to ascertain it by checking an official filing or recording. In other words, the term “notice” does not make clear that rail carriers must provide notice of their demurrage tariffs directly to receivers. For this reason, we will continue to use the term “actual notice,” as it more accurately conveys the requirements of the rule.

We also reject the contention that we should eliminate the actual notice provision because it would create uncertainty or cause disputes between carriers and receivers.³⁰ Disputes between carriers and receivers exist under current demurrage practices, as is evidenced by the Groves and Novolog cases, and this rule is intended to reduce disputes over demurrage practices by producing clear guidelines to the parties. In order to reduce uncertainty and assist in the resolution of these disputes, we will require the notice to be in written or electronic form.

The following subsections address comments seeking clarification or modification to the actual notice requirement.

i. Form of the actual notice

Several comments address what form the actual notice of demurrage tariff should take. AAR, CP, and NSR suggest that actual notice be satisfied by the Board’s issuance of these final rules in the Federal Register.³¹ As the above discussion should make clear, however, we find such constructive notice to be inadequate. Although publication of this decision and the final rules should put parties on notice as to the general legal framework for demurrage, it will not put them on notice as to the specific terms of a rail carrier’s tariff. Thus, to satisfy the actual notice requirement, the rail carriers must provide the demurrage tariff directly to receivers.

³⁰ AAR’s Comments 5-6; CP’s Comments 7-8; NSR’s Comments 12.

³¹ AAR’s Comments 8; CP’s Comments 7-8; NSR’s Comments 10-11.

AAR, CSXT, NSR, and UP ask that we clarify that a written or electronic notice with a link to the tariff online would satisfy the actual notice requirement.³² In response, IWLA and NITL agree that electronic or written notice with a link to the full tariff could qualify as actual notice, though each suggests that, in order to qualify as actual notice, the communication would need to produce a summary of the material provisions of the tariff.³³ IWLA provides specific suggestions as to which provisions should be considered material. We agree that it is not necessary to send the full terms of the tariff in order to satisfy the requirement, and that a link to the tariff in full could suffice. We decline, however, to decide at this time whether particular forms of notice are adequate or inadequate. Rather, the Board will, as appropriate, address any future arguments with respect to the adequacy of actual notice in the context of a specific factual dispute.

CP and UP also ask the Board to clarify that, in order to satisfy the actual notice requirement, rail carriers may provide a one-time “blanket notice” to each customer, rather than having to provide actual notice with each delivery to the same customer.³⁴ Assuming the adequacy of such blanket notices, several commenters then addressed the related issue of what responsibility, if any, rail carriers have to provide actual notice of changes to the demurrage tariff after the blanket notice has been issued.³⁵ We agree that it is not necessary to provide actual notice with each and every shipment, and that a one-time “blanket notice” would satisfy the requirement. We are not persuaded, however, by CSXT’s argument that no further obligation should be imposed on the carrier after providing a blanket notice because, so long as the electronic link to the tariff remains valid, the receiver has the ability to learn of any changes.³⁶ As we stated earlier, we reject this type of constructive notice in the demurrage context. If, after providing a blanket notice, a carrier makes material changes to the demurrage tariff, the carrier must provide actual notice of those changes to the receiver in order to hold the receiver liable for demurrage charges under the changed tariff.

³² AAR’s Comments 7; CSXT’s Comments 12-13; NSR’s Comments 13; UP’s Comments 6.

³³ IWLA’s Reply Comments 4; NITL’s Reply Comments 12-13.

³⁴ CP’s Comments 8; UP’s Comments 6.

³⁵ AAR’s Comments 8; CSXT’s Comments 5 n.4; UP’s Comments 6; IWLA’s Reply Comments 4; NITL’s Comments 6; NITL’s Reply Comments 13.

³⁶ CSXT’s Comments 5 n.4.

ii. Method of providing actual notice

In the NPR, we suggested that the actual notice should be provided electronically or in writing. Specifically, we stated:

We see no reason why we should depart from our directive when we addressed the form of carrier communications responding to shipper requests for rates. As we said there, carriers are to use “electronic responses and notices when both parties have the requisite capabilities. Otherwise, the response should be written.” We believe that carriers will have no trouble ensuring that actual notice is part of their regular business practices and customer communications.

