utility company that operates what is, in essence, a regular fixed route public transportation system for a city, and which receives funding under 49 U.S.C. 5307 or 49 U.S.C. 5309 via an agreement with a state or local government agency, would fall under the provisions of this section. The provider would have to comply with the vehicle acquisition, paratransit, and service requirements that would apply to the public entity through which it receives the FTA funds, if that public entity operated the system itself. The Department would not, however, construe this section to apply to situations in which the degree of FTA funding and state and local agency involvement is considerably less, or in which the system of transportation involved is not a *de facto* surrogate for a traditional public entity fixed route transit system serving a city (e.g., a private non-profit social service agency which receives funds under 49 U.S.C. 5310 to purchase a vehicle).

* * * * *

As already discussed under § 37.135, the states will receive FTA recipient plans for recipients of funding under 49 U.S.C. 5311 administered by the State or any small urbanized area recipient of funds under 49 U.S.C. 5307 administered by a state. Public entities who do not receive FTA funds will submit their plans directly to the applicable Regional Office (listed in appendix B to the rule).

PART 38—AMERICANS WITH DISABILITIES ACT (ADA) ACCESSIBILITY SPECIFICATIONS FOR TRANSPORTATION VEHICLES

■ 17. The authority for Part 38 continues to read as follows:

Authority: 42 U.S.C. 12101–12213; 49 U.S.C. 322.

■ 18. In the appendix to part 38, revise the first paragraph under the heading ''V. Public Information Systems'' to read as follows:

Appendix to Part 38—Guidance Material

* * * * *

Entities are encouraged to employ any available services, signage, or alternative systems or devices that are capable of providing the same or equivalent information to persons with hearing loss. Two possible types of devices are visual display systems and listening systems. However, it should be noted that while visual display systems accommodate persons who are deaf or are hearing impaired, assistive listening systems aid only those with a partial loss of hearing.

* * * * *

[FR Doc. 2014–08525 Filed 4–15–14; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1333

[Docket No. EP 707]

Demurrage Liability

AGENCY: Surface Transportation Board (Board or STB), DOT.

ACTION: Final rule.

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: This rule is effective on July 15, 2014.

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), Public Law 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.[1]

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.[2] The disputes between railroads and parties that originate or terminate rail cars can involve relatively straightforward application of the carrier's tariffs [3] 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.,*

[1] 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).

[2] *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 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).

[3] 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.

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.[4] 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.*).

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.[5]

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.[6]

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. 76496 (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 FR 27384 (May 10, 2012), and comments were submitted in response to the NPR.

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). The Board received comments from two entities.

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 certain clarifications made in response to the comments received. Additional information is contained in the Board's decision. The full decision is available on the Board's Web site at *www.stb.dot.gov.*

Are the Demurrage Rules Generally Applicable? 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.

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

[4] 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.

[5] 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).

[6] 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.

establishes demurrage liability, regardless of whether the receiver is a warehousemen or other consignee.[7]

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 provide an alternative legal basis for collecting demurrage in addition to the bill of lading. 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 CFR 1333.3 will continue to refer to ''[a]ny person receiving rail cars.''

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.

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, it was suggested that the Board modify the end of the proposed rule at 49 CFR 1333.1 to read as follows: ''To encourage the efficient use of rail cars *and* the rail network.'' 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 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.

Form of the Actual Notice: Several comments address what form the actual notice of demurrage tariff should take. Certain commenters suggest that actual notice be satisfied by the Board's issuance of these final rules in the **Federal Register**. We find such constructive notice to be inadequate, however. 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.

Certain commenters ask that we clarify that a written or electronic notice with a link to the tariff online would satisfy the actual notice requirement. Some commenters agree that electronic or written notice with a link to the full tariff could qualify as actual notice, though suggest that, in order to qualify as actual notice, the communication would need to provide a summary of the material provisions of the tariff. 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.

It was also requested that the Board 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. 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. 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 the 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. 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.

Method of Providing Actual Notice: In the NPR, we suggested that the actual notice should be provided electronically or in writing. 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.

One commenter states 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. It asks the Board to carve out an exception for Class III rail carriers, and offers several suggestions, including a total exemption from the

[7] 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.

actual notice provision, an exemption if the demurrage tariff is published on the Class III carrier's Web site, and a rebuttable presumption that the receiver was given actual notice or could have obtained such notice by accessing the tariff on the Class III carrier's Web site. 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 CFR 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 CFR 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.''

Other Notice Issues: We were asked to clarify that proof of delivery of the written notice is sufficient to establish proof of actual notice. 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. 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.

Some comments raise concerns about receivers who have renamed or restructured their company, arguing 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. One commenter proposes that we create a safe harbor for carriers, asking 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.

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.

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 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.

Certain comments on both the ANPR and the NPR suggest that constructive placement is a difficult issue for warehousemen. These comments argue 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.

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).

Avoidance of Disputes: We were asked to include a statement of agency support for mediation, arbitration, and the Rail Customer and Public Assistance Program for the resolution of demurrage disputes. 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 CFR 1109 and informally through RCPAP. The Board's mediation and arbitration procedures may be found at 49 CFR 1109.1–4 and 1108.1–13, respectively.

Several parties also discussed the role of private contracts in avoiding demurrage disputes. 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.

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. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b).[8] 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, 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 the American Short Line and Regional Railroad Association (ASLRRA), 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.[9]

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.

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. ASLRRA conducted a survey of small railroads regarding the impact of the rules in response to our request for comments. ASLRRA states that 55% of the respondents to its study have 25 or fewer customers. ASLRRA 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.

ASLRRA'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.

[8] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business. *See* 13 CFR 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).

[9] 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 Web site at *www.stb.dot.gov.*

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 ASLRRA'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 CFR 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 CFR 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. Comments relating to these issues are addressed above or in the Board's decision.

The proposed collection was submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. OMB withheld approval pending submission of the final rule. As also required under 5 CFR 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 CFR 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.

It is ordered:

■ 1. The final rules will be effective on July 15, 2014.

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

List of Subjects in 49 CFR Part 1333

Demurrage, Railroads.

Decided: April 9, 2014.

By the Board, Chairman Elliott and Vice Chairman Begeman.

Jeffrey Herzig,

Clearance Clerk.

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 by adding part 1333 to read as follows:

PART 1333—DEMURRAGE LIABILITY

Sec.

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.

[FR Doc. 2014–08454 Filed 4–15–14; 8:45 am]

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