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Federal Communications Commission.

Kirk Burgee,

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1039

[Docket No. EP 760]

Exclusion of Demurrage Regulation From Certain Class Exemptions

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule amending its regulations governing the class exemptions for the rail transportation of certain miscellaneous

commodities and rail transportation by boxcar to state more clearly that the exemptions do not apply to the regulation of demurrage. The final rule also revokes, in part, the class exemption that currently covers the rail transportation of certain agricultural commodities so that the exemption will not apply to the regulation of demurrage, thereby making the agricultural commodities exemption consistent with similar class exemptions covering non-intermodal rail transportation.

DATES: This rule will be effective on April 3, 2020.

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 provisions of 49 U.S.C. 10502, which authorize the Board to exempt types of rail services from its regulation, also provide that the Board may revoke an exemption (in whole or in part) should it determine that regulation is necessary to carry out the rail transportation policy (RTP). See 49 U.S.C. 10502(d). Currently, the Board's regulations exempt the rail transportation of certain miscellaneous commodities (see 49 CFR 1039.11) and boxcar transportation (see 49 CFR 1039.14). Although the language in the regulations for these class exemptions has consistently been interpreted by courts and the agency to effectively exclude the regulation of demurrage, the Board finds these regulations would be more easily understood by more clearly stating the demurrage exclusion.

The rail transportation of agricultural commodities (except grain, soybeans, and sunflower seeds¹) is also exempt (see 49 CFR 1039.10). Unlike the miscellaneous commodities and boxcar transportation exemptions, however, the agricultural commodities exemption in section 1039.10 does not contain language that has been interpreted to effectively exclude the regulation of demurrage.

Last October, the Board issued a notice of proposed rulemaking to address both of the above issues. *Exclusion of Demurrage Regulation from Certain Class Exemptions (NPRM)*, EP 760 (STB served Oct. 7, 2019). The *NPRM* proposed first to modify the language in section 1039.11 and section

1039.14 to reflect the longstanding court and agency precedent by more clearly stating that the miscellaneous commodities and boxcar transportation exemptions do not apply to the regulation of demurrage. The *NPRM* also proposed to revoke, in part, the exemption applicable to non-intermodal rail transportation of agricultural commodities (section 1039.10) so that the exemption would not apply to the regulation of demurrage, thereby making the agricultural commodities exemption consistent with similar class exemptions covering non-intermodal rail transportation.²

After considering the comments, the Board will adopt the rule as proposed in the *NPRM*. Specifically, the Board will add language to section 1039.11 and section 1039.14 to state more clearly, consistent with longstanding court and agency precedent, that these exemptions do not apply to the regulation of demurrage. Additionally, the Board finds that regulation of demurrage related to the non-intermodal rail transportation of agricultural commodities is necessary to carry out the RTP of 49 U.S.C. 10101. Therefore, pursuant to 49 U.S.C. 10502(d), the Board revokes in part the exemption for agricultural commodities at section 1039.10 to provide that the exemption does not apply to the regulation of demurrage related to the non-intermodal rail transportation of these commodities.

Background

Demurrage is a charge that is assessed when rail cars are detained beyond a specified period of time (i.e., "free time") for loading and unloading. Demurrage is subject to Board regulation under 49 U.S.C. 10702, which, among other things, requires railroads to establish reasonable 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.³

This proceeding arose, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges*, Docket No. EP 754, in which numerous

² As noted in the *NPRM*, this partial revocation is not intended to authorize the regulation of demurrage related to intermodal transportation under the exemption at 49 CFR 1039.13.

³ 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 in this decision.

¹ Because the agricultural commodities exemption under 49 CFR 1039.10 excepts the rail transportation of grain, soybeans, and sunflower seeds, the rail transportation of those commodities continues to be subject to the provisions of subtitle IV of title 49 and is not impacted by this decision.

parties, including those involved in rail transportation subject to class exemptions, submitted comments and testified at the hearing on May 22 and 23, 2019, about, among other things, their concerns regarding recent railroad demurrage rules and charges.⁴ The U.S. Department of Agriculture (USDA) submitted comments, expressing its concerns, as well as the concerns of agricultural shippers generally, about “new and increasing [demurrage] charges and their unfair structure, which imposes steep penalties on customer performance without reciprocal penalties on railroad performance.” USDA Comments 2, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754. After considering the submissions and hearing testimony, along with the relevant laws and regulations, the Board issued the *NPRM* and sought public comment.

As discussed in the *NPRM*, the class exemptions for miscellaneous commodities and boxcar transportation already effectively exclude the regulation of demurrage. *See NPRM*, EP 760, slip op. at 4. Specifically, the regulations state that the exemption for miscellaneous commodities “shall not be construed as affecting in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation 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). Similarly, under the boxcar transportation exemption, the Board retains regulatory authority over “[c]ar hire and car service” and “[c]ar supply.” 49 CFR 1039.14(b)(1), (4). Both the courts and the agency have found that the language of these provisions effectively excludes demurrage from the miscellaneous commodities and boxcar transportation exemptions. *See NPRM*, EP 760, slip op. at 4. The existing agricultural commodities exemption, however, does not specifically exclude car hire, car service, car supply, or equipment usage. The *NPRM* explained that the Board sought to make the agricultural commodities exemption more consistent with the miscellaneous commodities and boxcar transportation exemptions and that the regulation of demurrage related to agricultural commodities was necessary to carry out the RTP.

