

SUPPLEMENTARY INFORMATION: In document FCC 19–11, published at 84 FR 8457, March 8, 2019, the Commission adopted §§ 64.611(k) and 64.615(c), which advised that compliance with §§ 64.611(j)(2) and 64.615(a)(3) and (5), respectively, was not required until OMB approval was obtained. Sections 64.611(k) and 64.615(c) also each state that the Commission will publish a document in the **Federal Register** announcing the compliance date and revising the paragraphs. In a document, published at 85 FR 9392, February 19, 2020, the Commission announced OMB approval for §§ 64.611(j)(2) and 64.615(a)(3) and (5) and set the compliance date. The document also states it would remove §§ 64.611(k) and 64.615(c) of the Commission's rules. As the compliance date for §§ 64.611(j)(2) and 64.615(a)(3) and (5) is established, §§ 64.611(k) and 64.615(c) are no longer necessary. Accordingly, in this document the Commission removes §§ 64.611(k) and 64.615(c) from the Commission's rules.

List of Subjects in 47 CFR Part 64

Individuals with disabilities, Telecommunications, Telecommunications relay services Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 228, 251(a), 251(e), 254(k), 262, 403(b)(2)(B), (c), 616, 620, 1401–1473, unless otherwise noted; sec. 503, Pub. L. 115–141, 132 Stat. 348.

§ 64.611 [Amended]

■ 2. Amend § 64.611 by removing paragraph (k).

§ 64.615 [Amended]

■ 3. Amend § 64.615 by removing paragraph (c).

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1333

[Docket No. EP 759]

Demurrage Billing Requirements

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) adopts a final rule that requires Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier.

DATES: This rule is effective on June 20, 2020.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 759, and be submitted either via e-filing or in writing addressed to Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT:

Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On October 7, 2019, the Board issued a notice of proposed rulemaking to propose changes to its existing demurrage regulations to address several issues regarding carriers' demurrage billing practices. *Demurrage Billing Requirements (NPRM)*, EP 759 (STB served Oct. 7, 2019).¹ Demurrage is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply.²

Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are

¹ The proposed rule was published in the **Federal Register**, 84 FR 55109 (Oct. 15, 2019).

² In *Demurrage Liability*, EP 707, slip op. at 15–16 (STB served Apr. 11, 2014), the Board clarified that private car storage is included in the definition of demurrage for purposes of the demurrage regulations established in that decision. The Board uses the same definition of demurrage in this decision.

unduly detained beyond a specified period of time (*i.e.*, “free time”) for loading and unloading. *See Pa. R.R. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920) (“The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.”); 49 CFR 1333.1; *see also* 49 CFR pt. 1201, category 106.

In the simplest demurrage case, a railroad assesses demurrage on the consignor (the shipper of the goods) for delays in loading cars at origin and on the consignee (the receiver of the goods) for delays in unloading cars and returning them to the rail carrier at destination.³

Demurrage, however, can also involve third-party intermediaries, commonly known as warehousemen or terminal operators, that accept freight cars for loading and unloading but have no property interest in the freight being transported.⁴ Warehousemen do not typically own the property being shipped (although, by accepting the cars, they can be in a position to facilitate or impede car supply).

In response to the *NPRM*, the Board received a significant number of comments from stakeholders.⁵ This

³ As the Board noted in *Demurrage Liability*, EP 707, slip op. at 2 n.2, the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA), Public Law 104–88, 109 Stat. 803 (1995), does not define “consignor” or “consignee,” though both terms are commonly used in the demurrage context. Black's Law Dictionary defines “consignor” as “[o]ne who dispatches goods to another on consignment,” and “consignee” “as [o]ne to whom goods are consigned.” *Demurrage Liability*, EP 707, slip op. at 2 n.2 (citing Black's Law Dictionary 327 (8th ed. 2004)). The Federal Bills of Lading Act defines these terms in a similar manner. *Demurrage Liability*, EP 707, slip op. at 2 n.2 (citing 49 U.S.C. 80101(1) & (2)). For purposes of this decision, the term “shipper” will sometimes be used to refer to either consignors or consignees.

⁴ This decision uses the terms “warehousemen” and “third-party intermediaries” to refer to these entities.

⁵ The Board received comments and replies from the following: American Chemistry Council; American Forest & Paper Association (AF&PA); American Fuel & Petrochemical Manufacturers (AFPM); American Iron and Steel Institute; American Short Line and Regional Railroad Association (ASLRRRA); ArcelorMittal USA LLC (AM); Association of American Railroads (AAR); Barilla America, Inc. (Barilla); Canadian National Railway Company (CN); Canadian Pacific Railway Company (CP); Corn Refiners Association (CRA); CSX Transportation, Inc. (CSXT); Daniel R. Elliott; Diversified CPC International, Inc. (CPC); Dow, Inc. (Dow); The Fertilizer Institute (TFI); Freight Rail Customer Alliance (FRCA); Industrial Minerals Association—North America; The Institute of Scrap Recycling Industries, Inc. (ISRI); International Association of Refrigerated Warehouses (IARW); International Liquid Terminals Association (ILTA); International Paper; International Warehouse Logistics Association; The Kansas City Southern Railway Company (KCS); Kinder Morgan Terminals (Kinder Morgan); Lansdale Warehouse Company; National Association of Chemical Distributors; The Mosaic Company; National Coal Transportation

decision adopts the proposed rule with respect to requiring Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier, with the modifications discussed below.⁶

Background

This proceeding arises, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754. In that proceeding, parties from a broad range of industries raised concerns about demurrage billing practices, including issues with the receipt of invoices containing insufficient information. See *NPRM*, slip op. at 5–6 (providing overview of comments received in Docket No. EP 754 related to the adequacy of demurrage invoices). Warehousemen also raised concerns related to Class I carriers' billing practices as applied to them following the Board's adoption of the final rule in *Demurrage Liability*, EP 707 (STB served Apr. 11, 2014), codified at 49 CFR part 1333, which established that a person receiving rail cars for loading or unloading that detains the cars beyond the free time provided in the rail carrier's governing tariff may be held liable for demurrage if that person had actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. See *NPRM*, EP 759, slip op. at 6–8 (providing overview of comments received in Docket No. EP 754 relating to warehousemen).

