significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

*Indian Tribal Governments*

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

*Energy Effects*

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

*Technical Standards*

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

*Environment*

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves establishing a Regulated Navigation Area restricting tugs with less than 3,000 total horsepower from transiting the Hudson River when ice thickness is on average eight inches or greater. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.165 to read as follows:

**§ 165.165 Regulated Navigation Area; Hudson River south of the Troy Locks, New York.**

(a) *Regulated navigation area.* All navigable waters of the Hudson River south of the Troy Locks.

(b) *Definitions.* The following definitions apply to this section:

(1) Designated representative means any Coast Guard commissioned, warrant, or petty officer, or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port (COTP) New York.

(2) Horsepower (HP) means the total maximum continuous shaft horsepower of all the vessel's main propulsion machinery.

(c) *Applicability.* This section applies to tugs with less than 3,000 horsepower when engaged in towing operations.

(d) *Regulations.* (1) Except as provided in paragraph (c)(3) of this section, vessels less than 3,000 horsepower while engaged in towing operations are not authorized to transit that portion of the Hudson River south of the Troy Locks when ice thickness on average is eight inches or greater.

(2) All Coast Guard assets enforcing this Regulated Navigation Area can be contacted on VHF marine band radio, channel 13 or 16. The COTP can be contacted at (718) 354–4356, and the public may contact the COTP to suggest changes or improvements in the terms of this Regulated Navigation Area.

(3) All persons desiring to transit through a portion of the regulated area that has operating restrictions in effect must contact the COTP at telephone number (718) 354–4356 or on VHF channel 13 or 16 to seek permission prior to transiting the affected regulated area.

(4) The COTP will notify the public of any changes in the status of this Regulated Navigation Area by Marine Safety Information Broadcast on VHF–FM marine band radio, channel 22A (157.1 MHZ).

Dated: November 29, 2010.

**Daniel A. Neptun,**

*Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.*

[FR Doc. 2010–31118 Filed 12–9–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

### 49 CFR Parts 1030–1039

**[Docket No. EP 707]**

### Demurrage Liability

**AGENCY:** Surface Transportation Board (Board or STB).

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** Through this Advance Notice of Proposed Rulemaking (ANPR), the Board is instituting a proceeding regarding demurrage, *i.e.,* charges for holding rail cars. The agency's intent is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.

**DATES:** Comments are due by January 24, 2011. Reply comments are due by February 23, 2011.

**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: STB Ex Parte No. 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 1–800–877–8339.)

**SUPPLEMENTARY INFORMATION:** Demurrage—the assessment of charges for holding railroad-owned rail freight cars for loading or unloading beyond a specified amount of time—has compensatory and penalty functions. It compensates car owners for the use of their equipment, and by penalizing those who hold cars 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.

Since the earliest days of railroad regulation, there have been disputes about who should be responsible for paying demurrage. Certain principles for allocating liability for holding carrier equipment became well established over time and were reflected in agency and court decisions.[1] Regulatory and technological changes over the years, however—such as the elimination of required tariff-filing and the advances in electronic commerce—suggest a need to revisit the matter to consider whether the Board's policies should be revised to account for current statutory provisions and commercial practices.

The Board has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.[2] Our attention became focused on the possible need to examine our policies, however, when some tension developed in the Federal courts of appeals regarding the liability of warehousemen and similar third-party car receivers for railroad demurrage.[3] As we reviewed the two lines of analysis, we began to consider the possibility that neither court's approach produces an optimal outcome given the current statutory and commercial environment. We therefore are instituting this proceeding in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.

The Interstate Commerce Act (IC Act), as amended by the ICC Termination Act of 1995 (ICCTA), provides that 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 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 at origin and on the "consignee" (the receiver of the goods) for delays at destination.