Final Rule

In response to the *NPRM*, the Board received comments and reply comments

from over a dozen interested parties.⁵ After considering the comments, the Board is adopting the rule proposed in the *NPRM*. Text of the final rule is below.

Amendments to 49 CFR 1039.11 and Section 1039.14

As noted above, the exemptions in 49 CFR 1039.11 and 1039.14 have long been interpreted by courts and the agency to permit regulation of demurrage. *See 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) (“neither of these exemptions extends to controversies over assessment of demurrage”); *Del. & Hudson Ry. v. Offset Paperback Mfrs.*, 126 F.3d 426, 429 (2d Cir. 1997) (explaining that the language of section 1039.14(b) “encompass[es] demurrage charges”). The regulations themselves, however, do not explicitly refer to “demurrage.” To avoid confusion due to this lack of explicit reference, the *NPRM* proposed to formalize what has been established practice for many years by amending each of those regulations to clarify that they would “not apply to the regulation of demurrage, except the regulation of demurrage related to [intermodal] transportation that is subject to section 1039.13.” *NPRM*, EP 760, slip op. at 5. These amendments were proposed only to clarify and ensure that the regulations are consistent with court and agency precedent, not to make a substantive change. *Id.*

Most commenters either supported or did not oppose the proposed amendments to section 1039.11 and section 1039.14, and they will be adopted as proposed.⁶ These changes

⁵ The Board received comments and/or reply comments from the following: The Association of American Railroads (AAR), the American Forest & Paper Association (AF&PA), the American Iron and Steel Institute (AISI), ArcelorMittal USA LLC (ArcelorMittal), the American Short Line and Regional Railroad Association (ASLRRRA), Auriga Polymers, Inc. (Auriga), CSX Transportation, Inc. (CSXT), the Freight Rail Customer Alliance (FRCA), the Industrial Minerals Association—North America (IMA—NA), the Institute of Scrap Recycling Industries, Inc. (ISRI), International Paper, the National Industrial Transportation League (NITL), the Portland Cement Association (Portland Cement), and the Private Railcar Food and Beverage Association (PRFBA).

⁶ (See, e.g., Portland Cement Comments 1–2 (supporting the proposed amendments); AAR Comments 1 (stating that “AAR does not object” to these proposed amendments).) ASLRRRA generally objects to the proposed rule and, among other things, mentions these conforming amendments, arguing that the proposed rule would have significant adverse effects on small entities. (ASLRRRA Comments 3.) However, any objection that amending § 1039.11 and § 1039.14 would increase the burden on Class II and Class III

will clarify that it is not necessary to first seek an exemption revocation when demurrage matters relating to miscellaneous commodities and boxcar transportation are brought to the Board. Moreover, the amendments will state more clearly that carriers must comply with the statutes and Board regulations governing demurrage related to miscellaneous commodity and boxcar transportation. Although this was already the case given court and agency interpretations of the regulatory text, clarifying language will mitigate the potential for confusion among stakeholders and make the regulations more easily understood.

Several commenters asked the Board to add language stating that the exemptions in section 1039.11 and section 1039.14 also do not apply to accessorial programs. (AISI Comments 4; Portland Cement Comments 2; ArcelorMittal Comments 6 n.3.) The Board declines to add the requested language. As explained in the *NPRM*, EP 760, slip op. at 5, the purpose of the proposed amendments to section 1039.11 and section 1039.14 is “to ensure that the regulations will be clearly understood consistent with court and agency precedent, not to make a substantive change.” Court and agency precedent specifically addresses demurrage but does not discuss accessorial charges. *See Savannah Port*, FD 34920, slip op. at 7–8; *Del. & Hudson Ry.*, 126 F.3d at 429. Adding language addressing the broad category of accessorial charges, some of which are unrelated to the categories carved out of the section 1039.11 and section 1039.14 exemptions (e.g., car hire, car supply, car service, and the use of equipment) and which were not discussed in the precedent, would be a substantive change, not a clarification, beyond the purpose of the amendments proposed in the *NPRM*.⁷ The Board notes, however, that to the extent specific accessorial charges relate to categories that are already carved out (e.g., car hire, car supply, car service, and the use of equipment), they are already excluded from the section 1039.11 and section 1039.14 exemptions. Adding an express reference to “demurrage” to section 1039.11 and section 1039.14 does not change the scope of the existing

railroads, (see *id.* at 2–3), is unfounded. As noted, these amendments are not substantive changes but rather clarifications that ensure that the regulations will be clearly understood consistent with court and agency precedent.

