

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 25, 2019.

Mary S. Walker,

Regional Administrator, Region 4.

[FR Doc. 2019–22326 Filed 10–11–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 29, and 52

[FAR Case 2018–023; Docket No. 2018–0023; Sequence No. 1]

RIN 9000–AN81

Federal Acquisition Regulation: Taxes– Foreign Contracts in Afghanistan; Correction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule; correction.

SUMMARY: On September 20, 2019, DoD, GSA, and NASA published a document proposing to amend the Federal Acquisition Regulation (FAR) to add two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan. The document heading carried an incorrect Regulation Identifier Number (RIN). This document carries the correct RIN.

DATES: Comments for the proposed rule published September 20, 2019, at 84 FR 49502, continue to be accepted on or before November 19, 2019, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–023 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “FAR Case 2018–023” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Comment Now” that corresponds with “FAR Case 2018–023”. Follow the instructions provided on the screen. Please include your name, company name (if any), and “FAR Case 2018–023” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat Division, ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite “FAR case 2018–023” in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Kevin Funk, Procurement Analyst, at 202–357–5805 or kevin.funk@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite “FAR Case 2018–023.”

SUPPLEMENTARY INFORMATION: On September 20, 2019, at 84 FR 49502, DoD, GSA, and NASA published a proposed rule to amend the Federal Acquisition Regulation (FAR) to add two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan. The document’s heading contained the incorrect RIN, “RIN 9000–AN68.” The correct RIN is “RIN 9000–AN81” and is in the heading of this correction.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2019–22282 Filed 10–11–19; 8:45 am]

BILLING CODE 6820–EP–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1039

[Docket No. EP 760]

Exclusion of Demurrage Regulation From Certain Class Exemptions

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) proposes to clarify its regulations governing exemptions for certain miscellaneous commodities and boxcar transportation so that those regulations unambiguously state that demurrage continues to be subject to Board regulation. The Board also proposes to revoke, in part, the exemption that currently covers certain agricultural commodities so that the exemption would not apply to the regulation of demurrage, thereby making

the agricultural commodities exemption consistent with similar exemptions covering non-intermodal transportation.

DATES: Comments on the proposed rule are due by November 6, 2019. Reply comments are due by December 6, 2019.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 760, 395 E Street SW, Washington, DC 20423–0001. Comments and replies will be posted to the Board’s website at www.stb.gov.

FOR FURTHER INFORMATION CONTACT:

Amy Ziehm at (202) 245–0391.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board’s regulations exempt from the provisions of subtitle IV of title 49 of the U.S. Code the rail transportation of certain miscellaneous commodities (*see* 49 CFR 1039.11) and boxcar transportation (*see* 49 CFR 1039.14). The Board proposes to amend these regulations to state more clearly that the exemptions do not apply to the regulation of demurrage. Although the regulations for these class exemptions have already been interpreted to effectively exclude the regulation of demurrage, the Board finds these regulations would be more easily understood by more clearly stating the demurrage exclusion. Such clarification would also reflect the longstanding court and agency precedent that these exemptions do not apply to the regulation of demurrage.

The rail transportation of certain agricultural commodities is also exempt.¹ Section 1039.10 does not specifically state that demurrage² related to the transportation of these agricultural commodities continues to be subject to Board regulation. The Board finds that regulation of demurrage related to the non-intermodal transportation of these agricultural commodities is necessary to carry out the rail transportation policy of 49 U.S.C. 10101³ and notes that, as

¹ The agricultural commodity exemption under 49 CFR 1039.10 excepts the rail transportation of grain, soybeans, and sunflower seeds, so the rail transportation of those commodities is subject to the provisions of subtitle IV of title 49.

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 rules established in that decision. The Board uses the same definition for purposes of this notice of proposed rulemaking.

³ This proposed partial revocation is not intended to authorize the regulation of demurrage related to

discussed above, other exemptions for the rail transportation of certain miscellaneous commodities and for boxcar transportation already effectively permit regulation of demurrage. Therefore, the Board proposes, pursuant to 49 U.S.C. 10502(d), to revoke, in part, the exemption for agricultural commodities at 1039.10 to provide that the exemption does not apply to the regulation of demurrage related to the non-intermodal transportation of these commodities.