NPR at 13-14 (citing Rate Disclosure, 1 S.T.B. at 159). Although there was little direct discussion of this requirement in the comments, several commenters appear satisfied that the actual notice should be provided in either electronic or written form.³⁷

NSR and ASLRRRA, however, suggest alternatives to written or electronic notice. NSR asks the Board to create a safe harbor whereby a rail carrier is deemed to have provided actual notice so long as, prior to delivery, it provided notification that demurrage tariffs are available on its website via whatever form of notice the railroad customarily sends to receivers to inform them that the railcars are available for delivery.³⁸ Because NSR offers this proposal, which would appear to encompass other forms of communication, such as by telephone, without any substantive discussion as to why it is preferable to written or electronic communication, the request will be denied.

ASLRRRA’s comments state that providing a one-time notice, with either the full tariff or a link to that tariff, may be burdensome to some small carriers, at least in part because some of the small carriers say that they do not know the identity of the receivers of the rail cars they handle. ASLRRRA asks the Board to carve out an exception for Class III rail carriers, and offers several suggestions, including a total exemption from the actual notice provision, an exemption if the demurrage tariff is published on the Class III carrier’s website, and a rebuttable presumption that the receiver was given actual notice or could have obtained such notice by

³⁷ CSXT’s Comments 12-13; UP’s Comments 6; NITL’s Reply Comments 12-13.

³⁸ NSR’s Comments 13.

accessing the tariff on the Class III carrier's website.³⁹ But our rules are not absolute, by which we mean that they do not require the carrier to do anything; they simply say, as did the court in Groves, that a carrier may not collect demurrage from a party unless that party has first been given real notice of its potential liability. As a practical matter, a rail carrier that does not know the identity of its receivers cannot collect demurrage from those receivers today, so under the new regime such carriers will be in no different position than they are now. Finally, and most importantly, we are adopting these final rules in an effort to simplify the demurrage process and to provide uniformity in the area. These goals would not be met by creating different procedures for different classes of carriers.

Thus, our regulation at 49 C.F.R. §§ 1333.3 will require actual notice of the demurrage tariff to be electronic or in writing. Consistent with the NPR, in which we saw no reason to depart from the directives governing the form of carrier communications responding to shipper requests for rates, we will add language mirroring that found in 49 C.F.R. §§ 1300.3-4. Specifically, we are adding a sentence at the end of § 1333.3, which is set out in full in Appendix A, stating that “[t]he notice required by this section may be in written or electronic form.”

iii. Other notice issues

CP and NITL ask us to clarify that proof of delivery of the written notice is sufficient to establish proof of actual notice.⁴⁰ In other words, a carrier need not prove that a receiver read the tariff so long as the carrier can prove that it delivered the tariff to the receiver. As we stated above, Black's Law Dictionary defines actual notice as “notice given directly to, or received personally by, a party.” Consistent with this definition, we clarify here that proof of notice given directly to a party is sufficient to constitute “actual notice” under the rule.

NSR and UP raise concerns about receivers who have renamed or restructured their company.⁴¹ UP states that carriers may not be informed when a receiver changes its corporate name or has restructured, and that such a receiver should not be able to avoid demurrage liability on that basis simply because the carrier does not provide an additional notice to the renamed or restructured company. NSR proposes that we create a safe harbor for carriers. Specifically, it

³⁹ ASLRRRA's Comments 3-4; ASLRRRA's Supplemental Comments 8.

⁴⁰ CP's Comments 8-9; NITL's Reply Comments 14.

⁴¹ NSR's Comments 12-13; UP's Comments 7.

asks that a carrier be deemed to have provided actual notice so long as, prior to delivery, it mailed a copy of its current demurrage tariff to the street address of the rail-served facility. This proposal is meant to prevent a receiver from disclaiming liability if the actual notice is not addressed to the correct legal name of the receiver.⁴²

Those concerns could arise in certain circumstances. It would seem inappropriate to allow the delivery of written notice to one entity at a particular street address to convey actual notice to all future entities at that address. But whether the renaming or restructuring of a corporate entity is sufficient to trigger the actual notice requirement appears to be highly contextual. We therefore decline to provide a bright line rule as to this issue, but rather find that such questions should be addressed in the context of a specific factual dispute.