An important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other "intermediate" stops in the transportation chain before reaching their ultimate destination. Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery,[4] the issue was more complicated for warehousemen, who typically are not "owners" of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped.[5] And what became the most important "other basis" was whether the warehouseman was shown as the consignee on the bill of lading.[6] Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff[7] may not lawfully assess such charges on a warehouseman who is not the beneficial 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, "e.g., a warehouseman who receives the freight pursuant to an 'in care of' designation."[8]

The absence of any litigation over the matter suggests that the accepted rule described above provided some degree of certainty for several decades. In recent years, however, a new issue has arisen: what is the law when a warehouseman who accepts rail cars and holds 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 Eleventh Circuit in *Groves* looked to contract principles and found that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee.[9] On virtually identical facts, the Third Circuit in *Novolog* held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the

[1] *See Responsibility for Payment of Detention Charges, Eastern Cent. States,* 335 I.C.C. 537, 541 (1969) (*Eastern Central*) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), *aff'd, Middle Atl. Conference* v. *United States,* 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.) (*Middle Atlantic*).

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

[3] *Compare Norfolk S. Ry. v. Groves,* 586 F.3d 1273 (11th Cir. 2009) (*Groves*), *pet. for cert. pending,* No. 08–15418 (filed Apr. 6, 2010), *with CSX Transp. Co.* v. *Novolog Bucks Cnty.,* 502 F.3d 247 (3d Cir. 2007) (*Novolog*).

[4] *Pittsburgh, Cincinnati, Chicago & St. Louis Ry.* v. *Fink,* 250 U.S. 577, 581 (1919); *Groves,* 586 F.3d at 1278.

[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 basic transportation contract between the shipper and the carrier; 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.

[8] *Eastern Central,* 335 I.C.C. at 541. The "in care of" designation refers to the principle of agency law under which a consignee—although presumed to be an owner generally liable for freight charges upon acceptance of goods—could be relieved of such liability if the carrier were made aware that the receiver of the goods was accepting the goods only as an agent for the actual owner. The *Novolog* court, 502 F.3d at 255, found that agency principles such as these became incorporated into the IC Act in the 1920s in what is now 49 U.S.C. 10743(a). *See Novolog,* 502 F.3d at 255. That statutory provision states that a consignee that informs the railroad in writing that it is only an agent is not liable for "additional rates that may be found due after delivery."

[9] Relying in part on *Illinois Cent. R.R.* v. *South Tec Dev. Warehouse, Inc.,* 337 F.3d 813 (7th Cir. 2003) (*South Tec*), which did not directly decide the issue but that indicated a predilection toward such a result, *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.

notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. 10743(a)(1)."[10] That provision relieves certain receivers of property from liability for certain rates if it notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.

**Discussion**

We believe that broad public input would assist us in addressing the liability of a warehouseman who accepts rail cars and holds them too long, but who asserts either that it did not know that it had been designated the consignee on the bill of lading or that it affirmatively asked the shipper not to name it consignee. Indeed, even with the extensive discussions in *Novolog* and *Groves,* the best answer in this matter is not readily apparent. *Novolog* relies on a broad reading of section 10743(a)(1) (one that the ICC appeared to share), along with policy reasons why a rule requiring that a warehouseman explicitly accept potential demurrage liability would not be a good idea. *Groves* relies on contract law principles to support its view that a receiver of goods must explicitly agree before it can be a consignee subject to liability. But neither approach seems clearly superior, and indeed there are shortcomings with each.

*Novolog,* for example, cites valid transportation reasons for putting liability on the party best able to release the rail cars (the warehouseman) or to decline the cars if it knows that its facility is already overcrowded. Yet *Novolog* places dispositive weight on the designation given to the warehouseman in the bill of lading, which historically was a paper document that was consciously agreed upon by the carrier and the shipper (although it did not require any action by the consignee). Today, however, transactional paperwork such as the bill of lading is largely handled electronically, and the role of the railroad, the shipper, and the listed consignee in making the designation is evolving. In *Groves,* for example, it is unexplained why some of the bills named the warehouseman as the consignee while others did not.

*Groves,* for its part, is unsatisfying in various ways. First, it overlooks the fact that, because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C. 10746 (efficient use of freight cars). Moreover, although we share the concern that a party might be made liable for charges without its knowledge,[11] as the decision in *Novolog* points out, it is also true that the warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the *de facto* status of the parties.