Background

This notice of proposed rulemaking arises, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754. The Board commenced that docket by notice served on April 8, 2019, following concerns expressed by users of the freight rail network (rail users)⁴ and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring.⁵ Specifically, in *Oversight Hearing on Demurrage & Accessorial Charges (April 2019 Notice)*, EP 754, slip op. at 2 (STB served Apr. 8, 2019), the Board announced a May 22, 2019 public hearing, which was later extended to include a second day;⁶ directed Class I carriers to appear at the hearing; and invited shippers, receivers, third-party logistics providers, and other interested parties to participate. The notice also directed Class I carriers to provide specific information on their demurrage and accessorial rules and charges and required all hearing participants to submit written testimony, both in advance of the hearing. *April 2019 Notice*, EP 754, slip op. at 2–4. Comments were also

accepted from interested persons who would not be appearing at the hearing. The Board received over 90 pre-hearing submissions from interested parties; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments.

Numerous parties, including those involved in rail transportation subject to class exemptions, submitted comments and testified at the hearing.⁷ For example, the U.S. Department of Agriculture explained in its comments that “[m]any agricultural shippers are concerned with new and increasing charges and their unfair structure, which imposes steep penalties on customer performance without reciprocal penalties on railroad performance.” U.S. Department of Agriculture Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754. After considering the submissions and hearing testimony and related laws and regulations, the Board proposes to clarify its regulations governing exemptions for certain miscellaneous commodities and boxcar transportation to ensure that they unambiguously state that demurrage continues to be subject to Board regulation. The Board also proposes to partially revoke the exemption for transportation of certain agricultural commodities to permit the regulation of demurrage, which would make the agricultural commodities exemption consistent with similar exemptions covering non-intermodal transportation.

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 national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage is a charge that both compensates rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (*i.e.*, “free time”) for loading and unloading and serves as a

penalty for undue car detention to encourage the efficient use of rail cars in the rail network. *See* 49 CFR 1333.1; *see also* 49 CFR 1201, category 106.

Pursuant to 49 U.S.C. 10502(a), the Board is required to exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of 49 U.S.C. subtitle IV (1) is not necessary to carry out the transportation policy of 49 U.S.C. 10101, and (2) either the transaction or service is of limited scope, or the application of the statute is not needed to protect shippers from the abuse of market power.

However, after an exemption is granted, the agency continues to “monitor the effects of the exemption to assure that continued regulation is not needed.” *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 733 (1981) (citing H. Rep. 96–1430, 96th Cong., 2d Sess., at 104–05). Congress accordingly provided a mechanism for revoking exemptions in whole or in part. Specifically, 49 U.S.C. 10502(d) provides that “[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” In the 1980s, the Interstate Commerce Commission (ICC), the Board’s predecessor, exercised its exemption authority to exempt from regulation, subject to various exceptions, several types of commodities and all commodities transported in boxcars. *See Rail Gen. Exemption Auth.—Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 186 (1989) (codified as amended at 49 CFR 1039.11); *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. 298, 299 (1983) (codified as amended at 49 CFR 1039.10); *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 425, 455 (1983), *aff’d in relevant part*, *Brae Corp. v. ICC*, 740 F.2d 1023 (DC Cir. 1984) (codified at 49 CFR 1039.14).

The class exemptions for miscellaneous commodities and boxcar transportation already exclude the regulation of demurrage. Specifically, the regulations state that the exemption for miscellaneous commodities “shall not be construed as affecting in any way the existing regulations . . . regarding the use of equipment, whether shipper or railroad owned or leased, including car hire, per diem and mileage allowances.” 49 CFR 1039.11(a). The Board has also explained that the exemption “does not affect regulation regarding the use of equipment,” and

intermodal transportation under the exemption at 49 CFR 1039.13.

⁴ As used in this proposed rule, the term “rail users” broadly means any person that receives rail cars for loading or unloading, regardless of whether that person has a property interest in the freight being transported.