F. Other Issues

Commenters raise several other issues in response to the NPR, which we address below.

i. Constructive Placement

In the ANPR, the Board sought comment on a variety of matters to assist it in developing an appropriate way to allocate demurrage liability. Of the many issues on which the Board specifically sought comment, one pertained to how warehousemen or similar non-owner receivers could best be made aware that they were liable for demurrage charges. As part of that inquiry, it asked whether actual or constructive placement of rail cars constituted adequate notice to the receiver. ANPR at 7. After reviewing comments in response to the ANPR, we issued the NPR detailing a specific proposal under which receivers would not incur demurrage liability unless they had been provided written or electronic notice of the demurrage tariff, thus moving away from the concept that placement in itself might constitute adequate notice. Nevertheless, the placement of rail cars does play one role under our rules. We stated in the NPR that liability

⁴² NSR points out that this very situation was at issue in its litigation resulting in the Groves decision. NSR's Comments 12 n.5. Various bills of lading in that case identified the consignee as "Savannah Re-Load LLC" or "Savannah Reload," whereas the defendant's actual trade name was "Savannah Re-Load." Defendant argued before the district court that the incorrect appellations did not sufficiently identify it. Norfolk S. Ry. v. Brampton Enters., LLC, No. 4:07-CV-155, Brief in Support of Defendant's Motion for Partial Summary Judgment at 4, 6 (S.D. Ga., filed May 30, 2008).

does not begin unless a car is placed at the receiver's facility or proper notice of constructive placement is provided to the entity upon which liability is to be imposed. NPR at 10.

IWLA, in its comments on both the ANPR and the NPR, suggests that constructive placement is a difficult issue for warehousemen. In its comments on the ANPR, it stated that railroad claims of constructive placement are difficult to confirm or deny based on the railroad's systems and documentations.⁴³ In its comments on the NPR, IWLA states that when warehousemen provide rail carriers with notice of reasonable operational constraints, which the carrier then disregards, it is unfair for a railroad to be able to claim constructive placement.⁴⁴

As we stated in the NPR, however, these types of issues are outside the scope of this proceeding. NPR at 6 n.16. The Board sought comment in the ANPR on the viability of placement as a mechanism for notice of demurrage liability, not on the practice of constructive placement generally. Although our rules state that demurrage liability does not begin until actual placement or proper notice of constructive placement, we decline to elaborate on what would constitute "proper notice of constructive placement," as placement issues were not the focus of this proceeding. Receivers are free to avail themselves of the Board's alternative dispute resolution options or to pursue a complaint with the Board if they believe that the collection of demurrage charges against them is an unreasonable practice as a result of particular placement issues. See, e.g., Capitol Materials, Inc.—Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry., 7 S.T.B. 576, 584 (2004) (unreasonable practice claim relating to, among other things, placement); R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42102 (STB served July 20, 2010).

ii. Bunching and Other Actions by Railroads That Allegedly Cause Demurrage

CTI and NITL argue that actions by rail carriers, such as "bunching" (rail car deliveries that are not reasonably timed or spaced), often cause delays resulting in demurrage.⁴⁵ To address these issues, CTI suggests a rule whereby the demurrage clock is started when a rail car is delivered to the warehouse (as opposed to the local rail yard), the warehouse is allowed two full work days of free time, and the demurrage clock stops if the warehouse does not offer service on weekends or holidays. NITL suggests that we amend our demurrage rule by adding the clause

⁴³ IWLA's 2011 Comments 6.

⁴⁴ IWLA's Comments 2, 8-11; IWLA's Reply Comments 11-12.

⁴⁵ CTI's Comments 1-3; NITL's Reply Comments 6-7.

“Except to the extent that detention of rail cars beyond the applicable free time period is caused by a rail carrier,” to the beginning of § 1333.3.

As with constructive placement, we do not believe that an adjustment to our rules is necessary, as these issues are best addressed in the context of individual disputes. If a receiver believes that it has been unfairly charged demurrage because of a rail carrier’s conduct, and it is unable to resolve the dispute informally with the carrier, it is free to avail itself of the Board’s alternative dispute resolution options or to pursue a complaint with the Board. See, e.g., Capitol Materials Inc., 7 S.T.B. at 581 (unreasonable practice claim relating to, among other things, bunching).