After carefully considering the comments and testimony in Docket No. EP 754, the Board issued the *NPRM* in this docket.⁷ As relevant here, the Board

Association (NCTA); The National Industrial Transportation League (NITL); North American Freight Car Association; Norfolk Southern Railway Company (NSR); Peabody Energy Corporation (Peabody); The Portland Cement Association; Private Railcar Food and Beverage Association, Inc.; Quad, Inc.; Union Pacific Railroad Company (UP); Valley Distributing & Storage Company (Valley Distributing); Western Coal Traffic League and Seminole Electric Cooperative, Inc.; and Yvette Longonje.

⁶ In the *NPRM*, the Board also proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices. Concurrently with this decision, the Board is serving a supplemental notice of proposed rulemaking to invite comments on certain modifications and additions to the proposed requirements. See *Demurrage Billing Requirements*, EP 759 (STB served Apr. 30, 2020). The proposal pertaining to minimum information requirements, and the comments on that proposal, will be addressed in a separate decision.

⁷ The Board has also issued a final policy statement announcing principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. *Policy*

has proposed a rule relating to the identity of the party that should receive and be responsible for paying the demurrage bill when shipments are handled by warehousemen. As explained in the *NPRM*, before 2014, there was a split among the U.S. courts of appeals regarding who should bear liability for demurrage charges when a warehouseman that detains rail cars for too long is designated 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 designate it as consignee. The Board reviewed those court decisions, determined that it needed to reexamine its policies to assist in providing clarification, and instituted a proceeding in *Demurrage Liability*, Docket No. EP 707. As noted above, in a final rule issued in that docket, the Board established that a person, including a warehouseman, receiving rail cars for loading or unloading that detains the cars beyond the free time provided in the rail carrier's governing tariff may be held liable for demurrage if that person had actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. *Demurrage Liability*, EP 707, slip op. at 1, 17, 25. Under that final rule, the identification of a party in the bill of lading no longer controls; as the Board explained, it was “adopting a conduct-based approach to demurrage in lieu of one based on the bill of lading.” *Id.* at 15. The Board explained that its rule was “based on the theory that responsibility for demurrage should be placed on the party in the best position to expedite the loading or unloading of rail cars at origin or destination.” *Id.* at 8.

During the Docket No. EP 754 proceeding, warehousemen addressed the circumstances under which, in their view, a rail carrier should bill shippers directly for demurrage without requiring warehousemen to assume responsibility for any charges left unpaid by the shipper. Pointing out that, in some cases, shippers may be best positioned to mitigate delays in returning cars, warehousemen asked that the Board permit warehousemen and shippers to determine between themselves which party should receive and be responsible for the demurrage bill.⁸

In the *NPRM*, the Board found that warehousemen and shippers are in the best position to determine which party

Statement on Demurrage & Accessorial Rules & Charges, EP 757 (STB served Apr. 30, 2020).

⁸ See Kinder Morgan Terminals Comments 3–4, 19–20, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754.

should bear responsibility for demurrage charges and, therefore, that they should be able to make agreements for payment of demurrage charges that reflect this determination. *NPRM*, EP 759, slip op. at 11. Allowing shippers and warehousemen to reach direct-billing agreements that impose liability for demurrage charges on the party best positioned to mitigate the delays that cause demurrage would promote the efficient use of rail assets, thereby fulfilling the purpose of demurrage. *Id.* Accordingly, the Board proposed a requirement that Class I carriers send any demurrage bills related to transportation involving a warehouseman to the shipper (without requiring the warehouseman to guarantee payment), if the shipper and warehouseman agree to that arrangement and so notify the carrier. *Id.* As discussed below, most shippers and warehousemen commenters either support the Board's direct-billing proposal or are neutral towards it, while the six Class I railroads that filed comments (and AAR) uniformly oppose the proposal, and ASLRRRA supports the proposed exclusion of Class II and Class III carriers from the proposal. In addition, Class I carriers, warehousemen, and shippers ask the Board to clarify certain aspects of the proposal.

Final Rule

The Board now adopts a final rule requiring Class I carriers to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. As discussed below, the final rule reflects modifications made in response to parties' comments, following the Board's review of the issues raised. The final rule is below.

As noted above, most shippers and warehousemen who commented on direct billing are in favor of the proposal or neutral towards it.⁹ Kinder Morgan

⁹ See, e.g., Kinder Morgan Comments 1 (strongly supports the proposed rule); ILTA Comments 4 (stating that it supports the proposed rule even though it believes that returning to the regulatory environment in existence before *Demurrage Liability*, EP 707, would be a better solution); IARW Comments 1 (strongly supports the proposed rule); TFI Comments 4 (explaining that its primary interest is in ensuring that the Board continue to permit shippers and warehousemen to address demurrage in their contracts); NITL Comments 11 (stating that it has no concerns with the Board's direct-billing proposal); AM Comments 2 (stating that it supports the proposal as long as shippers are not responsible for demurrage absent an agreement with the warehouseman); Valley Distributing Comments 1 (supporting the direct-billing proposal); but see Peabody Comments 2 (stating that it does not support the direct-billing proposal because it believes that the shipper should always

Continued

states that the direct-billing requirement is “very fair, as it is predicated upon agreement by the shipper and terminal and would help end the gridlock that has prevented reasonable discussion and resolution of individual disputes.” (Kinder Morgan Comments 7.) Kinder Morgan argues that direct billing will allow for more efficient handling of demurrage disputes and will help end “abusive practices by railroads with respect to the collection of demurrage charges.” (*Id.* at 1, 8.) Likewise, ILTA contends that direct billing will bring greater clarity to the assessment and collection of demurrage charges and will help ensure fair treatment of warehousemen. (ILTA Comments 1.) Some commenters ask the Board to clarify certain aspects of the requirement to notify the carrier of the agreement. (ILTA Comments 3; IARW Comments 1.) In addition, some shippers and warehousemen argue that the rule should apply to Class II and Class III carriers. (*See, e.g.*, FRCA Comments 5.)