⁵ In November 2018, the Board sent letters to two Class I carriers, requesting that they examine, from the perspective of reciprocity and commercial fairness, recently announced changes to their policies and practices made in connection with new operating plans they were implementing. After receiving responses from those two carriers, the Board requested each Class I carrier to report its revenues from demurrage and accessorial charges for each quarter of 2018, and, on a going-forward basis, for each quarter of 2019. Because accessorial charges are not uniform among carriers, each Class I carrier was asked to identify the specific accessorial items that account for its reported revenues.

⁶ *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754, slip op. at 1 (STB served May 3, 2019).

⁷ These parties include, among others: Ag Processing Inc.; American Forest & Paper Association; Bunge North America; Consolidated Scrap Resources, Inc.; International Paper; the Agricultural Retailers Association; the California League of Food Producers; The Fertilizer Institute; the Freight Rail Customer Alliance; the Institute of Scrap Recycling; the National Grain and Feed Association; and the National Industrial Transportation League. Comments and written testimony from these parties are available in the docket for EP 754.

because “[d]emurrage is a matter regarding use of equipment,” such matters are expressly excluded from the exemption. *Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc.*, FD 34920, slip op. at 7–8 (STB served May 30, 2008) (rejecting argument that 1039.11 precluded the Board from hearing a demurrage dispute related to commodities listed in that section).

Similarly, under the boxcar transportation exemption, the Board retains jurisdiction over “[c]ar hire and car service” and “[c]ar supply,” 49 CFR 1039.14(b)(1), (4). The United States Court of Appeals for the Second Circuit held in 1997 that these terms encompassed demurrage, stating “the terms ‘car supply’ and ‘car service’ are defined in the [Interstate Commerce Act] as encompassing demurrage charges.” *Del. & Hudson Ry. v. Offset Paperback Mfrs.*, 126 F.3d 426, 429 (2d Cir. 1997) (citing 49 U.S.C. 10746, 10102(2)). Moreover, when the ICC promulgated 1039.14, it expressly stated that its decision “does not affect the obligations of rail carriers to compute demurrage charges and establish rules related to those charges.” *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. at 455. As the Board has stated, demurrage is “related to car service” and therefore the boxcar transportation exemption does not “extend[] to controversies over assessment of demurrage.” *Savannah Port Terminal R.R.*, FD 34920, slip op. at 7 (citing *Del. & Hudson Ry.*, 126 F.3d at 428–29).

Proposed Rule

The Board proposes to amend 49 CFR 1039.11 and 1039.14, consistent with the Second Circuit’s ruling in *Delaware & Hudson Railway* and the Board’s ruling in *Savannah Port*, to state unambiguously that the exemptions for certain miscellaneous commodities and boxcar transportation do not apply to the regulation of demurrage. In addition, the Board proposes to amend 49 CFR 1039.10 by revoking, in part, the exemption for the rail transportation of certain agricultural products (except grain, soybeans, and sunflower seeds, which are already subject to the Board’s regulation) to permit the regulation of demurrage related to the non-intermodal transportation of those commodities. For the reasons discussed below, the Board finds that the regulation of demurrage related to this transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. See 49 U.S.C. 10502(d).

Amendments to 49 CFR 1039.11 and 1039.14

Court and agency decisions have concluded that the exemptions in 1039.11 and 1039.14 do not apply to the regulation of demurrage. See *Savannah Port*, FD 34920, slip op. at 7–8; *Del. & Hudson Ry.*, 126 F.3d at 429. The Board recognizes, however, that the regulations themselves do not use the term “demurrage,” which could cause confusion. Therefore, the Board proposes amending 1039.11 to add the following language: “Consistent with the exemptions in 1039.10 and 1039.14, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to 1039.13.” Additionally, the Board proposes amending 1039.14 to add the following language: “Consistent with the exemptions in 1039.10 and 1039.11, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to 1039.13.” These proposed amendments to 1039.11 and 1039.14 are intended only to ensure that the regulations will be clearly understood consistent with court and agency precedent, not to make a substantive change.

