services are not used to originate illegal traffic.

■ 5. Effective January 1, 2022, further amend § 64.1200 by adding paragraph (k)(9) to read as follows:

**§ 64.1200 Delivery restrictions.**

* * * * *

(k) * * *

(9) Any terminating provider that blocks calls, either itself or through a third-party blocking service, must immediately return, and all voice service providers in the call path must transmit, an appropriate response code to the origination point of the call. For purposes of this rule, an appropriate response code is:

(i) In the case of a call terminating on an IP network, the use of Session Initiation Protocol (SIP) code 607 or 608;

(ii) In the case of a call terminating on a non-IP network, the use of ISDN User Part (ISUP) code 21 with the cause location ''user'';

(iii) In the case of a code transmitting from an IP network to a non-IP network, SIP codes 607 and 608 must map to ISUP code 21; and

(iv) In the case of a code transmitting from a non-IP network to an IP network, ISUP code 21 must map to SIP code 603, 607, or 608 where the cause location is ''user.''

* * * * *

■ 6. Delayed indefinitely, further amend § 64.1200 by adding paragraphs (k)(10) and (n)(2) to read as follows:

**§ 64.1200 Delivery restrictions.**

* * * * *

(k) * * *

(10) Any terminating provider that blocks calls on an opt-out or opt-in basis, either itself or through a third-party blocking service, must provide, at the request of the subscriber to a number, at no additional charge and within 3 business days of such a request, a list of calls to that number, including the date and time of the call and the calling number, that the terminating provider or its designee blocked within the 28 days prior to the request.

* * * * *

(n) * * *

(2) Take steps to effectively mitigate illegal traffic when it receives actual written notice of such traffic from the Commission through its Enforcement Bureau. In providing notice, the Enforcement Bureau shall identify with as much particularity as possible the suspected traffic; provide the basis for the Enforcement Bureau's reasonable belief that the identified traffic is unlawful; cite the statutory or regulatory provisions the suspected traffic appears to violate; and direct the voice service provider receiving the notice that it must comply with this section. Each notified provider must promptly investigate the identified traffic. Each notified provider must then promptly report the results of its investigation to the Enforcement Bureau, including any steps the provider has taken to effectively mitigate the identified traffic or an explanation as to why the provider has reasonably concluded that the identified calls were not illegal and what steps it took to reach that conclusion. Should the notified provider find that the traffic comes from an upstream provider with direct access to the U.S. Public Switched Telephone Network, that provider must promptly inform the Enforcement Bureau of the source of the traffic and, if possible, take steps to mitigate this traffic; and

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[FR Doc. 2021–04414 Filed 4–5–21; 8:45 am]

**BILLING CODE 6712–01–P**

## SURFACE TRANSPORTATION BOARD

### 49 CFR Part 1333

**[Docket No. EP 759]**

### Demurrage Billing Requirements

**AGENCY:** Surface Transportation Board.

**ACTION:** Final rule.

**SUMMARY:** The Surface Transportation Board (STB or Board) adopts a final rule that requires Class I carriers to include certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information.

**DATES:** This rule is effective on October 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** The Board issued a notice of proposed rulemaking on October 7, 2019, to propose changes to its existing demurrage regulations to address several issues regarding carriers' demurrage billing practices. *Demurrage Billing Requirements* (*NPRM*), EP 759 (STB served Oct. 7, 2019).[1] The Board subsequently issued a supplemental notice on April 30, 2020, seeking comment on potential modifications and additions to the proposal. *Demurrage Billing Requirements* (*SNPRM*), EP 759 (STB served Apr. 30, 2020).[2] Demurrage is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply.[3] Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (*i.e.,* ''free time'') for loading and unloading. *See Pa. R.R.* v. *Kittaning Iron & Steel Mfg. Co.,* 253 U.S. 319, 323 (1920) (''The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.''); 49 CFR 1333.1; *see also* 49 CFR pt. 1201, category 106.

In the simplest demurrage case, a railroad assesses demurrage 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 rail carrier at destination.[4] Demurrage, however, can also involve third-party intermediaries, commonly known as warehousemen or terminal operators, that accept freight cars for loading and unloading but have no property interest in the freight being transported.[5]

[1] The *NPRM* was published in the **Federal Register,** 84 FR 55109 (Oct. 15, 2019).