iii. Avoidance of Disputes: Alternative Dispute Resolution and Private Contracts

IWLA and NITL ask the Board to include a statement of agency support for mediation, arbitration, and the Rail Customer and Public Assistance Program for the resolution of demurrage disputes.⁴⁶ We agree that demurrage is an area well-suited to alternative dispute resolution, which includes the informal mediation process conducted by the Board’s Rail Customer and Public Assistance Program (RCPAP), formal mediation that attempts to negotiate an agreement resolving some or all of the issues in a dispute, and binding arbitration. In Assessment of Mediation and Arbitration Procedures, Docket No. EP 699 (STB served May 13, 2013), we adopted new rules governing mediation and arbitration. Disputes related to demurrage charges are one of four specifically enumerated areas that the Board deemed eligible for voluntary binding arbitration. Although mediation is not so limited in its scope, we believe that demurrage disputes are equally well-suited to mediation, both formally pursuant to our regulations at 49 C.F.R. pt. 1109 and informally through RCPAP. The Board’s mediation and arbitration procedures may be found at 49 C.F.R. §§ 1109.1-4 and §§ 1108.1-13, respectively.

Several parties also discussed the role of private contracts in avoiding demurrage disputes. For example, IWLA claims that rail carriers are not incentivized to address demurrage through contract, while NSR claims that intermediaries have little incentive to enter into contracts with rail carriers.⁴⁷ By contrast, IFTOA, ILTA, and Kinder Morgan state that demurrage is easily handled through private contracts in the current market, thus obviating the

⁴⁶ IWLA’s Comments 3; NITL’s Reply Comments 14.

⁴⁷ NSR’s Reply Comments 8-9.

need for demurrage rules entirely.⁴⁸ Our rules specifically allow (but do not require) parties to enter into contracts pertaining to demurrage. The rules crafted here, though, are default rules only, meant to govern demurrage in the absence of a privately negotiated contract.

Conclusion

Consistent with this decision, we adopt final rules establishing that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the “free time” provided in the carrier’s governing tariff will generally be responsible for paying demurrage, if that person has actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. These rules are set out in full in Appendix A, and will be codified in the Code of Federal Regulations. We also clarify that, for the reasons described herein and in the NPR, the provisions of 49 U.S.C. § 10743, titled “Liability for payment of rates,” apply to carriers’ line-haul rates but not to carriers’ charges for demurrage.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 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).⁴⁹ 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 NPR, the Board certified that the proposed rules would not have a significant impact on a substantial number of small entities. Nevertheless, by decision served on May 28,

⁴⁸ IFTOA’s Comments 2-3; ILTA’s Comments 1-4; Kinder Morgan’s Comments 12.

⁴⁹ The Small Business Administration’s (SBA) Office of Size Standards develops the numerical definition of a small business. See 13 C.F.R. § 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a short line railroad is considered small if its number of employees is 500 or less. Id. (subsector 482).

2013, the Board issued an initial regulatory flexibility analysis (IRFA) and request for comments in order to explore further the impact, if any, of the proposed rules on small rail carriers. Demurrage Liability, EP 707 (STB served May 28, 2013). The Board received comments from ASLRRRA, which conducted a survey of small rail carriers, and the Small Railroad Business Owners Association of America. Having reviewed the comments, we now publish this final regulatory flexibility analysis.⁵⁰

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 different circuits of the United States 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. This decision and the NPR both contain 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 adopting the final rules.

Succinct statement of the objectives of, and legal basis for, the final 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 final rule will apply.

In general, the rule will 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 Rule § 1333.3. The rule will apply to approximately 562 small rail carriers.

⁵⁰ Pursuant to the Small Business and Work Opportunity Act of 2007, 15 U.S.C. § 631 note, we are also publishing a Small Entity Compliance Guide on the Board's website at www.stb.dot.gov.

Description of the projected reporting, recordkeeping, and other compliance requirements of the final 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 final rules 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, either electronically or in writing, in order to hold that person liable for demurrage charges. See Rule § 1333.3. The Board is seeking, pursuant to the Paperwork Reduction Act, approval from the Office of Management and Budget for this requirement. To provide this initial notice, rail carriers wishing to collect demurrage from their receivers may need to update their demurrage practices to conform to the final rules to the extent that their existing practices conflict with the rules.

In our decision requesting comments on the impact of the rules on small rail carriers, we estimated that small rail carriers had an average of 10 terminating stations and that the burden imposed would therefore be to provide 10 one-time notices. ASLRRRA conducted a survey of small railroads regarding the impact of the rules in response to our request for comments. ASLRRRA states that 55% of the respondents to its study have 25 or fewer customers. ASLRRRA also stated that although some Class III rail carriers have the capability to provide written or electronic notice to their customers now, a subset of Class III rail carriers with either revenues of \$2.5 million or less or a limited number of shippers would need to hire or equip personnel to undertake the task of providing notice of their demurrage tariff to their customers.