Amendment to 49 CFR 1039.10

As noted above, numerous parties, including shippers and receivers of certain agricultural commodities subject to 1039.10, have expressed to the Board serious concerns about demurrage rules and charges. Those concerns, including those expressed in the extensive testimony and written submissions in *Oversight Hearing on Demurrage & Accessorial Charges*, have led the Board to issue a proposed policy statement to provide the public with information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges, and to issue a separate notice of proposed rulemaking addressing particular demurrage billing practices. See *Policy Statement on Demurrage & Accessorial Rules & Charges*, EP 757 (STB served October 7, 2019); *Demurrage Billing Requirements*, EP 759 (STB served October 7, 2019). But the principles announced in the proposed policy statement and the notice of proposed rulemaking would be thwarted to the extent demurrage is not subject to regulation. To help ensure that regulatory relief is on par with other, and accessible to all, non-intermodal transportation shippers and receivers, the Board proposes to

partially revoke the exemption for agricultural commodities.

The concerns expressed suggest that certain carrier demurrage rules and charges may not be reasonable and may not fulfill the overarching purpose of demurrage, and therefore may render freight rail service less likely to meet the needs of the public. The Board is concerned about the imposition of demurrage charges for circumstances beyond the shipper’s or receiver’s reasonable control. Such charges—which may arise in connection with the transportation of a wide range of commodities, including agricultural commodities—do not incentivize behavior on the part of shippers or receivers that would encourage the efficient use of rail assets (both equipment and track), and therefore would not fulfill the overarching purpose of demurrage. Therefore, the Board finds that this partial revocation is necessary to “ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public,” 49 U.S.C. 10101(4); to foster “sound economic conditions in transportation,” 10101(5); and to “encourage honest and efficient management of railroads,” 10101(9). Further, if demurrage is exempt from regulation, then agricultural shippers or receivers seeking to bring a demurrage-related action before the Board would need to request, and the Board would need to grant, partial revocation of the class exemption as it applies to demurrage in every individual case, which may add to the complexity, length, and cost of such proceedings to the parties and the Board. The proposed partial revocation is therefore necessary to “require fair and expeditious regulatory decisions when regulation is required,” 10101(2), and to “provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part,” 10101(15). There does not appear to be any significant conflict between the proposed partial revocation of the exemption for transportation of agricultural commodities and the other aspects of the rail transportation policy of 10101.

This proposed partial revocation is consistent with longstanding agency practice and precedent. The Board, and the ICC before it, have long regulated demurrage, including as related to certain transportation otherwise exempt under 10502, and have declined to exclude demurrage from regulation. For example, in 1996, the Board considered but rejected two proposals that would have largely eliminated the regulation of demurrage, finding that they did not

meet the exemption criteria of 10502(a). *See Exemption of Demurrage from Regulation*, EP 462, slip op. at 2–4 (STB served Mar. 29, 1996). The Board found that the first proposal, which was “to exempt demurrage following the first 24-hour period after a car is tendered for loading and following the first 48-hour period after a car is tendered for unloading,” created the “potential . . . for an abuse of market power” by making shippers potentially subject to “unreasonable charges.” *Id.* at 3. The Board found that the second proposal, which was to “exempt demurrage as a separate and distinct area of regulation” except that demurrage charges could be included in rate reasonableness challenges, would “be far more cumbersome and costly than the present regulatory scheme.” *Id.* at 4.

Given that exemptions for certain miscellaneous commodities and boxcar transportation do not apply to the regulation of demurrage, it is reasonable to conclude that demurrage should be excluded from the exemptions in 1039.10 as well. The Board finds no reason why demurrage claims should be permitted under 1039.11 and 1039.14 but barred under 1039.10, given that all three exemptions are otherwise substantially similar and were promulgated for similar reasons. *See Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. at 299–303; *Rail Gen. Exemption Auth.—Miscellaneous Manufactured Commodities*, 6 I.C.C.2d at 186–96; *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. at 425–56.