⁷ (See also AAR Reply Comments 6–7 (opposing the addition of the broad category of accessorial charges because it would be contrary to the Board’s stated purpose for its clarification proposed in the *NPRM*.)

⁴ Comments and written testimony from these parties are available in Docket No. EP 754.

categories carved out of these exemptions.

Amendment to 49 CFR 1039.10

As noted above, numerous parties have expressed to the Board serious concerns about recent demurrage rules and charges. Those concerns, including those reflected in the extensive record compiled in Docket No. EP 754, 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 Oct. 7, 2019); *Demurrage Billing Requirements*, EP 759 (STB served Oct. 7, 2019). But as the Board noted in the *NPRM*, EP 760, slip op. at 5, the general principles and statutory goals articulated by the Board in those proceedings would be thwarted to the extent demurrage is not generally subject to regulation. To ensure that the regulatory relief available to agricultural shippers is on par with relief available to other non-intermodal rail transportation shippers and receivers, the Board proposed to partially revoke the exemption for agricultural commodities at section 1039.10 to exclude demurrage.

Three commenters (AAR, CSXT, and ASLRRRA) oppose the proposed amendment to section 1039.10. The Board will address their arguments below.

Market Power

AAR and CSXT argue that no revocation of any exemption is permissible unless the Board first makes a finding that railroads have market power over transportation of the relevant commodities. (AAR Comments 5–6; CSXT Comments 1–2.) AAR states that the *NPRM* is “legally insufficient due to the absence of any discussion of railroad market power over the commodities at issue.” (AAR Comments 5.) CSXT asserts that the Board must provide “evidence that the agency’s prior conclusions that railroads lack market power over those commodities are no longer correct” and that the *NPRM* “does not establish the essential element of any exemption revocation: proof that railroads possess and have abused market power for the particular commodities subject to the exemption.” (CSXT Comments 1.)

AAR and CSXT’s arguments mischaracterize the Board’s statutory

requirements. The exemption revocation statute, 49 U.S.C. 10502(d), provides that the Board may revoke an exemption in whole or in part when it finds that regulation “is necessary to carry out the transportation policy of” 49 U.S.C. 10101. Notably, the exemption-revocation provision does not say anything about market power, in contrast to the exemption-granting provision, which, as pertinent here, requires a finding that regulation is not needed to advance the RTP or to protect shippers from the abuse of market power. *Compare* 49 U.S.C. 10502(d) with *id.* section 10502(a).

Even though it is not mentioned in the exemption-revocation statute, the agency has treated market power as an important issue in some of its past exemption revocation decisions. *See, e.g., WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, NOR 42092 et al., slip op. at 3 (STB served Feb. 17, 2006) (“[W]e have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.”).⁸ The statute itself, however, does not require such an analysis.⁹ Moreover, the Board has decided exemption revocation cases without mentioning market power. *See, e.g., BNSF Ry.—Temporary Trackage Rights Exemption—Union Pac. R.R.*, FD 35963 (Sub-No. 1), slip op. at 2 (STB served Dec. 17, 2015) (granting partial revocation of an exemption because it would “promot[e] RTP policy goals”); *S. Plains Switching, Ltd.—Acquis. Exemption—BNSF Ry.*, FD 33753 (Sub-No. 1), slip op. at 2 (STB served Sept. 15, 2006) (revocation is appropriate “if we find that: Regulation is necessary to carry out the rail transportation policy of 49 U.S.C. [section] 10101; or

revocation is necessary to ensure the integrity of the Board’s processes”).¹⁰

Although not statutorily required to do so, and contrary to the contentions of AAR and CSXT that the Board failed to examine market power, the Board nevertheless addressed market power in the *NPRM*. The *NPRM* explained that in 1996, the Board found that a proposed exemption of demurrage from most regulation created the “potential . . . for an abuse of market power” because it could make shippers potentially subject to “unreasonable charges.” *NPRM*, EP 760, slip op. at 6 (quoting *Exemption of Demurrage from Regulation (Exemption of Demurrage)*, EP 462, slip op. at 4 (STB served Mar. 29, 1996)). The Board’s 1996 decision elaborates on how the proposed exemption could result in shippers being charged demurrage due to circumstances beyond their control:

As the shippers point out, demurrage, which could extend well beyond the free period covered by the proposed exemption, is often caused by factors that are beyond their control. Sometimes, the carriers themselves may be responsible for the conditions giving rise to car detention. Other times, demurrage is incurred not as a storage charge, but because cars cannot reach their intended destination due to congestion in the stream of transit. And in other instances, demurrage charges accrue due to circumstances beyond the control of either the carrier or the shipper (e.g., strikes, bunching, run-around, fire/explosion, and weather). Deregulating demurrage, shippers claim, could subject them to abusive practices resulting from circumstances over which they have no control.