ASLRRRA's study also indicates that some small rail carriers identify as "handling carriers" and do not know who the receiver of the rail cars is. Of the carriers surveyed, 38% responded that they either never know the name of the receiver or agent or only sometimes do. To provide actual notice under the rules, and thereby make themselves eligible to collect demurrage from their receivers, these carriers would be required to know the identity of the entity to which they are delivering rail cars. Current practice allows handling carriers to receive rail cars from Class I railroads and deliver them to receivers without knowing the receivers' identity. This practice is not an impediment to providing actual notice, but instead may be a byproduct of the current demurrage system, as it is not necessary for the handling carriers to know the identity of the receiver, unless it intends to collect demurrage. Even under the current system, a rail carrier that does not know the identity of its receivers cannot collect demurrage, so under the new regime such carriers will be in no different position than they are now. Nevertheless, to provide actual notice under the final rules, such knowledge would be necessary, and handling rail carriers, if they do not know the identity of the recipient of the cars, may contact the Class I carrier to receive that information.

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

The Board is unaware of any duplicative, overlapping, or conflicting federal rules.

Description of any significant alternatives to the final 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 final rule, rail carriers are free to choose between providing notice electronically or in writing. In response to the NPR, many commenters suggested that notice could be fulfilled by providing a link to the notice, rather than the complete text of the notice of demurrage tariff. Additionally, some commenters also argued that a one-time notice should fulfill the notice requirement, as opposed to providing notice with every shipment. As we explain earlier in this decision, we agree with both of these suggestions, which will minimize the burden on rail carriers.

We considered establishing a different notice requirement for small rail carriers, or exempting small rail carriers from the notice requirement altogether, but rejected these alternatives because they would conflict with the primary goal of this rulemaking, which is to simplify the demurrage process in light of current practices and to promote uniformity in the area. To minimize the burden on small rail carriers, we did adopt several suggestions, described above. However, the goals of this rulemaking would not be met by creating an exemption for certain classes of carriers. Although ASLRRRA's comments state that providing a one-time notice, with either the full tariff or a link to that tariff, may be burdensome to some small carriers, we believe that incorporating this relatively modest requirement into the carriers' regular business practices and customer communications will provide certainty in the event of a demurrage dispute. Thus, the procedures adopted here will provide notice in the event that a carrier wants to collect demurrage, which even today it can do only if it knows the identity of the party from whom it seeks to collect.

Paperwork Reduction Act. Under the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.3(c), a disclosure requirement, such as the notification requirements in the final rule, falls within the definition of a “collection of information,” which must be approved by OMB. In the NPR, the Board sought comments pursuant to the PRA and OMB regulations at 5 C.F.R. § 1320.8(d)(1) and (3) regarding: (1) whether the proposed 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 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. Any comments relating to these issues are addressed in the decision above.

The proposed collection was submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11. OMB withheld approval pending submission of the final rule. As also required under 5 C.F.R. § 1320.11, we are today submitting the collection contained in this final rule to OMB for approval. Once approval is received, we will publish a notice in the Federal Register stating the control number and the expiration date for this collection. Under the PRA and 5 C.F.R. § 1320.11, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

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

List of Subjects

49 C.F.R. part 1333

Railroads

Demurrage

It is ordered:

1. The rules set forth in Appendix A are adopted as final rules.

2. Notice of this decision will be published in the Federal Register. The final rules will be effective on July 15, 2014.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Chairman Elliott and Vice Chairman Begeman.

APPENDIX A

For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, subchapter D, of the Code of Federal Regulations as set forth below:

PART 1333 – Demurrage Liability

Sec.

- 1333.1 Demurrage Defined
- 1333.2 Who May Charge Demurrage
- 1333.3 Who Is Subject to Demurrage

Authority: 49 U.S.C. 721.

§ 1333.1 Demurrage Defined

“Demurrage” is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.

§ 1333.2 Who May Charge Demurrage

Demurrage shall be assessed by the serving rail carrier, i.e., the rail carrier providing rail cars to a shipper at an origin point or delivering them to a receiver at an end-point or intermediate destination. A serving carrier and its customers (including those to which it delivers rail cars at origin or destination) may enter into contracts pertaining to demurrage, but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

§ 1333.3 Who Is Subject to Demurrage

Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. The notice required by this section shall be in written or electronic form.