CN, CP, CSXT, KCS, and AAR (joined by NSR and UP) oppose the Board’s direct-billing proposal. These commenters argue that they lack privity of contract to enforce direct-billing agreements, (*see* CSXT Comments 15; *see also* CN Comments 15; CP Comments 8–9; AAR Comments 6); that the notice requirement, as proposed in the *NPRM*, is flawed, (CSXT Comments 14–15; KCS Comments 3; CP Comments 8); that the direct-billing proposal is inconsistent with 49 U.S.C. 10746, (CSXT Comments 12), and the final rule in *Demurrage Liability*, EP 707, (CN Comments 17–18; AAR Comments 4, 6); and that the direct-billing proposal would only increase the difficulty and complexity of demurrage disputes, (CP Comments 7–9; CSXT Comments 15–16).

The Board will adopt its direct-billing proposal with the modifications discussed below.

Class I Carriers’ Ability To Understand and Enforce Direct-Billing Agreements

Many Class I carrier commenters and AAR argue that the *NPRM*’s direct-billing proposal is unworkable because carriers would be unable to understand or enforce nuanced and complex agreements to which they are not parties. CSXT and CN explain that agreements between shippers and warehousemen can have substantially different provisions regarding when

be invoiced, in part, to reduce the risk that carriers will bill two parties for the same delay; AFPM Comments 9 (expressing concerns that there could be miscommunication over which party is to receive the invoice).

shippers will accept demurrage liability. (CSXT Comments 15; CN Comments 15.) CSXT expresses concern that shippers might limit the circumstances in which they will accept liability. (CSXT Comments 15.) In this regard, CN references Kinder Morgan’s third-party complaint against some of its customers, which shows that Kinder Morgan’s shipper-customers declined to accept across-the-board responsibility for demurrage liability, pointing instead to various exceptions that would place the liability on Kinder Morgan. (CN Comments 15.) CSXT further argues that carriers “will have no knowledge of the terms of the agreement” and therefore “will have no ability to understand or effectively enforce these contractual provisions and no ability to adjudicate responsibility in situations where receiver and shipper disagree as to fault.” (CSXT Comments 15.)¹⁰ In order to ensure accountability to the carrier, CP urges the Board to require the shipper to “expressly agree that it is liable to the railroad for demurrage on its assets even if such demurrage is due to actions taken by the warehouseman or actions of its other shippers.” (CP Comments 9.)

Kinder Morgan argues that such preconditions by the carrier are not necessary for direct-billing arrangements, which Kinder Morgan points out were common before the Docket No. EP 707 rule was adopted. (Kinder Morgan Reply 14–16.) ILTA argues that Class I carriers’ concern about not being parties to direct-billing agreements “confounds both legal obligations and common sense.” (ILTA Reply 2.)

The Board finds that the arguments by the Class I carriers and AAR are overstated. As the court cases preceding Docket No. EP 707 indicated, the shipper, rather than the warehouseman, is often the signatory to the bill of lading and the one that actually has the privity of contract with the railroad. Indeed, that was why some courts had held that, unless the warehouseman was aware that it had been named as a party to the bill of lading, the shipper was the only party to which the railroad could send the demurrage bill. *See Demurrage Liability*, EP 707, slip op. at 3–4 (citing *Norfolk S. Ry. v. Groves*, 586 F.3d 1273, 1275–76 (11th Cir. 2009), *cert. denied*,

¹⁰ *See also* AAR Comments 6 (arguing carriers would have no privity of contract to enforce agreements); CP Comments 8 (stating that “it is unclear whether CP would have a cognizable legal claim against a shipper with whom it is not in privity of contract”); KCS Comments 2 (opposing the Board’s direct-billing proposal because “issues such as lack of privity of contract could prevent rail carriers from collecting demurrage that is rightly owed”).

131 S. Ct. 993 (2011)). Under the final rule adopted in this decision, where shippers and warehousemen jointly notify their serving railroads that the shipper is the party to be billed, billing arrangements would effectively proceed under the standard practices that prevailed for much of the industry before the final rule in Docket No. EP 707 was adopted. ILTA correctly notes that it is inconsistent for the carriers, from a contractual privity standpoint, to prefer avoiding direct billing of shippers with whom they are often signatories on the bill of lading in favor of holding warehousemen, with whom they often hold no contractual relationships, responsible for demurrage.

The intent in proposing the direct-billing requirement at 49 CFR 1333.3(b) was not to require Class I carriers to analyze or enforce any specific conditions of liability agreed upon by the shipper and warehouseman. Rather, in an agreement under the new direct-billing rule, the shipper must agree to (1) receive the demurrage bill from the Class I carrier and (2) be liable to the Class I carrier for demurrage that accrues on all of the shipments received by the warehouseman from the shipper during the term of the agreement.

Warehousemen and shippers may address the nuances of demurrage liability between themselves in their commercial relationships, as the Board has previously contemplated.¹¹ However, Class I carriers would not be responsible for billing in accordance with any specific liability conditions that the warehouseman and shipper may have agreed upon as between themselves.¹² Rather, to the extent the shipper believes that its commercial arrangement with the warehouseman requires the warehouseman to reimburse the shipper for demurrage it has paid to the carrier, the Board expects the shipper and warehouseman to resolve this issue between themselves. In doing so, the warehouseman would continue to have an incentive to make efficient use of rail cars in the rail network, contrary to carriers’ claims that, if the shipper

¹¹ *See Demurrage Liability*, EP 707, slip op. at 9 (finding that its demurrage regulations “should encourage warehousemen and shippers to address demurrage liability in their commercial arrangements”).