[2] The *SNPRM* was published in the **Federal Register,** 85 FR. 26915 (May 6, 2020).

[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 of demurrage in this decision.

[4] As the Board noted in *Demurrage Liability,* EP 707, slip op. at 2 n.2, the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA), Public Law 104–88, 109 Stat. 803, does not define ''consignor'' or ''consignee,'' though both terms are commonly used in the demurrage context. Black's Law Dictionary defines ''consignor'' as ''[o]ne who dispatches goods to another on consignment,'' and ''consignee'' ''as [o]ne to whom goods are consigned.'' *Demurrage Liability,* EP 707, slip op. at 2 n.2 (alterations in original) (citing Black's Law Dictionary 327 (8th ed. 2004)). The Federal Bills of Lading Act defines these terms in a similar manner. *Id.* (citing 49 U.S.C. 80101(1) & (2)).

[5] This decision uses ''rail users'' to broadly mean any person or business that sends goods by rail or receives rail cars for loading or unloading,

Continued

In the *NPRM,* the Board proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices.[6] *NPRM,* EP 759, slip op. at 8–11, 14–15. In response, the Board received a significant number of comments from stakeholders, including requests for additional and modified invoicing requirements.[7] The Board subsequently issued a supplemental notice of proposed rulemaking to invite comment on potential modifications and additions to the proposed minimum information requirements and format. The Board received comments and replies in response to the *SNPRM.*[8] After considering the record in this proceeding, the Board adopts a final rule requiring Class I carriers to include certain minimum information on or with their demurrage invoices and provide, in the format of their choosing, machine-readable[9] access to the required minimum information, as discussed below.

## Background

This proceeding arises, in part, as a result of the testimony and comments submitted in *Oversight Hearing on Demurrage & Accessorial Charges,*[10] Docket No. EP 754. In that proceeding, parties from a broad range of industries raised concerns about demurrage invoicing practices, including issues involving the receipt of invoices containing insufficient information. *See NPRM,* EP 759, slip op. at 5–6 (providing overview of comments received in Docket No. EP 754 related to the adequacy of demurrage invoices).

After carefully considering the comments and testimony in Docket No. EP 754, the Board issued the *NPRM* in this docket. As relevant here, the Board proposed requirements for certain minimum information to be included on or with Class I carriers' demurrage invoices. Specifically, the Board proposed the inclusion of:

- The unique identifying information (*e.g.,* reporting marks and number) of each car involved;
- the following shipment information, where applicable:
  - The date the waybill was created;
  - the status of each car as loaded or empty;
  - the commodity being shipped (if the car is loaded);
  - the identity of the shipper, consignee, and/or care-of party, as applicable; and
  - the origin station and state of the shipment;
- the dates and times of:
  - Actual placement of each car;
  - constructive placement of each car (if applicable and different from actual placement);
  - notification of constructive placement to the shipper, consignee, or third-party intermediary (if applicable); and
  - release of each car; and
- the number of credits and debits attributable to each car (if applicable).

*NPRM,* EP 759, slip op. at 9–10. The Board also proposed to require Class I carriers, prior to sending demurrage invoices, to take ''appropriate action to ensure that the demurrage charges are accurate and warranted, consistent with the purpose of demurrage.'' *Id.* at 10 (footnote omitted). The Board proposed to add both the minimum information requirements and the appropriate-action requirement to a new regulation at 49 CFR 1333.4. *Id.* at 14. In the *NPRM,* the Board invited stakeholders to comment on the proposed rule, as well as any additional information that Class I carriers could reasonably provide on or with demurrage invoices to help rail users effectively evaluate those invoices. *Id.* at 10.