The shippers’ concerns are not without basis. Although the arguments favoring the limited exemption have some appeal, the exemption could result in shippers paying unreasonable charges for detention that they did not cause. Thus, there is the potential with such an exemption for an abuse of market power.

Exemption of Demurrage, EP 462, slip op. at 4.

The testimony and comments in Docket No. EP 754 validate the Board’s concerns expressed in 1996 that there is a potential for abuse of market power in the context of demurrage. *See NPRM*, EP 760, slip op. at 6. As the Board explained in the *NPRM*, the testimony and comments “suggest that certain carrier demurrage rules and charges may

⁸ *See also Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 122–23 (2d Cir. 1993), in which the reviewing court deferred to the agency’s interpretation that “the initial inquiry in a reregulation case is whether the carrier has market power.”

⁹ AAR relies heavily on some of the legislative history provided in the Conference Report accompanying the ICC Termination Act of 1995 (ICCTA). (AAR Comments 5.) While the legislative history does provide that the conferees expected the Board, in considering requests for revocation, to “examine all competitive transportation factors that restrain rail carriers’ actions and that affect the [relevant] market for transportation,” as AAR emphasizes, it also provides that when the Board considers a revocation request, it should require either “demonstrated abuse of market power that can be remedied only by reimposition of regulation or that regulation is needed to carry out the national transportation policy.” H.R. Rep. No. 104–422, at 169 (1995), as reprinted in 1995 U.S.C.A.N. 850, 853 (emphasis added). The Conference Report language that AAR emphasizes does not overcome the clear statutory language giving the Board authority to revoke based solely on RTP concerns.

¹⁰ *See also Norfolk & W. Ry.—Trackage Rights Exemption—Norfolk S. Ry.*, FD 32961, slip op. at 2 (STB served Aug. 22, 1997) (“Under 49 U.S.C. [§] 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the RTP of 49 U.S.C. [§] 10101.”); *Consol. Rail Corp.—Declaratory Order—Exemption*, 1 I.C.C.2d 895, 900 (1986) (party seeking revocation of an exemption must show that “regulation is needed to carry out the national rail transportation policy.”).

not be reasonable,”¹¹ and the Board “is concerned about the imposition of demurrage charges for circumstances beyond the shipper’s or receiver’s reasonable control.” *Id.*

The concerns that led the Board to find the potential for abuse of market power in the 1996 decision—unreasonable practices and charges for circumstances beyond the shipper’s or receiver’s control—have been borne out by the Board’s observations of recent practices relating to demurrage rules and charges. For example, several carriers have implemented or announced significant reductions to “free time” (*i.e.*, the specified period of time for loading and unloading before demurrage charges are imposed) that, according to interested parties from a broad range of industries, have made it difficult, if not impossible, to avoid demurrage charges. *See Policy Statement on Demurrage & Accessorial Rules & Charges*, EP 757, slip op. at 2, 9–11 & nn.25–28, 30–31 (citing comments filed in Docket No. EP 754, and applicable to demurrage generally, from, among others, the Agricultural Retailers Association, the Corn Refiners Association, the National Grain and Feed Association (NGFA), NITL, and The Fertilizer Institute). In addition, the Board has received reports of recent increases in “bunched” deliveries of rail cars—deliveries that are not reasonably timed or spaced—that make it difficult to avoid demurrage charges no matter how promptly and efficiently the receiving party acts. *Id.* at 13–14 & nn.37–39 (citing comments filed in Docket No. EP 754 from, among others, NGFA, the American Chemistry Council, PRFBA, and the International Association of Refrigerated Warehouses). Agricultural shippers and organizations generally, and the USDA, are among the commenters that have expressed concerns about such changes in demurrage rules and charges.¹²

¹¹ The record in Docket No. EP 754 demonstrates that shippers and receivers can be particularly susceptible to unreasonable practices with respect to demurrage. For example, a shipper or receiver may not know in advance whether there will be issues in transit that could lead to loading or unloading delays subject to demurrage charges. Further, a shipper or receiver may not receive sufficient information to assess the validity of demurrage charges even after it receives an invoice. Concerns such as these are addressed in Docket Nos. EP 757 and EP 759, and the goals of those proceedings would be thwarted for the transportation of agricultural commodities at § 1039.10 to the extent demurrage is not subject to regulation.

¹² *See, e.g.*, USDA Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754; NGFA Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754; Agricultural Retailers Ass’n Comments, May 8, 2019, *Oversight Hearing on*

Therefore, the Board reaffirms its conclusion in the 1996 decision and finds partial revocation for these agricultural commodities is appropriate.

As the Board pointed out in the *NPRM*, EP 760, slip op. at 6, the 1996 *Exemption of Demurrage* decision broadly discussed the potential for the abuse of market power, and neither the participants at the Board’s hearing nor the commenters in this proceeding identified any basis for treating agricultural commodities in section 1039.10 differently from other commodities with respect to demurrage charges. The only difference that AAR raises between the transportation of these agricultural commodities and that of other commodities is that the agricultural commodities exemption did not exclude demurrage. (AAR Comments 7.) But that does not mean that the agency in 1983 affirmatively found that rail carriers should be free to levy demurrage charges at will. The 1983 decision establishing the agricultural commodities exemption contains no specific reference to demurrage. *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities*, 367 I.C.C. 298, 302–03 (1983).

