

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

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Docket No. EP 707

DEMURRAGE LIABILITY

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

**Keith T. Borman
Vice President & General Counsel
American Short Line and Regional Railroad Association
Suite 7020
50 F Street, N.W.
Washington, D.C. 20001-1564
Telephone: (202) 628-4500
Facsimile: (202) 628-6430
E-Mail: kborman@aslrra.org**

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Initial Notice of Proposed Rulemaking

In a decision served May 7, 2012, the Surface Transportation Board (the "Board" or the "STB") issued a notice of proposed rulemaking ("NPR") regarding demurrage liability. In the NPR the Board announced a proposed rule providing that any 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 stated that rail carriers would be required to provide a one-time notice (electronic or written) to their customers and the Board noted that these types of notices are generally already electronically provided.¹ The Board

¹ In a subsequent decision the Board cited the Small Business Administration's Office of Size Standards, which 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, to determine that the burden imposed by the NPR would not be significant as a small carrier would only have to provide approximately 10 notices of its demurrage tariff, either electronically or in writing. *Demurrage Liability, EP 707, slip op. at 2,*

further said that a review of the 2011 Waybill Sample reveals that small rail carriers, as defined by the Small Business Administration "have an average of 10 terminating stations, which generally equates to 10 customers." *Demurrage Liability, EP 707, slip op. at 2 (STB served May 28, 2012).*

ASLRRA's Initial Comments

In response to the NPR, the American Short Line & Regional Railroad Association ("ASLRRA") filed Comments on August 24, 2012. The ASLRRA stated that while it was difficult to make definitive comments about the proposed demurrage rule because of the diversity and number of Class III railroads, it generally supported the concept contained in the NPR that the party who actually receives the railcars is responsible for the payment of any demurrage charges arising from the carrier's demurrage tariff. As noted by the STB in the NPR, this new rule would resolve the split between two circuit courts of appeal regarding which party is responsible for such demurrage charges. Further, ASLRRA said the proposed rule is clear and simple.

The concern with the NPR stated by ASLRRA is, however, that while it generally supports the proposed rule, the conditions and limitations the STB included in the NPR are problematic for small railroads. Those conditions and limitations include:

1. The requirement that a receiver of the freight receive *actual* notice of the railroad's demurrage tariff before liability for demurrage charges can be imposed on the receiver;
2. The assumption that small railroads have the ability to automatically provide the demurrage tariffs by electronic means to shippers or receivers;
3. Alternatively, the assumption that if an electronic method is not available, the carrier can provide the notice in writing;
4. The assumption that the small railroad always knows who the receiver is;
5. The condition of actual notice placing the burden on the railroad to prove it did provide actual electronic or written when the receiver claims it did not receive actual notice; and

and fn. 3 (STB served May 28, 2012). It also cited the use of the 2011 Waybill Sample to determine that small entities would not suffer an undue burden as a result of this NPR.

6. The condition that a receiver acting as an agent for another party (such as a warehouseman) shall not be liable for demurrage if that entity has provided the railroad with actual notice of the agency status and identity of the principal.

In the initial ASLRRA Comments, the Association argued that the condition requiring that a railroad provide actual notice electronically assumed that all Class III carriers have the capability to electronically send demurrage tariffs, which is not the case. It further argued that some small railroads that operate as handling carriers do not know who the receiver is to even provide a written or electronic notice. ASLRRA also asserted that even when the small carrier knows the identity of the shipper, the carrier often communicates with the shipper by telephone or in person. Thus, the alternative method of notifying the receiver of the demurrage tariff in writing does not work for those carriers who use the telephone or personal visits to do the notification. Requiring a small railroad to provide actual notice electronically or in writing places an undue burden it would not otherwise have.

ASLRRA also stated that requiring actual written notice when an electronic method is not available takes away the advantage of the new proposed rule, which arguably is to provide certainty regarding who is responsible for demurrage charges. With the requirement in effect that the carrier has the burden of showing it provided the receiver written notice of its demurrage tariff, what could happen is that the receiver claim that it never received the notice, placing the burden on the carrier to prove that it did send the notice. This could inevitably lead to delay in paying, not paying at all, and added costs to try to collect legitimate demurrage charges.

Regarding the "warehouseman issue" where the person acting as an agent will not be liable for demurrage charges if that person has provided the carrier with actual notice of the agency relationship and the identity of the principal, ASLRRA stated this condition keeps the Class III carriers in the same position that caused them problems for decades – chasing after various parties in an often futile attempt to collect demurrage charges. This would happen because the party refuses to pay small railroads often cannot afford to go through the costly steps attempting to collect demurrage charges.

The ASLRRA suggested that the STB either drop the actual notice requirement for Class III carriers delivering to receivers as long as the carrier in fact has the demurrage rule published in its tariff or adopt a rebuttable presumption that the receiver was given actual notice or could have obtained notice by accessing the applicable demurrage tariff on the Class III carrier's

publically available website. ASLRRA also suggested that the STB only absolve a receiver or agent for the shipper from responsibility for demurrage charges when the principal for whom the agent acts steps forward and accepts responsibility for itself for payment.

STB May 28, 2013 Decision

On May 28, 2013, the STB issued a decision in which it published an initial regulatory flexibility analysis ("IRFA") to aid in commenting on the impact of the proposed rule on demurrage on small carriers. In this decision, the STB requested that the ASLRRA to provide comments in response to the IRFA regarding the impact on small carriers. It specifically seeks 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; information on small carriers that deliver rail cars but are unaware of the receiver's identity; comment on the number of customers served by small carriers; and any other information is relevant to the burden, if any, the proposed rules would have on small rail carriers.