In response to stakeholders' comments, the Board issued the *SNPRM,* which invited comments on modifications and additions to proposed section 1333.4(a) that the Board was considering. The changes proposed in the *SNPRM* would require that Class I carriers provide certain additional information on or with demurrage invoices, including: (1) The billing cycle covered by the invoice; (2) the original estimated date and time of arrival (ETA) of each car (as established by the invoicing carrier) and the date and time each car was received at interchange (if applicable), either on or with each invoice or, alternatively, upon reasonable request from the invoiced party; and (3) the date and time of each car ordered in (if applicable). *SNPRM,* EP 759, slip op. at 4–5. In the *SNPRM,* the Board also asked for comment on a requirement that Class I carriers provide access to demurrage invoicing data in machine-readable format and invited further comment on the proposed demurrage regulations at section 1333.4(b), which would require Class I carriers to take appropriate action to ensure that demurrage charges are accurate and warranted prior to sending demurrage invoices.[11] *Id.* at 5, 9–11.

As discussed below, rail users express broad support for the minimum information proposed in the *NPRM* and *SNPRM,* although many suggest additions and modifications that they argue would improve the rule. Rail

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regardless of whether that person has a property interest in the freight being transported.

[6] In the *NPRM,* the Board also proposed that the serving Class I carrier be required to directly bill the shipper for demurrage (instead of the warehouseman) when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. *See NPRM,* EP 759, slip op. at 11, 14–15. The Board subsequently adopted a direct-billing final rule. *See Demurrage Billing Requirements,* EP 759 (STB served Apr. 30, 2020). The final rule was published in the **Federal Register,** 85 FR 26858 (May 6, 2020).

[7] In response to the *NPRM,* the Board received comments and/or replies from the following: American Chemistry Council (ACC); American Forest & Paper Association; American Fuel & Petrochemical Manufacturers (AFPM); American Iron and Steel Institute; American Short Line and Regional Railroad Association (ASLRRA); ArcelorMittal USA LLC (AM); Association of American Railroads; Barilla America, Inc.; Canadian National Railway Company (CN); Canadian Pacific Railway Company (CP); Corn Refiners Association (CRA); CSX Transportation, Inc. (CSXT); Daniel R. Elliott; Diversified CPC International, Inc. (CPC); Dow, Inc. (Dow); The Fertilizer Institute (TFI); Freight Rail Customer Alliance (FRCA); Industrial Minerals Association—North America; The Institute of Scrap Recycling Industries, Inc. (ISRI); International Association of Refrigerated Warehouses (IARW); International Liquid Terminals Association (ILTA); International Paper; International Warehouse Logistics Association (IWLA); The Kansas City Southern Railway Company (KCS); Kinder Morgan Terminals (Kinder Morgan); Lansdale Warehouse Company (Lansdale); National Association of Chemical Distributors (NACD); The Mosaic Company; National Coal Transportation Association (NCTA); The National Industrial Transportation League (NITL); North American Freight Car Association (NAFCA); Norfolk Southern Railway Company (NSR); Peabody Energy Corporation; The Portland Cement Association (PCA); Private Railcar Food and Beverage Association, Inc.; Quad, Inc.; Union Pacific Railroad Company (UP); Valley Distributing & Storage Company; Western Coal Traffic League and Seminole Electric Cooperative, Inc. (WCTL & SEC); and Yvette Longonje.

[8] In response to the *SNPRM,* the Board received comments and/or replies from the following: ACC; AFPM; ASLRRA; BNSF Railway Company (BNSF); CN; CP; The Chlorine Institute (TCI); CRA; CSXT; Dow; TFI; FRCA; ISRI; ILTA; IWLA; Lansdale; NACD; NCTA; The National Grain and Feed Association (NGFA); NITL; NSR; PCA; San Jose Distribution Services, Inc.; and UP.

After the record closed, CN submitted a sur-reply to address claims that CN argued ''could give a misleading impression to CN customers about the circumstances in which they could incur demurrage.'' (CN Reply 1–2, July 27, 2020; *see also* Joint Reply (ACC, CRA, TCI, & TFI) 9, July 6, 2020.) Although a reply to a reply is not permitted, *see* 49 CFR 1104.13(c), due to the brevity and narrowness of CN's filing, and in the interest of a complete record, the Board will accept this submission as part of the record.

[9] As discussed below, the Board will adopt a definition for machine-readable data that is ''data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.''

[10] Accessorial charges are not specifically defined by statute or regulation but are generally understood to include charges other than line-haul and demurrage charges. *See Revisions to Arbitration Procedures,* EP 730, slip op. at 7–8 (STB served Sept. 30, 2016) (describing a variety of charges that are considered accessorial charges).