The Board recognizes that the market power discussion is not particularly robust in either the 1983 decision, which broadly exempted many agricultural commodities, or the 1996 *Exemption of Demurrage* decision, which rejected a railroad proposal for a broad exemption for demurrage. But, as discussed above, the 1996 decision—unlike the 1983 exemption decision—did directly address the demurrage market power concerns that are before the Board today. So even if the general discussion of car supply in the 1983 decision, *see id.*, could be read as encompassing demurrage, the explicit language in the more recent decision in *Exemption of Demurrage* specifically finds that the potential for abuse of market power exists with respect to demurrage (and provides no reason to conclude that this potential varies by commodity). In addition, the practices documented in the Board’s 2019 demurrage hearing confirm that the Board’s concerns about the “potential” for abuses in 1996 were well-founded. Therefore, even if a finding about

Demurrage & Accessorial Charges, EP 754; Bunge North America Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754; California League of Food Producers Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754; Ag Processing, Inc. Comments, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754.

market power were necessary—which it is not—the specific findings in the 1996 decision are more persuasive than any inferences about market power and demurrage that might be drawn from the 1983 exemption decision.

Rail Transportation Policy

As noted above, the exemption revocation statute, 49 U.S.C. 10502(d), provides that the Board may revoke an exemption in whole or in part when it finds that regulation “is necessary to carry out the transportation policy of” 49 U.S.C. 10101. In the *NPRM*, the Board identified five relevant provisions of the RTP and explained how the revocation of section 1039.10 with respect to demurrage is necessary to carry out these policies.¹³ *NPRM*, EP 760, slip op. at 6 (quoting 49 U.S.C. 10101(2), (4), (5), (9), (15)).

AAR alleges that the *NPRM* “fails to even address the first two RTP factors,” specifically section 10101(1) (“to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail”) and section 10101(2) (“to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required”). (AAR Comments 3–4.) AAR acknowledges that the *NPRM* quotes part of section 10101(2) but argues that the Board failed to consider the remaining part. (AAR Comments 3.)

Regarding section 10101(1), demurrage is not generally considered to be a rate for “rail transportation.” *See, e.g., Demurrage Liability*, EP 707, slip op. at 10 (explaining that the term “rates for transportation” as used in 49 U.S.C. 10743 applies to “shipping or line-haul charges,” not demurrage, which is addressed in section 10746). Indeed, the statute, at 49 U.S.C. 10701–10707, contains elaborate procedures for determining rate reasonableness, none of which have been applied to demurrage. But even if demurrage were considered to be a rate,¹⁴ revocation

¹³ When the Board considers the RTP, it does not need to “address each and every one of the policy’s fifteen components, for some may be completely unrelated to the exemption.” *Ill. Commerce Comm’n v. ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986). Rather, the Board is entitled to wide deference when deciding which factors of the RTP are relevant in decisions regarding exemptions. *See Alaska Survival v. STB*, 705 F.3d 1073, 1083–84 (9th Cir. 2013).

¹⁴ The Board included a reference to § 10101(1) in *Exemption of Demurrage*, EP 462, slip op. at 3, in its discussion of eliminating antitrust immunity for the collective establishment of demurrage charges. However, the Board did not discuss § 10101(1) in the portion of the decision that declined to exempt demurrage from regulation, and the only discussion

here is fully consistent with section 10101(1). As the Board explained in the *NPRM* and in its 1996 decision, exempting demurrage from regulation could make “shippers potentially subject to ‘unreasonable charges.’” *NPRM*, EP 760, slip op. at 6 (quoting *Exemption of Demurrage*, EP 462, slip op. at 4). This is not a situation where “competition and the demand for services” are sufficient to ensure “reasonable” demurrage charges.

Regarding section 10101(2), AAR points out that the *NPRM* quotes only the part of the provision that discusses requiring fair and expeditious regulatory decisions when regulation is required, and not the part about minimizing the need for Federal regulatory control over the rail transportation system. (AAR Comments 3.) AAR concludes from this that the *NPRM* “fails to even address” section 10101(2). (AAR Comments 3.) But any action either adopting or revoking an exemption, by definition, looks at whether regulatory control over the rail system is needed, so in any exemption proceeding, the merits discussion will distinguish between situations where the Board should “minimize the need for Federal regulatory control over the rail transportation system” and situations “when regulation is required.” The *NPRM*, EP 760, slip op. at 5–7, explained why regulation of demurrage related to rail transportation of the commodities in section 1039.10 is necessary, which illustrates that the Board has concluded that this is a situation “when regulation is required”—and, therefore, not one where “minimiz[ing]” regulation is appropriate. The *NPRM* adequately considered section 10101(2) even though it did not quote it in its entirety.