¹² Any suggestions of Class I carriers that they will be unable to hold shippers liable for demurrage at all when they are not parties to the agreements between shippers and warehousemen are unavailing. Under the direct-billing requirement, Class I carriers must seek demurrage from shippers—just as they regularly did before the Docket No. EP 707 rules were adopted—only when those shippers give notification that they have agreed to be responsible for demurrage under § 1333.3(b).

agrees to accept responsibility for demurrage, then the warehouseman would not have any incentive to efficiently utilize rail cars. (See AAR Comments 5; CN Comments 17; CP Comments 3.)

To clarify its intent in the regulations, the Board will revise § 1333.3(b) to specify that the Class I carrier must bill the shipper for demurrage when a warehouseman “has reached an agreement with a shipper (or consignee) that the shipper (or consignee) shall be billed for demurrage” and so notifies the Class I carrier.¹³ Furthermore, the Board will add an additional sentence to clarify that, pursuant to this paragraph, “the shipper (or consignee) shall be liable to the Class I carrier for demurrage but shall not be prohibited from seeking payment from the third-party intermediary for demurrage charges for which the third-party intermediary is responsible pursuant to an agreement between the shipper (or consignee) and the third-party intermediary.”¹⁴ The full text of revised § 1333.3(b) is set forth below.

Notice of Direct-Billing Agreements

Class I carrier commenters seek clarification of the *NPRM* proposal to require Class I carriers to bill the shipper for demurrage charges “after being notified of the agreement by the shipper, consignee, or third-party intermediary.” *NPRM*, EP 759, slip op. at 14. CSXT expresses concern that because the proposed rule requires notice by only one party, the counterparty would be able to disclaim the validity of the agreement to the carrier. (CSXT Comments 14–15.) Additionally, both KCS and CP express concerns about the notice requirement as it relates to interlined traffic. KCS states that, in some cases in which traffic is interlined for destination delivery to the warehouseman, it does not know the identity of the original shipper. (KCS Comments 3.) CP likewise explains that much of its traffic

¹³ Peabody’s concern that the rule will make it more likely that two parties could be billed for the same demurrage, (see Peabody Comments 2), is unfounded, as the new rule will require that when a shipper and warehouseman agree that the shipper is to be billed for demurrage and convey such agreement to the railroad, the railroad will bill the shipper, as agreed.

¹⁴ This clarification is intended to help ensure that shippers and warehousemen continue to have the ability to address demurrage in their contracts. (See TFI Comments 4; CRA Comments 4–5.) It also addresses CP’s concern that the proposed rules would “put the railroad in the middle” of a dispute between the shipper and the warehouseman, which CP alleges would be contrary to the provision in the rail transportation policy that the Board should “provide for the expeditious handling and resolution of [disputes].” (See CP Comments 7–8 (citing 49 U.S.C. 10101(15)).)

originates or terminates on CP, but not both, and when CP is the delivering carrier, it may not have a relationship with the shipper. (CP Comments 8.)

Warehousemen commenters seek clarity about the form of the notice contemplated by the *NPRM*. They argue that it is not feasible for shippers and warehousemen to share their entire contracts with carriers because doing so would expose confidential business information. Accordingly, they ask the Board to specify that the notice requirement may be satisfied by an excerpt or redacted version of the agreement, a separate letter or an email between the parties, or a copy of standard terms and conditions for storage. (ILTA Comments 3; IARW Comments 1.)

Based on these comments, the Board will revise and clarify the notice requirements. First, to avoid the possibility that one of the parties may subsequently disclaim the existence of an agreement and the validity of the notice, the Board will require that the shipper and warehouseman jointly notify the carrier of a direct-billing agreement.¹⁵

Second, the Board clarifies that the notice requirement does not expect that shippers and warehousemen share their contracts with Class I carriers. As discussed above, shippers that enter into direct-billing agreements must agree to be billed by Class I carriers for demurrage and to accept responsibility to the carrier for paying demurrage bills. Of course, the recipient of the bill, whichever party it may be, has every right to challenge the appropriateness of the bill with the carrier or with the Board. But any specific conditions under which the shipper and warehouseman apportion ultimate responsibility are for the shipper and warehouseman to address between themselves. If the shipper believes that it has been billed for demurrage for which the warehouseman is responsible under the terms of an agreement between the shipper and warehouseman, then the shipper may seek reimbursement for those charges from the warehouseman in accordance with their commercial arrangement and applicable laws. However, the notice of the billing agreement would be sufficient to provide the Class I carrier with the information it needs in order to know where to send its demurrage bills.

¹⁵ As discussed further in the Appendix below, this joint notice may be given to the carrier by way of a letter, such as the example provided in below. In addition, electronic signature of a joint notice would be sufficient. See 15 U.S.C. 7001(a).

Third, to address commenters’ concerns that a delivering carrier may not always know the identity of the shipper in the direct-billing agreement, the Board will require that the notice contain the shipper’s contact information.¹⁶ This information is necessary, not only for interline carriers, but also for all Class I carriers that seek to charge demurrage because *Demurrage Liability*, EP 707, established that carriers must provide actual notice of their demurrage tariffs prior to charging demurrage.¹⁷ The Board will also require that the notice contain the date upon which the Class I carrier is to begin billing the shipper for demurrage. Recognizing that Class I carriers will need sufficient time to provide shippers with actual notice of the carriers’ demurrage tariffs and to update their billing systems to reflect new direct-billing arrangements, this date shall be no earlier than 20 days after the notice is provided.