Finally, notwithstanding the ICC's finding in *Eastern Central* in 1969, we are not certain that the provisions of 49 U.S.C. 10743 should be interpreted to apply to demurrage. The language of section 10743 ("[l]iability for rates for transportation") can be read to focus on the shipping charges themselves, and not on accessorial charges such as demurrage. As explained in *Hub City* and *Hall,*[12] the statutory provision, which was first enacted in the Transportation Act of 1920 as an antidiscrimination provision, was modified in 1927 to address the liability of a sales agent for freight charges that turned out to be higher than those originally paid. It was further modified in 1940 to address the liability of an agent *vis a vis* a beneficial owner for additional freight charges resulting when shipments were reconsigned and refused at destination. Neither event speaks to application of the provision to demurrage. Moreover, because section 10743(b) does not apply to a shipment that is prepaid, applying section 10743 to demurrage as well as line-haul charges could have the curious effect of making the consignee liable for demurrage if the shipment is not prepaid, but not liable for the same conduct—holding the cars too long—if it is prepaid. That would be in some tension with the historic (and statutory, *see* 49 U.S.C. 10746) purposes of demurrage: to compensate the equipment owner and to facilitate prompt return of cars.

For all of these reasons, we are instituting this proceeding to explore whether we should look to a new way of determining the liability of warehousemen for demurrage.

One possible rule would place liability for demurrage on the receiver of the rail cars, regardless of the designations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability. (If the receiver were an agent of another party, we assume that the usual principal-agent rules would govern, although we request comments on this point.) What constitutes "adequate notice" could be decided on a case-by-case basis either by the Board or the Federal courts in collection actions, or it could be established by rule. Given the potential industry-wide implications of such rules, broad public input is warranted.

Accordingly, we seek comment on these matters. In their comments, parties may address any relevant matters, but we specifically seek comment on the following, which we believe will assist us in developing an appropriate way of allocating liability that advances the purposes of demurrage and also is consistent with the IC Act, contract law, agency law, and principles of notice/fairness:

- Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in *Eastern Central,* is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?
- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.
- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or

[10] 502 F.3d at 254. *Novolog* cited *Middle Atlantic,* the Uniform Commercial Code, and the Federal Bills of Lading Act to find (502 F.3d at 258) that a warehouseman (or, in that case, a transloader) could be a "legal consignee" even if it was not the "ultimate consignee." 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 § 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." 502 F.3d at 258–59. The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability under § 10743(a) simply by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. *Id.* at 259.

[11] *See West Point Relocation, Inc. & Eli Cohen–Petition for Declaratory Order,* FD 35290 (STB served Oct. 29, 2010).

[12] *Blanchette* v. *Hub City Terminals, Inc.,* 683 F.2d 1008 (7th Cir. 1981); *Union Pac. R.R.* v. *Hall Lumber Sales, Inc.,* 419 F.2d 1009 (7th Cir. 1969).

similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

• Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

• Given the discussions in *Hub City* and *Hall,* should section 10743 be read as applicable to demurrage charges at all? The ICC said it was in *Eastern Central,* but it did so with little discussion. Would general agency principles apply to demurrage liability even if section 10743 were found inapplicable?

• If section 10743 is applicable, would the *Groves* analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

• Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in *Middle Atlantic,* 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

The requirements of section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq., (RFA) do not apply to this action because, at this stage, it is an ANPR and not a "rule" as defined in section 601 of the RFA. Under the RFA, however, the Board must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If adoption of any rule likely to result from this ANPR could have a significant economic impact on a small entity within the meaning of the RFA, commenters should submit as part of their comments an explanation of how the business or organization falls within the definition of a small entity, and how and to what extent the commenter's business or organization could be affected. Following review of the comments received in response to this ANPR, if the Board promulgates a notice of proposed rulemaking regarding this matter, it will conduct the requisite analysis under the RFA.

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

*It is ordered*:

1. Initial comments are due on January 24, 2011.

2. Reply comments are due on February 23, 2011.

3. This decision is effective on its date of service.

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

**Andrea Pope-Matheson,**

*Clearance Clerk.*

[FR Doc. 2010–30967 Filed 12–9–10; 8:45 am]

**BILLING CODE 4915–01–P**