Case-Specific Revocations

AAR contends that the *NPRM* fails to explain why the Board cannot handle partial revocations of section 1039.10 on a case-by-case basis where any aggrieved shipper can seek revocation in an individual case. (AAR Comments 7–8.) But demurrage cases tend to be smaller cases involving less money than is typically at stake in rate cases, which can involve tens of millions of dollars;¹⁵

about the meaning of “rates” in that portion was its citation to a shipper’s comment that “demurrage is not part of the transportation rate.” *Exemption of Demurrage*, EP 462, slip op. at 4 n.7.

¹⁵ Six cases involving alleged violations of the statutes governing demurrage have been referred to or filed with the Board in the past 10 years. Half of those cases involved contested demurrage charges of between \$70,000–\$110,000. See *Utah Central Ry.—Pet. for Declaratory Order—Kenco Logistic Services, LLC, Kenco Group, & Specialized Rail Service, Inc.*, FD 36131, slip op. at 3 (STB

thus, as the Board explained, requiring that demurrage-related revocations be processed case-by-case for agricultural commodities would unduly “add to the complexity, length, and cost of such proceedings to the parties and the Board.” *NPRM*, EP 760, slip op. at 6. Particularly given that no other non-intermodal rail transportation shipper or receiver is required to take the extra step of demurrage-related revocation requests, the Board further explained that requiring proceedings that are unnecessarily complex, lengthy, and costly would be inconsistent with the directive in 49 U.S.C. 10101(2) to “require fair and expeditious regulatory decisions when regulation is required,” and the directive in section 10101(15) to “provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” *NPRM*, EP 760, slip op. at 6.

Burden of the Exemption Revocation on Class II and III Carriers

ASLRRA raises concerns about the Board’s analysis of the impact of the partial revocation on Class II and Class III carriers. In particular, ASLRRA argues that the Board has not sufficiently analyzed the adverse effects on small entities that could be caused by the partial revocation. (ASLRRA Comments 3.) ASLRRA asserts that the rule would require small carriers to engage in more paperwork and recordkeeping, including by subjecting them to the requirement in 49 CFR 1333.3 that they provide actual notice of demurrage liability and charges as a prerequisite to assessing demurrage. (ASLRRA Comments 3.) However, as discussed further in the Regulatory Flexibility Act (RFA) section below, section 1333.3 already requires small (and large) carriers to provide such notice in order to collect demurrage charges. Given that transportation of the agricultural commodities exempted at section 1039.10 accounts for less than 1% of all rail traffic,¹⁶ the final rule adopted here only very slightly expands

served Mar. 20, 2019); *Portland & Western R.R.—Pet. for Declaratory Order—RK Storage & Warehousing, Inc.*, FD 35406, slip op. at 1 (STB served Sept. 29, 2011); *Compl. 6, Brampton Enters., LLC v. Norfolk S. Ry.*, NOR 42118 (Mar. 29, 2010). Even the case with the largest amount at issue during that period, *Finch Paper LLC—Petition for Declaratory Order*, FD 35981 (Pet. 2, Dec. 7, 2015), involved a fraction of what is typically at stake in a rate reasonableness matter. See, e.g., *Consumers Energy Co. v. CSX Transp.*, NOR 42142, slip op. at 44 (STB served Aug. 2, 2018) (rate case with award of \$94.9 million).

¹⁶ Analysis of the 2018 Waybill Sample shows that the relevant agricultural commodity traffic constitutes only 0.53% percent of all traffic by tonnage, and 0.62% by carload.

the amount of traffic for which small carriers would need to provide notice if they want to collect demurrage.

The Board understands why some small carriers, simply by virtue of their size, might believe they would have difficulty complying with certain regulations, including those relating to demurrage. But an exemption, or a revocation of an exemption, considers whether enforcement of an entire regulatory scheme enacted by Congress and implemented by the Board is appropriate, and ASLRRA has not attempted to show that its members, simply because of their size, should not be subject to any of the statutes and regulations governing demurrage for the agricultural commodities subject to the exemption. Indeed, with respect to miscellaneous commodities and boxcar transportation, court and agency precedent has already interpreted the demurrage statutes and regulations to apply to carriers of all sizes. See *NPRM*, EP 760, slip op. at 4–5. To the extent that certain regulations cause particular issues for small carriers, the Board has considered, and will continue to consider, the merits of excluding Class II and III carriers from the relevant regulations;¹⁷ however, ASLRRA has not shown that the Board ought not apply *any* of the statutes and regulations related to demurrage, including those that protect against the potential for unreasonable rules and charges. Accordingly, the Board finds no basis for a finding that the revocation should not apply to small rail carriers.

ASLRRA also claims that there is no “indication in this record that the STB notified the Small Business Administration Office of Advocacy of the proposed rules.” (ASLRRA Comments 3.) This is incorrect. A copy of the decision was “served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.” See *NPRM*, EP 760, slip op. at 10; see also Docket No. EP 760 service list (listing the U.S. Small Business Administration, Chief Counsel for Advocacy as a non-party).