For the reasons discussed above, the Board will revise 49 CFR 1333.3(b), which is set forth in full in below, to state that Class I carriers must directly bill a shipper for demurrage “after being jointly notified of the agreement by the shipper (or consignee) and third-party intermediary.” The Board will also add a sentence clarifying that “[t]he joint notice required by this paragraph may be provided in hard copy or electronic form, and must contain the contact information for the shipper (or consignee) who has agreed to be billed (and liable to the Class I carrier) for demurrage and provide the date upon which the Class I carrier is to begin billing the shipper (or consignee) for demurrage (no earlier than 20 days after the notice is provided).” To address the concern discussed above regarding potential disagreements between warehousemen and their customers about the existence of direct-billing agreements, the Board will also modify § 1333.3(b) to require that a party to the agreement notify not only the Class I carrier but also the other party to the agreement that the agreement is no longer in force if and when appropriate.¹⁸ To provide further

¹⁶ The Board contemplates that such contact information would typically include the shipper’s full name, mailing address, telephone number, and email address.

¹⁷ As shown below, this requirement is redesignated in the regulations as paragraph (a) of 49 CFR 1333.3.

¹⁸ With respect to the Class I carriers’ obligations for direct billing, a statement from one party that the agreement has been terminated is sufficient to end the direct-billing requirement, regardless of any disputes as to the sufficiency of the termination

guidance on these notice requirements, the Board has provided a sample letter in the Appendix below that the warehouseman and shipper may use (but are not required to use) to notify the Class I carrier of their direct-billing agreement.

Direct-Billing Agreements in Relation to 49 U.S.C. 10746

CSXT argues that a direct-billing requirement is contrary to 49 U.S.C. 10746 because “[f]orcing a railroad’s demurrage billing to be governed by contracts to which that railroad is not a party is directly inconsistent with Congress’s instruction that railroads have the right to ‘compute demurrage charges and establish rules related to those charges’ in the first instance.” (CSXT Comments 12.) However, requiring railroads to bill shippers instead of warehousemen for demurrage under specific circumstances does not limit the railroads’ ability to compute demurrage and determine when it will apply. Indeed, as noted in *Demurrage Liability*, EP 707, slip op. at 3–4, the ICC, the Board, and the courts have all weighed in on whom the railroads could charge for demurrage. These sorts of actions are consistent with 49 U.S.C. 10702, which authorizes the Board to determine the reasonableness of railroad-established rates, rules, and practices, and with 49 U.S.C. 1321(a), which authorizes the Board to “prescribe regulations in carrying out . . . subtitle IV.”¹⁹

In establishing this final rule, the Board exercises its regulatory authority to ensure that carriers’ demurrage practices allow shippers and warehousemen, who are best positioned to determine which party between them will typically be most able to promote prompt movement of the cars, to make agreements that reflect this determination. Allowing shippers and warehousemen to reach direct-billing agreements that impose liability for demurrage charges on the party best positioned to mitigate the delays that cause demurrage would promote the efficient use of rail assets, thereby fulfilling the purpose of demurrage.

Direct-Billing Agreements in Relation to Demurrage Liability, EP 707

Class I carrier commenters also argue that the direct-billing proposal contradicts the regulations established

under the terms of the specific agreement between the shipper and warehouseman.

¹⁹ See also H.R. Rep. No. 104–311, at 100 (1995); H.R. Rep. No. 104–422, at 178 (1995) (Conf. Rep.) (indicating that § 10746 “retains the agency’s authority over demurrage charges and related rules”).

in *Demurrage Liability*, EP 707. However, the Board may modify its rules as long as its actions are rational and fully explained.²⁰ Here, these modifications comport with the spirit of Docket No. EP 707 (and with the other actions the Board is currently pursuing regarding demurrage) by advancing the principle that demurrage should be assessed on a party that can alter its behavior to help promote the efficient use of rail assets. Below, the Board discusses the direct-billing rule as it relates to the current demurrage regulations at 49 CFR 1333.2 and 1333.3 and modifies 1333.2.

1. 49 CFR 1333.2

CSXT and CN argue that a direct-billing rule contradicts the language in 49 CFR 1333.2, which states that 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.” Based on this provision, CSXT and CN contend that the only contracts that can alter demurrage liability are those to which the serving carrier is a party. (CN Comments 13–14; CSXT Comments 12–13.) Some of the Class I carriers indicate that they would be willing to enter into such contracts provided they maintain their ability to hold warehousemen accountable when they deem it appropriate to do so. (CN Comments 19–20; CSXT Comments 12.)

As noted, the Board may modify existing regulations as long as its actions are rational and adequately explained. Here, the language of § 1333.2 relied on by CN and CSXT permitting contracts between a “serving carrier and its customers” does not prevent the Board from modifying the regulations to require direct billing to shippers in certain circumstances, and it provides no basis for a finding that payment guarantees from warehousemen are necessary in direct-billing agreements. As before, under § 1333.2, 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.” The final rule here merely adds another option: A direct-billing arrangement between the shipper and

²⁰ See *Nat’l Cable & Telecomm’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82, 1001 (2005) (finding that an agency “is free within the limits of reasoned interpretation to change course if it adequately justifies the change”); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (“An initial agency interpretation is not instantly carved in stone.”).

warehouseman. To harmonize § 1333.2 with the final rule, the Board will revise this section to be consistent with the language in new § 1333.3(b). Specifically, the Board will add a sentence stating that “a third-party intermediary may enter into contracts with a shipper (or consignee) that the shipper (or consignee) shall be billed for demurrage pursuant to § 1333.3(b).” To reflect the added sentence, the Board will update the section heading to “Who May Charge Demurrage and Who May Enter into Contracts Pertaining to Demurrage.” The full text of the revised section 1333.2 is set forth below.

Furthermore, the Board does not find that payment guarantees from warehousemen are necessary in direct-billing agreements. After all, before 2014, railroads regularly billed shippers, rather than warehousemen, without holding warehousemen as guarantors.²¹ Moreover, the Board rejects the view that warehousemen should be guarantors because they are the only parties positioned to mitigate demurrage. As discussed in the *NPRM*, EP 759, slip op. at 3, warehousemen, by accepting rail cars, may be in a position to facilitate or impede car supply. However, in some cases, shippers may be in a better position to affect car supply by, for example, modifying the frequency or volume with which they consign cars.²² The Board continues to find, as discussed in the *NPRM*, that warehousemen and shippers are in the best position to know which party can best promote the prompt handling of cars and hence which party should bear responsibility for demurrage charges.