The STB also listed a series of items concerning which it is interested in having the ASLRRA comment. Those items included the following:

1. A description and estimate of the number of small entities to which the rule will apply.
2. The actual time, cost or expenditures of providing a one-time notice of the demurrage tariff and updating the demurrage tariff to conform to the proposed rule and the extent to which these costs may differ for small entities.
3. Whether there are any relevant duplicative, overlapping or conflicting federal rules with the proposed rule.
4. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact on small entities.

ASLRRA Comments in Response to the IRFA

Upon receiving the IRFA decision, the ASLRRA determined the most efficient and effective way to provide the STB with more specific information was to survey its smaller railroad members. It sent 360 surveys out and received responses from 135 Class III railroads. The results basically confirm the more general comments filed by the ASLRRA in the ASLRRA

Initial Comments – that the proposed rules do not work for many of the small carriers or would put an economic burden on them to conform to the rule.

Before describing the responses and conclusions reached about those responses, ASLRRRA must address the Board's use of the 2011 Waybill Sample. The Board has relied in part on the 2011 Waybill Sample to conclude that small rail carriers have an average of 10 terminating stations and that therefore the burden imposed would only be to provide 10 notices of their demurrage tariff. Seventy-eight point two percent (78.2%) of the responding carriers stated they did not provide the STB any data for inclusion in the waybill sample. That fact puts the reliance on the 2011 Waybill Sample as to the potential burden of this proposed rule in serious doubt. Thus, ASLRRRA believes its survey results are a much better indicator of the burden, which is greater than the Board has suggested.

Regarding electronic notification to receivers or agents, ninety of the 116 carriers responding to the question of how they notified these entities stated they did so by phone, in person, facsimile or a combination of the above. Many of the respondents reported that they could not electronically notify receivers or agents for one or more of the following reasons: the carrier did not have the equipment or the trained personnel; the receiver did not have the equipment or trained personnel; they are handling carriers and do not know who the receiver or agent is; the personnel at the warehouse changes frequently and without notice; or the shippers or carriers are too small. Thirty point eight percent (30.8%) of these respondents said they simply do not have the ability to provide electronic notice of their tariff at all.

To require these carriers to adopt a procedure requiring them to electronically or in writing notify a shipper or agent would mean in some cases hiring and training additional personnel, acquiring new equipment, ensuring the receiver or agent has the ability to receive the notice, and other added costs and burdens. Given the fact that many of the employees of these small carriers perform multiple tasks during the course of their workday makes it far easier for them to notify the receiver by telephone or in person than to take the time to do so electronically.

The responses to the survey show that 55.2% of the respondents have 25 or fewer customers. These carriers are truly small entities with limited resources. The demands on those resources are significant in terms of labor, fuel, and maintenance costs for them to continue to provide service to those customers. To divert those precious resources to meet the proposed rule

– a rule that would not provide any additional revenue to the carrier but just costs – seems both counterproductive and burdensome.

Thirty-seven point eight percent (37.8%) of the respondents said they either never know the name of the receiver or the agent or only sometimes do. Thus, the portion of the proposed rule that requires electronic or written notification would not work in these cases nor would portion relieving an agent of liability if it notified the carrier of the identity of the principal since the carrier would have no idea why it received the notice from the agent.

The STB also sought information concerning four specific questions. First, it sought a description and estimate of the number of small entities to which the rule will apply. The rule would apply to all 464 railroad members of ASLRRA plus an unknown number of Class III railroads that are not members.

Second, it seeks information regarding the actual time, cost or expenditures of providing a one-time notice of the demurrage tariff and updating the demurrage tariff to conform to the proposed rule and the extent to which these costs may differ for small entities. Some of the larger Class III carriers do have the capability now to provide the notices required in the proposed rule. The smaller carriers, generally those with revenues of \$2.5 million or less or with a limited number of shippers would have to expend a considerable amount of money to hire, train, and equip personnel to undertake these tasks. Over 56% of the carriers responding to the question about what they would need to acquire in order to comply with the proposed rule said they would need to hire and train personnel and 40.6% said they would have to acquire equipment.

The STB also sought information as to whether there are any relevant duplicative, overlapping or conflicting federal rules with the proposed rule. The ASLRRA does not know of any such rules.

Finally, the STB sought a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact on small entities. As the ASLRRA said in its initial comments in this proceeding, it generally supported the concept contained in the NPR that the party who actually receives the railcars is responsible for the payment of any demurrage charges arising from the carrier's demurrage tariff. For small carriers and their customers, that would work. The small carriers could continue to do business as usual regarding notification without the additional cost

and burden of adding people and equipment to their operations. It would also make collecting legitimately owed demurrage charges much more straightforward and less costly. If in fact the agent receiving the freight is not by agreement with its principal liable for the charges, then it and the principal should resolve that question as it would be a contractual matter between them.

In short, the least burdensome and costly solution in the NPR for small entities is to exempt Class III railroads from (1) the requirement that Class III carriers provide actual electronic or written notice of its demurrage tariff to a receiver or agent and (2) the proposal that if the agent has provided the Class III carrier with actual notice of the agency status and identity of the principal, the agent is exempt from demurrage charges. As it relates to Class III carriers, the STB should only impose that portion of the proposed rule that makes the receiver liable for any demurrage charges.

Respectfully submitted,

American Short Line & Regional Railroad Association

A handwritten signature in cursive script that reads "Keith T. Borman".

By: Keith T. Borman