Leaving 1039.10 unchanged could have undesirable effects. Shippers and receivers of certain agricultural commodities might interpret the absence of the exclusion of demurrage in 1039.10 (especially when contrasted with the exclusions with respect to certain miscellaneous commodities and boxcar transportation) to mean that the Board lacks the authority (unless it revokes the exemption) to hear demurrage disputes related to transportation of certain agricultural commodities. Although the Board has a process for case-specific revocations, the Board finds no basis for treating only this segment of exempt transportation differently from other exempt, non-intermodal transportation.

Because the Board finds that regulation of demurrage is necessary to carry out the rail transportation policy of 49 U.S.C. 10101, the Board proposes to amend 1039.10, pursuant to 49 U.S.C. 10502(d), by partially revoking the exemption to permit the regulation of demurrage related to non-intermodal transportation of certain agricultural

commodities. The Board proposes to add the following sentence to 1039.10: “Consistent with the exemptions in 1039.11 and 1039.14, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to 1039.13.” By stating that 1039.10 is “[c]onsistent with the exemptions in 1039.11 and 1039.14,” the Board intends to clarify that all three provisions permit the regulation of demurrage. The proposed language also clarifies that this revocation is not intended to authorize the regulation of demurrage related to intermodal transportation. *See* 49 CFR 1039.13.

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. Section 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a “significant impact on a substantial number of small entities.” 605(b). 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 circumscribed or mandated” by the proposed rule. *White Eagle Coop. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

The proposed rule could potentially have a significant economic impact on a substantial number of small entities.⁸

⁸ For the purpose of RFA analysis, the Board defines a “small business” as only including those rail carriers classified as Class III rail 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, or \$39,194,876 or less when adjusted for inflation using 2018 data. Class II rail carriers have annual operating revenues of less than \$250 million in 1991 dollars or up to \$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.R.s.*, EP 748 (STB served June 14, 2019).

In the past 10 years, two of the six cases involving alleged violations of the statutes governing demurrage that have been referred to or filed with the Board have involved Class III carriers, and one of those two cases arose from a collection action instituted by the rail carrier. Parties may comment on information relevant to the burden, if any, the proposed rule would have on small rail carriers.

Description of the Reasons Why the Action by the Agency Is Being Considered

The Board instituted this proceeding to address an issue related to the Board’s recent proceeding, *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754. The Board commenced that docket by notice served on April 8, 2019, following concerns expressed by rail users and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring.

Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed rule is (1) to clarify the Board’s regulations governing exemptions for certain miscellaneous commodities and boxcar transportation to ensure that the regulations unambiguously state that demurrage continues to be subject to Board regulation and (2) to revoke, in part, the exemption for the transportation of certain agricultural commodities (except grain, soybeans, and sunflower seeds, which are already subject to the Board’s regulation) to provide that the exemption does not apply to the regulation of demurrage. Partial revocation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Partial revocation also would make the agricultural commodities exemption consistent with similar exemptions for certain miscellaneous commodities and boxcar transportation, neither of which applies to the regulation of demurrage. Partial revocation would help ensure that this segment of exempt transportation is not treated differently from other exempt, non-intermodal transportation. The legal basis for the proposed rule is 49 U.S.C. 10502(d), which gives the Board authority to revoke an exemption, in whole or in part, when necessary to carry out the rail transportation policy of 49 U.S.C. 10101.

Description of, and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

The proposed rule would apply to rail carriers charging demurrage in connection with the transportation of certain agricultural commodities, certain miscellaneous commodities, and boxcar transportation, subject to the exemptions at 49 CFR 1039.10, 1039.11, and 1039.14, respectively. It therefore could potentially apply to approximately 656 small rail carriers.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