ASLRRA’s comments express concerns about the impacts on small entities of the proposals in Docket Nos. EP 759 and EP 757. The Board notes, however, that the proposal in Docket No. EP 759 excludes Class II and III carriers from its requirements. Moreover, the proposed policy

¹⁷ The Board regularly analyzes and addresses the concerns of Class II and Class III railroads in its rulemaking process. See, e.g., *Demurrage Liability*, EP 707, slip op. at 20–21, 27–28; *Reporting Requirements for Positive Train Control Expenses & Invs.*, EP 706, slip op. at 12 (STB served Aug. 14, 2013).

statement in Docket No. EP 757 is not a proposed rule and is not subject to the RFA's requirements. *See* 5 U.S.C. 603(a).

Finally, ASLRRRA's concern that the proposed rule in this proceeding "could lead to the removal of the exemptions that are under consideration in Docket No. [EP] 704 [(Sub-No.1)]," which it says would create additional burdens, *see* ASLRRRA Comments 4, should be addressed in that docket.

Conclusion

For the reasons discussed above, the Board will clarify its regulations governing exemptions for certain miscellaneous commodities and boxcar transportation to ensure that the regulations more clearly state that demurrage continues to be subject to Board regulation. Additionally, the Board concludes that the records in this proceeding and in Docket No. EP 754 support a finding that regulation of demurrage related to the non-intermodal rail transportation of agricultural commodities is necessary to carry out the RTP, and that partial revocation of the exemption to achieve that purpose is warranted.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, section 604(a), or certify that the final rule would not have a "significant impact on a substantial number of small entities," section 605(b).¹⁸ 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 rule. *White Eagle Coop. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

In the *NPRM*, the Board stated that the proposed rule could potentially have a significant economic impact on a substantial number of small entities. The *NPRM* therefore included an initial regulatory flexibility analysis (IRFA) and request for comments in order to explore further the impact, if any, of the proposed rule on small rail carriers. A copy of the *NPRM* was served on the Chief Counsel for Advocacy, U.S. Small Business Administration (SBA). The Board received comments regarding the IRFA from one organization, ASLRRRA. Having reviewed ASLRRRA's comments, the Board finds it unlikely that the rule will have a significant economic impact on a substantial number of small entities. However, out of an abundance of caution, and to ensure that ASLRRRA's comments are fully considered, the Board now publishes this final regulatory flexibility analysis.¹⁹

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. In Docket No. EP 754, USDA, among others, submitted comments expressing concerns about the new and increasing demurrage charges related to the transportation of agricultural commodities generally and the potential for those charges to have negative effects on agricultural shippers and society. *See, e.g.,* USDA Comments 5, *Oversight Hearing on Demurrage & Accessorial Charges*, EP 754.

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

For the purposes of regulatory flexibility analysis, the relevant objective of this rule is 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.²⁰ Partial revocation—by removing barriers to shippers' ability to contest improper demurrage charges—is necessary to carry out the RTP of 49 U.S.C. 10101. Partial revocation also would make the exemption for the rail transportation of certain agricultural commodities at 49 CFR 1039.10 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 rail transportation. The legal basis for the final 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 RTP of 49 U.S.C. 10101.

Description of and, where feasible, an estimate of the number of small entities to which the final rule will apply.

The rule will 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, section 1039.11, and section 1039.14, respectively. It therefore could potentially apply to approximately 656 Class II and III rail carriers.

Description of the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule will subject rail carriers that charge demurrage in connection with the rail 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 ICCTA removed regulatory paperwork burdens (with limited exceptions) on rail carriers to file tariffs or contract summary filings for rail shipments, whether exempt or non-

¹⁸ 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).

¹⁹ Pursuant to the Small Business and Work Opportunity Act of 2007, 15 U.S.C. 631 note, the Board is also publishing a Small Entity Compliance Guide on the Board's website, available at www.stb.gov (click on "About STB", then "Agency Materials").

²⁰ Additionally, this rule also clarifies, for miscellaneous commodities and boxcar transportation, that court and agency precedent has already interpreted the demurrage statutes and regulations to apply to carriers of all sizes. Because this part of the rule simply codifies already existing law, it will not have a significant economic impact on a substantial number of small entities.

exempt.²¹ To the extent that the rail transportation of certain agricultural commodities will become subject to Board regulation of demurrage, carriers will be required to provide actual notice of the demurrage tariff under which liability would arise, prior to the placement of the rail cars, as a prerequisite to assessing demurrage. See 49 CFR 1333.3. However, these types of notices are generally already provided, often electronically, for regulated commodities and certain other exempt transportation.²² Rail carriers wishing to collect demurrage may need to update their demurrage practices 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 brought to 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.