2. 49 CFR 1333.3

In the *NPRM*, the Board stated that while the “proposed rule would amend the Board’s current regulations to require Class I carriers to issue invoices to shippers and to treat shippers as the ultimate guarantors of payment (when the shipper and warehouseman agree to that arrangement and have so notified the rail carrier), . . . rail carriers are already permitted to do so under the current rule,” which states that parties

²¹ As Kinder Morgan points out, guarantees from warehousemen are unnecessary because “if the railroads directly billed their shippers, at the direction of the shipper and receiver as proposed by the Board, they would simply be engaging in arrangements that they have traditionally and customarily adopted and encouraged, without issue, for many decades.” (Kinder Morgan Reply 14–15.)

²² See, e.g., ILTA Comments 1, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754; see also KCS Comments 3 (acknowledging that “in some cases the warehouseman or terminal operator is not the party that actually causes demurrage to accrue and that responsibility lies with the shipper”).

who receive rail cars “may be held liable for demurrage.” *NPRM*, EP 759, slip op. at 11 (quoting 49 CFR 1333.3). CN takes exception to the Board’s statement, contending that “the [*NPRM*]’s suggestions that a rail carrier is already permitted to issue direct bills to shippers because they are ‘listed on the bill of lading’ has no support in the actual language of the Part 1333 regulations,” which “effectively forbid bills to nonreceivers in the absence of an explicit agreement to that effect.” (CN Comments 17; *see also* AAR Comments 4, 6.) CN maintains that the proposed rule cannot be reconciled with the Board’s prior decision to “‘place demurrage liability on the receiver of rail cars, regardless of their designation in the bill of lading.’” (*Id.* at 17–18 (quoting *Demurrage Liability*, EP 707, slip op. at 5).)

The Board does not agree with CN’s interpretation of the rule adopted in Docket No. EP 707. The Board pointed out in the *NPRM* (and in the proposed policy statement in Docket No. EP 757) that § 1333.3 states, in permissive terms, that parties who receive rail cars “may be held liable for demurrage.”²³ In other words, § 1333.3 permits billing of warehousemen, but does not foreclose direct billing of shippers. None of this prevents the Board from adopting, as it does here, a final rule that explicitly requires shippers to be billed for demurrage under certain conditions. Furthermore, as discussed above, even if CN’s interpretation were accurate, which it is not, the Board is not constrained from modifying regulations previously in effect, as long as its actions are rational and adequately explained.

Dispute Resolution

Some Class I carrier commenters contend that the Board’s proposal would make demurrage disputes more complex and difficult to resolve. CP argues that demurrage disputes frequently involve information that is only within the warehouseman’s possession, such as daily orders submitted by the warehouseman, pipeline information of other shippers, and information regarding cars arriving from other carriers (when the warehouseman is served by more than one carrier). (CP Comments 7.) CP and

CSXT also contend that demurrage disputes can raise issues concerning confidential shipper data. (CP Comments 8; CSXT Comments 15–16.) CSXT argues that shippers “will be in a poor position to assess whether any demurrage charges are attributable to railroad fault or to the receiver’s conduct (such as favoring one customer’s traffic over others)” because “[i]nformation about incoming shipments to other customers at that receiver facility will typically be protected by 49 U.S.C. 11904.” (CSXT Comments 15–16.) To account for § 11904, CP requests that the Board mandate that a warehouseman “obtain the consent of all its shippers for the delivering railroad to disclose all shipment data associated with that receiving location necessary to allow the shipper to audit the carrier’s invoicing.” (CP Comments 9.) CP also raises concerns about dispute resolution if it needs to pursue a shipper for demurrage in an inconvenient forum or “in another country altogether.” (*Id.* at 8.) CP states that there “must be a clear path for formal resolution should the shipper refuse to pay due to delay or bunching that is not caused by the delivering rail carrier.” (*Id.* at 9.)

Apart from the fact that some demurrage disputes may turn on information—such as the frequency and volume of cars consigned—that is more accessible to shippers than to warehousemen, these claims ring hollow. Before 2014, direct billing of the shipper rather than the warehouseman was common, and yet carriers were somehow able to resolve their highly fact-specific demurrage disputes.²⁴ Moreover, any information deficit an individual shipper may have vis-à-vis the warehouseman—such as access to information about incoming shipments from other customers at the warehouseman’s facility—would presumably disadvantage the shipper rather than the railroad in a particular dispute.²⁵ Therefore, the Board

²⁴ CP’s expressed concerns that carriers may be forced to pursue a shipper for demurrage in an inconvenient forum are unpersuasive given the long history of direct shipper billing before 2014.

²⁵ As noted, some demurrage disputes may turn on information that is more accessible to shippers than to warehousemen, and warehousemen have also argued that they cannot access relevant information because they do not have commercial relationships with carriers. *See, e.g.*, ILTA Comments 2, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754 (arguing that the “the terminal—lacking a contractual relationship with the railroad—has no access to information it would need to confirm or dispute charges”). Because shippers and carriers, and shippers and warehousemen, do have commercial relationships, the Board expects that direct-billing agreements could be drafted in such a way to reduce some information accessibility issues.

concludes that shippers that choose to enter into agreements with warehousemen are capable of determining, based on the facts and circumstances of their particular situation, whether they are suited to assess the factual issues associated with a demurrage dispute. If a particular demurrage dispute between the carrier and shipper involves information that is solely within the warehouseman’s possession, the discovery of such information is best addressed in the context of the individual dispute.²⁶

To the extent carriers, shippers, and warehousemen are having difficulty resolving demurrage disputes informally or in another jurisdiction, the Board strongly encourages them to avail themselves of the Board’s alternative dispute resolution options (mediation, arbitration,²⁷ and the Rail Customer and Public Assistance program²⁸).