The proposed rule would subject rail carriers that charge demurrage in connection with the transportation of certain agricultural commodities to the Board's statutes and regulations regarding demurrage. Regulation would not impose new reporting requirements directly or indirectly on small entities because the ICC Termination Act of 1995 removed regulatory paperwork burdens (with limited exceptions) on rail carriers to file tariffs or contract summary filings for rail shipments, exempt or non-exempt.⁹ To the extent that transportation of certain agricultural commodities would become subject to Board regulation of demurrage, carriers would be required to provide actual notice of demurrage liability and charges as a prerequisite to assessing demurrage. However, these types of notices are generally already provided, often electronically, for regulated commodities and certain other exempt transportation. Rail carriers wishing to collect demurrage may need to update their demurrage rules and charges to conform to this notice requirement to the extent they do not already do so. Only six cases involving alleged violations of the statutes governing demurrage have been referred to or filed with the Board in the past 10 years. Of those cases, only two involved a Class III carrier, and one of those two cases arose from a collection action instituted by the carrier. The Board seeks further comment on any recordkeeping or other compliance

requirements, if any, needed to conform to the proposed rule.

Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

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

Description of any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) any Exemption From Coverage of the Rule, or any Part Thereof, for Such Small Entities

One alternative to the proposed rule would be to exempt certain or all small rail carriers from coverage or compliance with the rule, in whole or in part (partially revoking the exemption from demurrage regulation for larger carriers but keeping the exemption in place for some or all small carriers or excepting small carriers from certain compliance obligations). This alternative, however, would greatly complicate cases involving demurrage disputes that involve both large and small carriers, and it could thwart the principles announced in the Board's proposed policy statement in Docket No. EP 757 and its other notice of proposed rulemaking regarding demurrage in Docket No. EP 759. Another alternative would be to take no action—thereby implementing no changes to the current regulations—however, this would also thwart the aforementioned principles. Neither alternative would accomplish the proposed rule's objective of making the agricultural commodities exemption consistent with similar exemptions for miscellaneous commodities and boxcar transportation, neither of which applies to the regulation of demurrage. Commenters should, if they advance any of these alternatives in their comments, address how such alternatives would be consistent or inconsistent with the goals envisioned

by the proposed rules, particularly whether such alternatives carry out the rail transportation policy of 49 U.S.C. 10101.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the **Federal Register**.

2. Comments are due by November 6, 2019. Reply comments are due by December 6, 2019.

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

4. This decision is effective on its service date.

List of Subjects in 49 CFR Part 1039

Agricultural commodities, intermodal transportation, railroads.

Decided: October 4, 2019.

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

Kenyatta Clay,
Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1039 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1039—EXEMPTIONS

■ 1. The authority citation for part 1039 continues to read as follows:

Authority: 49 U.S.C. 10502, 13301.

■ 2. Amend § 1039.10 by adding a sentence before the last sentence to read as follows:

§ 1039.10 Exemption of agricultural commodities except grain, soybeans, and sunflower seeds.

* * * Consistent with the exemptions in § 1039.11 and § 1039.14, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to § 1039.13. * * *

■ 3. Amend § 1039.11 by adding a sentence at the end of paragraph (a) to read as follows:

§ 1039.11 Miscellaneous commodities exemptions.

(a) * * * Consistent with the exemptions in § 1039.10 and § 1039.14, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to § 1039.13.

■ 4. Revise § 1039.14(d) to read as follows:

⁹ Railroads are required to file with the Board summaries of all contracts for the transportation of agricultural products within seven days of the contracts' effective dates. Summaries must contain specific information contained in 49 CFR part 1313 and are posted on the agency's website, www.stb.gov.

§ 1039.14 Boxcar transportation exemptions and rules.

* * * * *

(d) Carriers must continue to comply with Board accounting and reporting requirements. Railroad tariffs pertaining to the exempted transportation of commodities in boxcars will no longer apply. Consistent with the exemptions in § 1039.10 and § 1039.11, this exemption shall not apply to the regulation of demurrage, except the regulation of demurrage related to transportation that is subject to § 1039.13. This exemption shall remain in effect, unless modified or revoked by a subsequent order of the Board.

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1333

[Docket No. FD EP 759]

Demurrage Billing Requirements

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) proposes changes to the Board's regulations governing demurrage liability. Specifically, the Board proposes certain requirements regarding Class I carriers' demurrage invoices, as well as a requirement that a Class I carrier directly bill the shipper if the shipper and warehouseman agree to that arrangement and have so notified the rail carrier.

