



**Surface Transportation Board**  
Washington, D.C. 20423-0001

**Small Entity Compliance Guide**

**Docket No. EP 760**

**Exclusion of Demurrage Regulation from Certain Class Exemptions**

February 28, 2020

This guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>1</sup> It is intended to help small rail carriers comply with the new rule adopted in the above-referenced Surface Transportation Board (Board) rulemaking. This guide is not intended to replace the Board's rule. Users of this guide therefore should consult the new rule and applicable Board regulations themselves, which remain the authoritative source of all compliance obligations. Although the guide attempts to cover all parts of the rule that might be especially important to small entities, the coverage may not be exhaustive. This guide may not apply in a particular situation based upon the specific circumstances, and the Board retains the discretion to adopt on a case-by-case basis approaches that may differ from this guide. The Board may decide to revise this guide without public notice to reflect changes in the Board's approach to implementing the rule, or to clarify or update the text of the guide. For further assistance, contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238 or [rcpa@stb.gov](mailto:rcpa@stb.gov). Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

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<sup>1</sup> Pub. L. No. 104-121, § 212, 110 Stat. 847.

## **Purpose of this Guide**

This guide was created to inform small rail carriers about the new rule adopted in Exclusion of Demurrage Regulation from Certain Class Exemptions, Docket No. EP 760, effective April 3, 2020.

## **Introduction**

Demurrage is a charge assessed by railroads when rail cars are detained beyond a specified period of time (called “free time”) for loading or unloading. Demurrage is subject to Board regulation under §§ 10702 and 10746 of title 49 of the U.S. Code, and the Board has long been involved in resolving demurrage disputes.

The rule adopted in EP 760 arose, in part, as a result of the testimony and comments submitted in Oversight Hearing on Demurrage & Accessorial Charges, Docket No. EP 754. The Board commenced that proceeding following concerns expressed by shippers and other stakeholders about recent changes to demurrage and accessorial tariffs administered by Class I carriers. The testimony and comments received in that proceeding prompted the Board to reexamine current demurrage rules and policies and to provide clarification on various issues.

## **Objectives of the Rulemaking**

The rule adopted accomplishes two objectives. First, the rule clarifies that the class exemptions<sup>2</sup> for the rail transportation of certain miscellaneous commodities (49 C.F.R. § 1039.11) and transportation by boxcar (49 C.F.R. § 1039.14) do not apply to the regulation of demurrage. These clarifications ensure that the Board’s regulations are consistent with longstanding court and agency precedent; they do not substantively change the Board’s regulations. Second, the rule partially revokes the class exemption for the rail transportation of certain agricultural commodities<sup>3</sup> so that the exemption does not apply to the regulation of demurrage. Partial revocation of the class exemption for the rail transportation of certain agricultural commodities is needed to carry out the rail transportation policy of the United

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<sup>2</sup> Section 10502 of title 49 of the U.S. Code authorizes the Board to exempt types of rail service from its regulation. A “class exemption” is the exemption of an entire class of transactions from regulation.

<sup>3</sup> The class exemption for certain agricultural commodities expressly excludes grain, soybeans, and sunflower seeds. Therefore, the rail transportation of those commodities is already subject to the Board’s regulations and is not impacted by the rule adopted by the Board in EP 760.

States and will help ensure that the regulatory relief available to agricultural shippers is on par with relief available to other non-intermodal rail transportation shippers and receivers.

### **Rules Approved by the Board**

The amendments to 49 C.F.R. § 1039.11 and 49 C.F.R. § 1039.14 add language to state more clearly, consistent with longstanding court and agency precedent, that the class exemptions for the rail transportation of certain miscellaneous commodities and transportation by boxcar do not apply to the regulation of demurrage. As noted above, these clarifications do not substantively change the Board's regulations.

The amendment to 49 C.F.R. § 1039.10 to partially revoke the class exemption makes the Board's statutes and regulations regarding demurrage applicable to the rail transportation of certain agricultural commodities. The rule does not impose new reporting requirements directly or indirectly on small entities because rail carriers are not required (with limited exceptions) to file tariffs or contract summary filings for rail shipments, whether exempt or non-exempt.<sup>4</sup> 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 C.F.R. § 1333.3. These types of notices are generally already provided for regulated commodities and certain other exempt transportation.

The notice may be in written or electronic form. As the Board described in its 2014 decision adopting the notice requirement,<sup>5</sup> the notice need not include the full terms of the demurrage tariff in order to satisfy this requirement, and a link to the full tariff could suffice. Moreover, it is not necessary for a rail carrier to provide actual notice with each shipment to the same customer; a one-time "blanket notice" would satisfy the notice requirement. However, if, after providing a blanket notice, a carrier makes material changes to its demurrage tariff, the carrier must provide actual notice of those changes to the receiving party in order to hold that party liable for demurrage charges under the changed tariff.

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<sup>4</sup> Railroads are required to file with the Board summaries of all contracts for the transportation of agricultural products within seven days of the contract's effective date. Summaries must contain the information specified in 49 C.F.R. part 1313 and are posted on the agency's website, [www.stb.gov](http://www.stb.gov).

<sup>5</sup> See Demurrage Liability, EP 707, slip op. at 19 (STB served Apr. 11, 2014).

## **Impact on Small Entities**

The amendments to 49 C.F.R. § 1039.11 and 49 C.F.R. § 1039.14 do not substantively change the Board's regulations. Therefore, these clarifications will have no impact on small carriers.

With respect to the amendment to 49 C.F.R. § 1039.10, the rule slightly expands the amount of traffic for which small carriers would need to provide notice if they want to collect demurrage. As noted above, in order for a rail carrier to hold a party liable for demurrage, the rail carrier must provide that party with advance notice of its demurrage tariff, either electronically or in writing. Under the rule adopted in EP 760, this requirement will apply to the transportation of the agricultural commodities exempted at 49 C.F.R. § 1039.10; however, these commodities account for less than 1% of all rail traffic. Rail carriers wishing to collect demurrage may need to update their demurrage practices to conform to this notice requirement to the extent their existing practices do not already do so. Additionally, to the extent that a small rail carrier serves as a handling carrier and receives rail cars from Class I carriers without knowing the receiving party's identity, if the small carrier wishes to hold the party liable for demurrage charges, the carrier may need to contact the Class I carrier to obtain information on the identity of the receiving party.

The amendment to 49 C.F.R. § 1039.10 would also slightly expand the amount of traffic for which small carriers would be subject to the laws that pertain to the reasonableness of demurrage charges, rules, and practices. However, 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.

## **Additional Information**

For additional information, please see the Board's decision adopting the final rule in Exclusion of Demurrage Regulation from Certain Class Exemptions, Docket No. EP 760, issued on February 28, 2020. The decision is available on the Board's website at [www.stb.gov](http://www.stb.gov).