[11] Due to changes adopted in the final rule as discussed below, section 1333.4(b) has been removed and proposed section 1333.4(a) is adopted, with modifications, as section 1333.4.

users also largely support a machine-readable data requirement and the Board's proposal to require Class I carriers to ''take appropriate action to ensure that demurrage charges are accurate and warranted.'' Some rail users argue that the rule should apply to Class II and Class III carriers.

Class I carriers oppose the proposed minimum information requirements but argue that, if they are adopted, carriers should be allowed to provide the information on their existing online platforms rather than on or with invoices. Class I carriers also oppose the Board's proposed appropriate-action requirement. ASLRRA supports the proposed exclusion of Class II and Class III carriers from the rule.

**Final Rule**

The Board now adopts a final rule requiring Class I carriers to include certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information. The final rule is below.

*Minimum Information Requirements*

1. General Comments on Minimum Information Requirements

Class I carriers argue generally that a rule establishing any minimum information requirements is unnecessary; would lead to increased litigation; contradicts Board precedent, the rail transportation policy (RTP) of 49 U.S.C. 10101, and the purpose of demurrage; and would restrict innovation.[12]

CSXT and CN argue that rail users have not shown that Class I carriers have a systemwide problem with demurrage invoicing sufficient to justify the rule. (CSXT Comments 4, Nov. 6, 2019; CN Comments 4–5, Nov. 6, 2019; CSXT Comments 3, June 5, 2020; CN Comments 5–6, June 5, 2020.) CSXT, CN, UP, and KCS assert that rail users' complaints do not apply to them because they already provide sufficient information.[13] To the extent some Class I carriers do not provide sufficient information, CP urges the Board to ''defer to competitive market pressures to provide the incentive for those railroads to innovate and to catch up with their peers.'' (CP Comments 5, Nov. 6, 2019.) CSXT suggests that any problems with carriers' invoicing systems should be addressed on an individualized basis through the Board's formal and informal complaint procedures. (CSXT Comments 4, Nov. 6, 2019.)

CN and CSXT also express concerns about the effect that minimum information requirements would have on demurrage litigation. CN argues that the *NPRM* suggests that ''invoices will not be deemed valid unless they include all eleven specific categories of information,'' which would lead to more frequent and more complex litigation. (CN Comments 7, Nov. 6, 2019; *see also* CSXT Comments 4–5, June 5, 2020 (asserting that minimum information requirements would lead to disputes ''over purely technical issues'').) For example, CN suggests that an invoice recipient could argue that an invoice is invalid if ''a waybilling error by the originating shipper causes a demurrage bill to show the wrong commodity for a particular car'' even if the error has ''no material effect on the demurrage billpayer's ability to understand and potentially dispute demurrage for that car.'' (CN Comments 7, Nov. 6, 2019; *see also* CSXT Comments 4–5, June 5, 2020 (contending that under the Board's proposal, ''shippers could challenge invoices on the basis of missing or incorrect information whether due to carrier fault or otherwise'').)

Furthermore, CSXT and CN argue that minimum information requirements contradict *Maintenance of Records Pertaining to Demurrage, Detention, & Other Related Accessorial Charges by Rail Common Carriers of Property* (*Maintenance of Records*), 367 I.C.C. 145 (1982). (CSXT Comments 3, Nov. 6, 2019; CN Comments 7, Nov. 6, 2019; CN Comments 6, June 5, 2020.) CSXT contends that the Board's proposed rule is contrary to Congressional policy and ''would turn the clock back to long-rejected policies that mandated paperwork requirements for demurrage bills and that prescribed inefficient nationwide practices.'' (CSXT Comments 3, Nov. 6, 2019; *see also* CN Comments 7, Nov. 6, 2019 (arguing that the Board should refrain from reversing ''the principle underlying this [Interstate Commerce Commission (ICC)] decision by adopting requirements for the content of demurrage invoices that would bind all Class I railroads'').)