DATES: Comments are due by November 6, 2019. Reply comments are due by December 6, 2019.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 759, 395 E Street SW, Washington, DC 20423-0001. Written comments and replies will be posted to the Board's website at www.stb.gov.

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: This notice of proposed rulemaking (NPRM) arises, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754. The Board commenced that docket by notice served on April 8, 2019, following concerns expressed by users

of the freight rail network (rail users)¹ and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers, which the Board was actively monitoring. Specifically, in *Oversight Hearing on Demurrage & Accessorial Charges (April 2019 Notice)*, EP 754, slip op. at 2 (STB served Apr. 8, 2019), the Board announced a May 22, 2019 public hearing, which was later extended to include a second day;² directed Class I carriers to appear at the hearing; and invited shippers, receivers, third-party logistics providers, and other interested parties to participate. The notice also directed Class I carriers to provide specific information on their demurrage and accessorial rules and charges and required all hearing participants to submit written testimony, both in advance of the hearing. *April 2019 Notice*, EP 754, slip op. at 2-4. Comments were also accepted from interested persons who would not be appearing at the hearing. The Board received over 90 pre-hearing submissions from interested parties; heard testimony over a two-day period from 12 panels composed of, collectively, over 50 participants; and received 36 post-hearing comments.

The purpose of the hearing was "to receive information from railroads, shippers, receivers, third-party logistics providers, and other interested parties about their recent experiences with demurrage and accessorial charges, including matters such as reciprocity, commercial fairness, the impact of operational changes on such charges, capacity issues, and effects on network fluidity." *April 2019 Notice*, EP 754, slip op. at 2. The *April 2019 Notice* invited stakeholders to comment on, among other things, whether the tools available to manage demurrage and accessorial charges provide adequate data for shippers and receivers to evaluate whether charges are being properly assessed and to dispute the charges when necessary. *Id.* at 3. Participants in the hearing included railroads and rail users. Among the participants were third-party intermediaries, commonly known as warehousemen or terminal operators,³ which accept freight cars for loading and unloading but have no property

¹ As used in this proposed rule, the term "rail users" broadly means any person that receives rail cars for loading or unloading, regardless of whether that person has a property interest in the freight being transported.

² *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754, slip op. at 1 (STB served May 3, 2019).

³ This NPRM uses the terms "warehousemen" or "third-party intermediaries" to refer to these entities.

interest in the freight being transported. In oral testimony at the hearing and written submissions before and after the hearing, shippers and warehousemen (or their representatives) expressed dissatisfaction with their recent experiences with demurrage and accessorial charges. As is pertinent to this NPRM, parties from a broad range of industries raised concerns about demurrage billing practices, including issues with the receipt of invoices with insufficient information and issues arising from the experiences of warehousemen following the Board's adoption of the final rule in *Demurrage Liability (Demurrage Liability Final Rule)*, EP 707 (STB served April 11, 2014), codified at 49 CFR part 1333.

The Board now proposes rules intended to address several issues with demurrage billing practices raised by many stakeholders. Specifically, the Board proposes: (1) Certain requirements regarding Class I carriers' demurrage invoices, such as minimum information to be included on or with those invoices, and (2) a requirement that Class I carriers send any demurrage invoice related to transportation involving a warehouseman to the shipper if the shipper and warehouseman have agreed to that arrangement and have so notified the rail carrier. The Board also invites comments on this proposal and any other measures that might be appropriate to help further clarify demurrage billing practices; to ensure that the party responsible for causing the delays that result in demurrage charges is the party that pays for such charges; and to promote timely resolution of related disputes.

Background

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 national needs related to freight car use and distribution and maintenance of an adequate car supply.⁴ Demurrage is a charge that both compensates rail carriers for the expense incurred when rail cars are detained beyond a specified period of time (*i.e.*, "free time") for loading and unloading and serves as a

⁴ In *Demurrage Liability Final Rule*, EP 707, slip op. at 15-16, the Board clarified that private car storage is included in the definition of demurrage for purposes of the demurrage rules established in that decision. The Board uses the same definition of demurrage for purposes of this NPRM.