Exclusion of Class II and III Carriers

In the *NPRM*, the Board explained that it did not propose to require Class II and Class III carriers to comply with the rule because it would be more costly for smaller carriers to do so and the demurrage issues raised by stakeholders before the Board predominantly pertained to Class I carriers. *NPRM*, EP 759, slip op. at 10–11. The Board invited comment on the proposed exclusion of Class II and Class III carriers. *Id.* at 11.

Although some shippers find that that demurrage issues most frequently involve Class I carriers, (*see* AFPM Comments 8; ISRI Comments 10), several commenters express concerns about excluding Class II and Class III carriers,²⁹ particularly those with larger,

²⁶ CP makes an unwarranted request that the Board mandate that warehousemen obtain consent, presumably from multiple customers, to reveal what would otherwise be confidential shipper data under § 11904. The Board and the courts are well-suited to assist the parties in the resolution of discovery disputes of this nature in individual cases through, for example, the use of third-party subpoenas and protective orders.

²⁷ The Board notes that three of the Class I carriers have agreed to arbitrate certain demurrage disputes under the binding, voluntary program set forth in 49 CFR part 1108. *See* UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), *Assessment of Mediation & Arbitration Procedures*, EP 699.

²⁸ The Board’s Rail Customer and Public Assistance (RCPA) office provides informal assistance to the public on a wide range of matters within the Board’s expertise. The RCPA office can be reached by telephone at 202–245–0238 or email at rcpa@stb.gov.

²⁹ (*See* FRCA Comments 5; AFPM Comments 8; Barilla Comments 3; CPC Comments 3.) It is unclear whether some comments on this issue are intended to address exclusion of Class II and III carriers from the minimum invoicing requirements aspect of the rule, the direct-billing aspect, or both. For

²³ CN cites to *Demurrage Liability*, EP 707, slip op. at 5, which states that the advance notice of proposed rulemaking in that proceeding “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.” (*See* CN Comments 17–18.) However, the Board ultimately proposed and adopted permissive language in § 1333.3.

more sophisticated operations, (see FRCA Comments 5; AFPM Comments 8). One commenter urges the inclusion of Class II and Class III carriers for uniformity across the industry, (see ISRI Comments 10), and others fear that Class I carriers will seek to evade the rule by tasking Class II and Class III carriers with demurrage invoicing where possible, (see NITL Comments 10; AF&PA Comments 10). Acknowledging that the new requirements may be too burdensome for the smallest carriers, some commenters suggest that the Board apply the rule to all carriers and grant waivers on a case-by-case basis. (NITL Comments 10; AF&PA Comments 10; AM Reply 5–6.) Others suggest that the Board exclude some or all Class III carriers from the rule, but not Class II carriers. (AFPM Comments 8 (exclude all Class III carriers, but not Class II carriers); FRCA Comments 5 (require Class II carriers and Class III carriers affiliated with large holding companies to comply.))

ASLRRRA supports the Board's proposal to exclude Class II and Class III carriers, (see ASLRRRA Comments 4), pointing out that shippers' complaints have been about Class I carriers and that small carriers already "work closely every day with their customers and if there arises a question about invoices, services or anything else, the customer and small railroad resolve those issues in a timely manner directly between them," (see ASLRRRA Reply 6–7). ASLRRRA questions the workability of some commenters' suggestion that Class II and Class III carriers could file for individual waivers, which, it states, would be an expensive and time-consuming process for small carriers with limited resources. (ASLRRRA Reply 7.) Importantly, ASLRRRA dismisses commenters' concerns that Class I carriers would assign demurrage billing to Class II and Class III carriers to avoid the rule, arguing that Class I carriers will not "want to cede the control of their operations or practices to others or the compensation they receive for the misuse of their rail assets." (*Id.* at 8.)

In the *NPRM*, EP 759, slip op. at 10, 11, the Board proposed to exclude Class II and Class III carriers because the demurrage issues raised by stakeholders in Docket No. EP 754 predominantly pertained to Class I carriers. The comments have not changed the Board's view on this issue, nor do they provide any realistic basis for concluding that Class I carriers will seek to avoid the rule by assigning their demurrage billing

completeness, all potentially applicable comments are addressed here.

to small carriers.³⁰ The case-by-case waiver approach suggested by some shipper parties could be impractical and unduly burdensome for some small carriers. Likewise, the Board declines to adopt AFPM's proposal to make Class II carriers (but not Class III carriers) subject to the rule because, as noted above, the record indicates most demurrage issues pertain to Class I carriers and the record does not justify imposing the requirements on Class II carriers at this time. Nonetheless, the Board continues to strongly encourage Class II and Class III carriers to comply with the rule to the extent they are able to do so, but it will not make compliance mandatory at this time.

Conclusion

Consistent with this decision, the Board adopts a final rule requiring Class I carriers to directly bill the shipper for demurrage without requiring the warehouseman to act as a guarantor, when the shipper and warehouseman agree to that arrangement and so notify the rail carrier, unless and until a party to the agreement notifies both the Class I carrier and the other party to the agreement that the agreement is no longer in force. This rule is set out in full below and will be codified in the Code of Federal Regulations.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a 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 final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is

³⁰ Should sufficient evidence be presented in the future that Class I carriers are attempting to avoid the rule by assigning their demurrage claims processing to smaller connecting carriers, the Board can revisit this issue and propose any warranted modifications to the rule.

circumscribed or mandated" by the proposed rule. *White Eagle Coop. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

As discussed above, the final rule will apply only to Class I carriers. Accordingly, the Board again certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities as defined by the RFA.³¹ A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) under OMB Control No. 2140–0021. In the *NPRM*, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and OMB regulations at 5 CFR 1320.11, regarding: (1) Whether the collection of information, as modified, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. The Board received one comment, from CN, in response to the Board's PRA analysis in the *NPRM* regarding the requirement that railroads directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier.³²

³¹ For the purpose of RFA analysis, the Board defines a "small business" as only including those rail carriers classified as Class III carriers under 49 CFR 1201.1–1. See *Small Entity Size Standards Under the Regulatory Flexibility Act*, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars (\$39,194,876 or less when adjusted for inflation using 2018 data). Class II carriers have annual operating revenues of less than \$250 million in 1991 dollars (\$489,935,956 when adjusted for inflation using 2018 data). The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.*, EP 748 (STB served June 14, 2019).

³² In its initial comments, ASLRRRA questions the source of the estimated 677 burden hours in the *NPRM*. This estimate comes from the existing collection for which the Board is seeking a modification. In other words, the burden analysis in the Appendix of the *NPRM* included the burdens for the existing portion of the collection being modified by this final rule.

CN argues that it would take longer than five minutes to permanently implement direct billing to a terminal customer. CN argues that, if it were required to change its billing for the 500 terminals it serves in its U.S. network, then it “conservatively estimates that each large terminal of more than 5 shippers would require 1 hour of processing time per month, every month, and each small terminal would require 30 minutes per month, plus additional time at start up were they to opt for direct billing.” (CN Comments 21–22.) However, Class I carriers are only required to directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. The Board estimates that each Class I railroad would receive approximately 60 of these agreements per year. The Board therefore disagrees with CN’s burden-hour and frequency estimates. Nevertheless, Board staff has reviewed its burden-hour estimates to prepare for such direct billing and, to reflect the fact that the requests for direct billing could increase a carrier’s workload, has increased its estimate from five minutes per agreement to one hour per agreement.³³

No other railroads commented on the Board’s estimates.

This modification to an existing collection, along with CN’s comment and the Board’s response, will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

List of Subjects in 49 CFR Part 1333

Penalties, Railroads.

It is ordered:

1. The Board adopts the final rule as set forth below. Notice of the final rule will be published in the **Federal Register**.

2. This decision is effective on June 20, 2020.

³³ The Board also clarifies that its burden estimates are on a per agreement basis (*see NRP*, EP 759, slip op. at 16), not on a per invoice basis (*see id.* at 17, inadvertently referencing per invoice). CN suggests that, if only some terminal customers agree to direct billing and so notify CN, it would be “required to devote significant staffing needs to creating and separating the bills.” (CN Comments 22.) This general concern does not challenge the Board’s frequency estimate (60 agreements per Class I carrier), nor does it provide specific burden hours based on a more limited number of agreements.

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

Decided: April 30, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Jeffrey Herzig,
Clearance Clerk.

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

PART 1333—DEMURRAGE LIABILITY

■ 1. Revise the authority citation for part 1333 to read as follows:

Authority: 49 U.S.C. 1321, 10702, and 10746.

■ 2. Section 1333.2 is revised to read as follows:

§ 1333.2 Who May Charge Demurrage and Who May Enter into Contracts Pertaining to Demurrage.

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. Additionally, a third-party intermediary may enter into contracts with a shipper (or consignee) that the shipper (or consignee) shall be billed for demurrage pursuant to section 1333.3(b). However, in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

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

§ 1333.3 Who Is Subject to Demurrage.

(a) * * *

(b) If the rail cars are delivered to a third-party intermediary that has reached an agreement with a shipper (or consignee) that the shipper (or consignee) shall be billed for demurrage, then the serving Class I carrier shall, after being jointly notified of the agreement by the shipper (or consignee) and third-party intermediary, bill the shipper (or consignee) for demurrage charges without requiring the third-party intermediary to act as a guarantor, unless and until a party to the agreement notifies both the serving Class I carrier and the other party to the agreement that the agreement is no longer in force. Pursuant to this paragraph, the shipper (or consignee) shall be liable to the Class I carrier for demurrage but shall not be prohibited from seeking payment from the third-party intermediary for demurrage charges for which the third-party

intermediary is responsible pursuant to an agreement between the shipper (or consignee) and the third-party intermediary. The joint notice required by this paragraph may be provided in hard copy or electronic form, and must contain the contact information for the shipper (or consignee) who has agreed to be billed (and liable to the Class I carrier) for demurrage and provide the date upon which the Class I carrier is to begin billing the shipper (or consignee) for demurrage (no earlier than 20 days after the notice is provided). With respect to Class I carriers’ obligations for direct billing, a statement from one party that the agreement has been terminated is sufficient to end the direct-billing requirement, regardless of any disputes as to the sufficiency of the termination under the terms of the specific agreement between the shipper (or consignee) and third-party intermediary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

Sample Letter

[Date]

[Shipper’s (or Consignee’s) Name]
[Shipper’s (or Consignee’s) Mailing Address]
[Shipper’s (or Consignee’s) Phone Number]
[Shipper’s (or Consignee’s) Email Address]
[Third-Party Intermediary’s Name]
[Third-Party Intermediary’s Mailing Address]
[Third-Party Intermediary’s Phone Number]
[Third-Party Intermediary’s Email Address]
Dear [Serving Class I Carrier]:

[Shipper’s (or Consignee’s) Name] and [Third-Party Intermediary’s Name] have reached an agreement that [Shipper’s (or Consignee’s) Name] shall be billed for demurrage as of [date], and that [Shipper’s (or Consignee’s) Name] shall be liable to [Serving Class I Carrier] for demurrage that accrues on all of the shipments received by [Third-Party Intermediary’s Name] from [Shipper’s (or Consignee’s) Name] during the term of the agreement.

Sincerely,

Shipper’s (or Consignee’s) Name

Shipper’s (or Consignee’s) Signature

Third-Party Intermediary’s Name

Third-Party Intermediary’s Signature

[FR Doc. 2020–09683 Filed 5–5–20; 8:45 am]

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