In its comments, ASLRRRA asserts that the Board has overlooked adverse effects on small entities that could be caused by the exemption revocation. (ASLRRRA Comments 3.)²³ ASLRRRA claims that the rule would require small carriers to engage in more paperwork and recordkeeping. In response to the Board's statement that, by adopting the rule, small carriers would be subject to the requirement that they provide actual notice of demurrage liability and charges as a prerequisite to assessing demurrage, ASLRRRA states that "many

small railroads do not issue such notices today and many do not have the capacity to send notices electronically." (*Id.*) However, section 1333.3 already requires small (and large) carriers to provide such notice "in [either] written or electronic form" in order to collect demurrage charges. Given that transportation of the agricultural commodities exempted at section 1039.10 accounts for less than 1% of all traffic, the final rule adopted here only slightly expands the amount of traffic for which small carriers must provide notice if they want to collect demurrage.

The Board notes that the rule adopted here does not prescribe specific carrier action and that the existing rule at section 1333.3 also does not require carriers to do anything—it simply states that a carrier may not collect demurrage from a party unless that party has first been given notice. While ASLRRRA alludes generally to an increased risk of litigation for small railroads if the Board were to adopt this rule "as well as" taking other actions, ASLRRRA does not specify any particular increased litigation risk from this rule. (ASLRRRA Comments 3.) Nor is any such risk likely to be significant, given that demurrage related to the rail transportation of miscellaneous commodities and boxcar transportation was already subject to Board regulation and exemption revocation was an available remedy for agricultural commodities exempted at section 1039.10 (which, as noted, constitute less than 1% of overall rail traffic).

ASLRRRA also cites potential burdens that small carriers might incur if the Board were to revoke exemptions that are currently under consideration in a separate, unrelated docket. (ASLRRRA Comments 4.) However, for the purpose of this final regulatory flexibility analysis, the Board is tasked with considering the impacts of the rule at issue in this docket.

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

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

Description of any significant alternatives to the final rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the 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.

The Board considered two alternatives to the final rule: (1) Taking no action (thereby implementing no changes to the current regulations), and (2) exempting 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).

ASLRRRA asserts that "the best alternative . . . is for the Board to take no action," but that, if adopted, the rule should exempt all Class II and Class III carriers. (ASLRRRA Comments 4.) The Board explained in its initial regulatory flexibility analysis that both alternatives would thwart the principles announced in the Board's proposed policy statement in Docket No. EP 757, and that neither alternative would accomplish the rule's objective of making the agricultural commodities exemption consistent with similar exemptions for miscellaneous commodities and boxcar transportation.²⁴ With respect to the second alternative, the Board also explained that it would greatly complicate cases involving demurrage disputes that involve both large and small carriers.

ASLRRRA takes exception to the Board's observation that exempting Class II and III carriers would complicate cases involving demurrage disputes, arguing that "it is likely that small railroads would play little or no substantive part in any such case, so a case could easily proceed" without the small railroad having to participate, and that "fewer parties in a case would simplify the case, not complicate it." (ASLRRRA Comments 4–5.) However, when a small railroad chooses to collect demurrage as the originating or terminating carrier, its participation to facilitate the resolution of cases involving disputed charges is both necessary and appropriate.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of

²¹ All 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.

²² In the rulemaking adopting § 1333.3, ASLRRRA acknowledged that only a subset of Class III rail carriers would need to hire or equip personnel to perform the task of providing notice of their demurrage tariff to their customers. See *Demurrage Liability*, EP 707, slip op. at 27 (STB served Apr. 11, 2014).

²³ ASLRRRA also points to the proposed regulation in *Demurrage Billing Requirements*, EP 759, and proposed policy statement in *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, as possibly having adverse effects on small entities. (ASLRRRA Comments 3.) However, as noted, the proposal in Docket No. EP 759 excludes Class II and Class III carriers from its requirements, and the policy statement proposed in Docket No. EP 757 does not impose compliance obligations or requirements that "circumscribe[] or mandate []" the conduct of any entity, small or otherwise. *White Eagle*, 553 F.3d at 480. The Board also noted in Docket No. EP 757 that it will remain attentive to the need to consider future action to ensure that smaller rail carriers, as well as shippers and receivers, are not being forced to bear the burden of delays due to actions not attributable to them. *Policy Statement on Demurrage & Accessorial Rules & Charges*, EP 757, slip op. at 6 (STB served Oct. 7, 2019) (citing *Utah Central*, FD 36131, slip op. at 12 n.38).

²⁴ The "no action" alternative would also thwart the principles established in the Board's notice of proposed rulemaking in Docket No. EP 759 relating to demurrage billing requirements for Class I carriers.

Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 49 CFR Part 1039

Agricultural commodities, intermodal transportation, railroads.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the Federal Register.

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

3. This decision is effective April 3, 2020.

Decided: February 28, 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 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 prior to the last sentence (after the table) 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) (after the table) 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. Amend § 1039.14 by revising paragraph (d) to read as follows:

§ 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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