Additionally, CP and CN contend that minimum information requirements would contravene one of the goals of the RTP at 49 U.S.C. 10101(2), specifically ''to minimize the need for Federal regulatory control over the rail transportation system.'' (CP Comments 5, Nov. 6, 2019; CN Comments 4, June 5, 2020.) CP also argues that the proposed rule is inconsistent with one of the objectives of demurrage—encouraging the efficient use of rail assets—because the proposal ''places the emphasis on empowering customers in their ability to challenge invoiced demurrage charges'' after the fact instead of focusing Board policy on encouraging customers ''to remain actively engaged in monitoring and managing their supply chains to . . . avoid incurring demurrage charges in the first place.'' (CP Comments 4, June 5, 2020.)

Moreover, several carriers allege that minimum information requirements could stifle innovation and discourage carriers from exploring other methods of providing demurrage information to rail users.[14] (CP Comments 5, Nov. 6, 2019; CN Comments 9–10, Nov. 6, 2019; CSXT Comments 1–2, Nov. 6, 2019.)

CN argues that, at most, the Board should adopt a flexible, ''performance-based'' standard that would require Class I carriers to ''ensure that recipients of demurrage invoices have access to sufficient information to be able to understand the basis for the charges and to dispute charges believed to be unwarranted,'' which could be ''provided either on or with the demurrage invoice or through another electronic means, including through a software platform or portal.'' (CN Comments 14–15, June 5, 2020.) CSXT and NSR also support this proposal.

[12] In addition, NSR's pleading contains a vague reference to the Board's authority to regulate this aspect of demurrage. (NSR Comments 2 n.2, June 5, 2020 (''It is not clear to [NSR] that the Board has the authority to compel railroads to provide particular information related to demurrage invoices, and it is even less clear that the Board has the authority to compel railroads to turn over particular railroad records to its customers upon request by those customers.'').) NSR states, however, that it ''does not intend to formally raise such an objection at this point in this process, but reserves its right to do so depending on what the Board ultimately attempts to require in this docket.'' (*Id.*) Given that NSR provides no explanation or support for its passing assertion (and that NSR itself disclaims an intent to raise it), the Board need not address it here. In any event, the *NPRM* discussed the statutory authority for the Board's regulation of demurrage. *NPRM,* EP 759, slip op. at 3.

[13] (CN Comments 4, Nov. 6, 2019 (arguing that rail users' concerns have ''no application to CN, which already provides customers with each of the eleven categories of information specified by the proposed regulations''); CSXT Comments 9, Nov. 6, 2019 (stating that complaints of inadequate documentation ''plainly [do] not describe the kind of documentation that CSXT provides''); UP Comments 2, Nov. 6, 2019 (asserting that rail users already have access to ''the applicable minimum data requirements''); KCS Comments 6, Nov. 6, 2019 (requesting exclusion from the rule, in part, because ''KCS already provides accurate information with few disputes'').)

[14] Class I carriers also argue that the information would be best provided on their online platforms rather than on or with invoices, and that they already provide much of the information on such platforms. This argument is discussed below under the ''Alternative Visibility Platforms'' heading.

(CSXT Comments 5, June 5, 2020; NSR Reply 2, July 6, 2020.)

In their replies, many rail users counter that they are unable to effectively review and understand the demurrage invoices they receive from Class I carriers because the carriers either provide limited information or do not format the information in ways that enable efficient access and auditing.[15] ISRI acknowledges that minimum information requirements may increase costs for carriers but contends that rail users currently ''bear the costs and burdens associated with overtime and additional staffing needed to verify the accuracy of the invoices.'' (ISRI Reply 10–11, Dec. 6, 2019; *see also* WCTL & SEC Reply 9, Dec. 6, 2019 (arguing that carriers ''have effectively shifted the time and costs for reviewing invoices to shippers'').)

With respect to Class I carriers' concerns about increased litigation over technical issues, joint commenters (ACC, CRA, TCI, and TFI)[16] assert that rail users will not be inclined to dispute appropriate demurrage charges over technical issues since demurrage disputes are costly. (Joint Reply (ACC, CRA, TCI, & TFI) 13, July 6, 2020.) In addition, Dow argues that to the extent Class I carriers face more demurrage claims, those claims are likely to be valid for charges that previously went undetected. (Dow Reply 5, July 6, 2020.)

Several rail users counter CSXT's and CN's argument that minimum information requirements would constitute a return to the ICC's former demurrage rules by arguing, among other things, that unlike the former ICC rules, the Board's proposal would have little, if any, impact on the day-to-day operations of railroads because it would not impose timing requirements, content-organization requirements, or recordkeeping or notification methods. (Joint Reply (ACC, CRA, TFI, & NITL) 7–8, Dec. 6, 2019; *see also* ISRI Reply 12–13, Dec. 6, 2019 (arguing that the Board's proposal is less stringent than the rules the ICC removed); AM Reply 4, Dec. 6, 2019 (asserting that the minimum information requirements ''would not be 're-regulatory' '').)

Additionally, joint commenters (ACC, CRA, TCI, and TFI) and Dow dismiss CP's argument that minimum information requirements would discourage rail users from taking steps to avoid demurrage charges, asserting that rail users would not choose to incur the time and expense of challenging demurrage charges over preventing them in the first place. (Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020; Dow Reply 5, July 6, 2020.) Joint commenters (ACC, CRA, TCI, and TFI) and NGFA strongly object to carriers' calls for an alternative performance-based standard because they argue it would allow carriers to exclusively determine the information rail users need to assess the validity of demurrage charges and permit carriers to present the information in formats that would limit rail users' ability to use the information to verify demurrage charges. (Joint Reply (ACC, CRA, TCI, & TFI) 14–15, July 6, 2020; NGFA Reply 12, July 6, 2020.)

The Board finds ample support in the record for adoption of minimum information requirements for demurrage invoices. The Board received many comments in this proceeding[17] and in *Oversight Hearing on Demurrage & Accessorial Charges,* Docket No. EP 754,[18] from rail users asserting that carriers either do not provide sufficient information or do not present the information in a format that allows rail users to effectively verify demurrage charges. The Board is particularly concerned about rail users' assertions that even with significant time and resources devoted to reviewing demurrage invoices, they find erroneous charges overly difficult to detect under carriers' present invoicing practices. (*See* Dow Reply 2–3, Dec. 6, 2019; Joint Reply (ACC, CRA, TFI, & NITL) 5–6, Dec. 6, 2019; ISRI Reply 10–11, Dec. 6, 2019.) While it may be true that certain Class I carriers provide more information, or more accessible information, than others, the Board finds that the comments from a diverse array of shippers served by different carriers demonstrate a widespread issue that justifies the imposition of a uniform set of minimum requirements for all Class I carriers. Because CN's proposed flexible ''performance-based'' alternative standard lacks objective criteria, Class I carriers would be responsible for determining the amount of information sufficient for demurrage invoices in a manner that would likely continue to result in varied practices, some of which may not provide rail users with information sufficient for them to readily assess the validity of demurrage charges. Likewise, CP's argument that market pressure will encourage carriers to provide better information on demurrage invoices is also unpersuasive because, if the argument were correct, demurrage invoices would already be more complete and informative than they are, and this proceeding would not have been necessary in the first place.[19]

Regarding CN's and CSXT's concern that minimum information requirements will lead to increased demurrage litigation because rail users will challenge invoices based upon technical issues unrelated to the validity of demurrage charges, the Board clarifies here that a carrier's failure to comply with the minimum information requirements on a particular invoice does not, by itself, establish that the invoice is invalid. Rather, the Board intends for the final rule to reduce unnecessary litigation by providing rail users with information that enables them to readily assess the validity of demurrage charges and determine when to dispute or accept responsibly for them. Indeed, rail users describe demurrage litigation as a complicated and time-consuming process that they would prefer not to undertake. The Board understands that carriers may make occasional invoicing errors and does not expect that an error would conclusively invalidate an entire demurrage invoice. The question of whether specific demurrage charges are lawful depends on an array of fact-specific factors (including, for example, documentation supporting the charges) that would need to be determined in the context of an individual dispute. Nevertheless, the Board has made clear that transparency and mutual accountability in the billing process are ''important factors'' in the establishment of reasonable demurrage charges. *Pol'y Statement on Demurrage & Accessorial Rules & Charges* (*Pol'y Statement*), EP

[15] (*See, e.g.,* Dow Reply 1, 3–6, