Dated: April 19, 2012.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Columbia River.

[FR Doc. 2012–11239 Filed 5–9–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1333

[Docket No. EP 707]

Demurrage Liability

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

ACTION: Notice of proposed rulemaking.

SUMMARY: Through this notice of proposed rulemaking (NPRM), the Board is proposing a rule establishing that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the ''free time'' provided in the carrier's governing tariff will generally be responsible for paying demurrage, if that person has actual notice, prior to rail car placement, of the demurrage tariff establishing such liability. The Board also clarifies that it intends to construe U.S. Code provisions titled ''Liability for payment of rates,'' as applying to carriers' line-haul rates, but not to carriers' charges for demurrage.

DATES: Comments are due by June 25, 2012. Reply comments are due by July 23, 2012.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 707, 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Craig Keats at (202) 245–0260. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Demurrage is a charge for detaining railroad-owned rail freight cars for loading or unloading beyond a specified amount of time (called ''free time''). Demurrage has compensatory and penalty functions. It compensates rail carriers for the use of railroad equipment, and by penalizing those who detain rail cars for too long, it encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system. *See* 49 U.S.C. 10746.

Historical Regulation of Demurrage. Since the earliest days of railroad regulation, parties have had disputes about who, if anyone, should have to pay demurrage. Certain principles for allocating the liability of intermediaries for holding carrier equipment became established over time and were reflected in agency and court decisions.[1] After reviewing recent court decisions, however, we believe that it is appropriate to revisit the matter and to consider whether the Board's policies should be revised.

Demurrage collection cases may only be brought in court, and thus much of the law governing the imposition of demurrage liability has been established judicially. However, the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995) (ICCTA), also provides that demurrage is subject to Board regulation. Specifically, 49 U.S.C. 10702 requires railroads to establish reasonable rates and transportation-related rules and practices, and 49 U.S.C. 10746 requires railroads to compute demurrage and to establish demurrage-related rules ''in a way that fulfills the national needs related to'' freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed on the ''consignor'' (the shipper of the goods) for delays in loading cars at origin and on the ''consignee'' (the receiver of the goods) for delays in unloading cars and returning them to the carrier at destination.[2]

This agency has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.[3] The disputes between railroads and parties that originate or terminate rail cars can involve relatively straightforward application of the carrier's tariffs to the circumstances of the case. Complications can arise, however, in cases involving warehousemen or other ''third-party intermediaries'' who handle the goods but have no property interest in them. A consignee that owned the property being shipped had common-law liability (for both freight charges and demurrage) when it accepted cars for delivery,[4] but warehousemen typically are not owners of the property being shipped (even though, by accepting the cars, they are in a position to facilitate or impede car supply). Under the legal principles that developed, in order for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability beyond the mere fact of handling the goods shipped.[5]

What became the most important factor under judicial and agency precedent was whether the warehouseman was named the consignee on the bill of lading.[6] Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff[7] may not lawfully impose such

[1] *See Responsibility for Payment of Detention Charges, E. Cent. States* (*Eastern Central*), 335 I.C.C. 537, 541 (1969) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), *aff'd, Middle Atl. Conference* v. *United States* (*Middle Atlantic*), 353 F. Supp. 1109, 1114–15 (D.D.C. 1972) (3-judge court sitting under the then-effective provisions of 28 U.S.C. 2321 *et seq.*).

[2] While the Interstate Commerce Act does not define ''consignor'' or ''consignee,'' the Federal Bills of Lading Act uses the term ''consignor'' to refer to ''the person named in a bill of lading as the person from whom the goods have been received for shipment,'' 49 U.S.C. 80101(2), and the term ''consignee'' to refer to ''the person named in a bill of lading as the person to whom the goods are to be delivered,'' 49 U.S.C. 80101(1).

[3] *E.g., Eastern Central; Springfield Terminal Ry.—Pet. for Declaratory Order—Reasonableness of Demurrage Charges,* NOR 42108 (STB served June 16, 2010); *Capitol Materials Inc. —Pet. for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry.,* NOR 42068 (STB served Apr. 12, 2004); *R. Franklin Unger, Trustee of Ind. Hi-Rail Corp.—Pet. for Declaratory Order—Assessment & Collection of Demurrage & Switching Charges,* NOR 42030 (STB served June 14, 2000); *South-Tec Dev. Warehouse, Inc.—Pet. for Declaratory Order—Ill. Cent. R.R.,* NOR 42050 (STB served Nov. 15, 2000); *Ametek, Inc.—Pet. for Declaratory Order,* NOR 40663, *et al.* (ICC served Jan. 29, 1993), *aff'd, Union Pac. R.R.* v. *Ametek, Inc.,* 104 F.3d 558 (3d Cir. 1997).

[4] *Pittsburgh, Cincinnati, Chicago & St. Louis Ry.* v. *Fink,* 250 U.S. 577, 581 (1919); *Norfolk S. Ry.* v. *Groves* (*Groves*), 586 F.3d 1273, 1278 (11th Cir. 2009), *cert. denied,* 131 S.Ct. 993 (2011).

[5] *See, e.g., Smokeless Fuel Co.* v. *Norfolk & W. Ry.,* 85 I.C.C. 395, 401 (1923).

[6] A bill of lading is the transportation contract between the shipper and the carrier for moving goods between two points. Its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

[7] Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called ''filed rate doctrine.'' *See Maislin Indus., Inc.* v. *Primary Steel, Inc.,* 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICCTA. Nevertheless, although tariffs are no longer filed

demurrage charges on a warehouseman who is not the owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation.[8]

Recently, a new question arose: who should bear liability when an intermediary that accepts rail cars and detains them too long is named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee? On that issue, the courts of appeals have split.[9] The legal debate and resulting conflicting opinions prompted the Board to reexamine its existing policy and to assist in providing clarification for the industry.

Conflict Among the Circuits. In *Groves,* the United States Court of Appeals for the Eleventh Circuit looked to contract principles and concluded that a party shown as a consignee in the bill of lading is not in fact a consignee, and hence is not liable for demurrage charges, unless it expressly agrees to the terms of the bill of lading describing it as a consignee, ''or at the least, [is] given notice that it is being named as a consignee in order that it might object or act accordingly.'' [10] On virtually identical facts, the United States Court of Appeals for the Third Circuit held in *Novolog* that ''recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. 10743(a)(1).'' [11] The statutory notice provision of section 10743(a)(1), which is also referred to in *Groves,* states, among other things, that a person receiving property as an agent for the shipper or consignee will not be liable for ''additional rates'' that may be found due beyond those billed at the time of delivery, if the receiver notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.[12]

After reviewing these recent court decisions, the Board determined that it needed to revisit its demurrage precedent to consider whether the agency's policies accounted for current statutory provisions and commercial practices. Thus, on December 6, 2010, the Board published an Advance Notice of Proposed Rulemaking (ANPR) [13] that raised a series of specific questions about how the demurrage process works and sought public input on whether the Board should issue a new rule that does not follow the reasoning of *Novolog* or *Groves,* but that instead would provide that demurrage charges may apply when cars are accepted by a party with notice of the carrier's demurrage charges. Shortly thereafter, the United States Supreme Court denied a request that it review the split in the circuits. *Norfolk S. Ry.* v. *Groves,* 131 S.Ct. 993 (2011) (mem.).

Additional information is contained in the Board's decision. The full decision is available on the Board's Web site at *www.stb.dot.gov.*

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Comments are due by June 25, 2012; replies are due by July 23, 2012.

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 on its service date.

List of Subjects in 49 CFR Part 1333

Demurrage, Railroads.

Decided: May 3, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter D, of the Code of Federal Regulations by adding part 1333 to read as follows:

PART 1333—DEMURRAGE LIABILITY

Sec.

Authority: 49 U.S.C. 721.

§ 1333.1 Demurrage defined.

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained beyond a specified period of time (i.e., free time) for loading or unloading, and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.

§ 1333.2 Who may charge demurrage.

Demurrage shall be assessed by the serving rail carrier, i.e., the rail carrier providing rail cars to a shipper at an origin point or delivering them to a receiver at an end-point or intermediate destination. A serving carrier and its customers (including those to which it delivers rail cars at origin or destination) may enter into contracts pertaining to demurrage, but in the absence of such contracts, demurrage will be governed by the demurrage tariff of the serving carrier.

§ 1333.3 Who is subject to demurrage.

Any person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars. However, if that person is acting as an agent for another party, that person is not liable for demurrage if that

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with the agency, rail carriers may still use them to establish and announce the terms of the services they hold out.

[8] *Eastern Central,* 335 I.C.C. at 541.

[9] *Compare Groves, supra, with CSX Transp. Co.* v. *Novolog Bucks Cnty.* (*Novolog*), 502 F.3d 247 (3d Cir. 2007).

[10] 586 F.3d at 1282. Relying in part on *Illinois Central Railroad* v. *South Tec Development Warehouse, Inc.* (*South Tec*), 337 F.3d 813 (7th Cir. 2003), which did not directly decide the issue but which indicated a predilection toward such a result, the court in *Groves* found the warehouseman not to be a consignee and thus not liable for demurrage even though the warehouse accepted the freight cars as part of its business and held them beyond the period of free time.

[11] 502 F.3d at 254. The court in *Novolog* cited *Middle Atlantic,* the Uniform Commercial Code, and the Federal Bills of Lading Act to find that a warehouseman (or, in that case, a transloader) could be a ''legal consignee,'' even if it was not the ''ultimate consignee.'' 502 F.3d at 258–59. The court found that a contrary result, such as the one suggested in *South Tec,* would frustrate what it viewed as the plain intent of section 10743: ''to facilitate the effective assessment of charges by establishing clear rules for liability'' by permitting railroads to rely on bills of lading and ''avoid wasteful attempts to recover [charges] from the wrong parties.'' *Id.* The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. *Id.* at 259.

[12] 49 U.S.C. 10743(a)(1) states in full:

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—(A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

[13] *Demurrage Liability,* EP 707 (STB served Dec. 6, 2010), 75 FR 76,496 (Dec. 10, 2010).

person has provided the rail carrier with actual notice of the agency status and the identity of the principal.

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

Appendix

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

Description of Collection

Title: New Submissions Under the Board's Demurrage Liability Regulations.

OMB Control Number: 2140–XXXX.

STB Form Number: None.

Type of Review: New collection.

Respondents: Railroads that charge demurrage pursuant to a tariff, rather than a contract, and parties that receive rail cars as shipper agents and wish to avoid liability for demurrage under a tariff.

Number of Respondents: Approximately 650 railroads and approximately 75 receivers acting as shipper agents.

Estimated Time per Response: No more than 8 hours for each railroad; no more than one hour for each shipper agent.

Frequency: Railroads charging the demurrage under a tariff, rather than a contract, would have to provide notice to receivers of rail cars of the demurrage that may accrue with each delivery of cars. Similarly, persons receiving rail cars pursuant to a tariff, rather than a contract, would have to inform the servicing rail carrier whenever they acted solely in agency capacity in order to avoid potential demurrage on those cars.

Total Burden Hours (annually): No more than 2,208 (6,625 hours averaged over 3 years, based on the assumption that it will take each of 650 railroads 8 hours to provide initial notice to its customers (for a total of 5,200 hours) and that it will take each of an estimated 75 warehouses that might consider asserting agency status 1 hour to provide notice to each an average of 19 customers (for a total of 1,425 hours)). We anticipate that the notices required under the proposed rule will consist of electronic communications between parties that are already in communication regarding the transaction and that the burden will be minimal after the first year as the customer population for railroads tends to be rather stable and only new customers would have to be notified.

Total ''Non-Hour Burden'' Costs: None identified.

Needs and Uses: The new information collection, which involves notification requirements, is necessary to ensure that parties to rail transactions provide and/or receive notice regarding any potential liability for demurrage charges.

Retention Period: Under the proposed rule, these records will not be collected or retained by the agency, nor does the proposed rule impose a retention requirement on the parties to the transaction.

[FR Doc. 2012–11189 Filed 5–9–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2011–0019: 4500030113]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Arapahoe Snowfly as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Arapahoe snowfly (*Capnia arapahoe*) as endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of the best available scientific and commercial information, we find that listing the Arapahoe snowfly as threatened or endangered is warranted. Currently, however, listing the Arapahoe snowfly is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add the Arapahoe snowfly to our candidate species list. We will develop a proposed rule to list the Arapahoe snowfly as our priorities allow. We will make any determination on critical habitat during development of the proposed listing rule. In any interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review.

DATES: The finding announced in this document was made on May 10, 2012.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R6–ES–2011–0019. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Colorado Field Office, 134 Union Blvd., Suite 670, Lakewood, CO 80228. Please submit any new information, materials, comments, or questions concerning this finding to the above street address.

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, Colorado Field Office (see **ADDRESSES**); by telephone at 303–236–4773, or by facsimile at 303–236–4005. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Actions

On July 30, 2007, we received a petition from Forest Guardians (now WildEarth Guardians), requesting that the Service consider for listing as either endangered or threatened 206 species in our Mountain-Prairie Region ranked as G1 or G1G2 by the organization NatureServe (except those that are currently listed, proposed for listing, or candidates for listing). The Arapahoe snowfly was 1 of the 206 species included in the petition. On March 19, 2008, WildEarth Guardians filed a complaint indicating that the Service failed to make a preliminary 90-day finding on their two multiple-species petitions—one for mountain-prairie species, and one for southwestern species. We subsequently published two 90-day findings, including one on February 5, 2009 (74 FR 6122) for the mountain-prairie species. That finding concluded that the petition did not present substantial scientific or commercial information indicating that listing may be warranted for 165 of the 206 species, including the Arapahoe snowfly.

On April 6, 2010, we received a petition, of the same date, from The Xerces Society for Invertebrate Conservation, Dr. Boris Kondratieff, Save the Poudre: Poudre Waterkeeper,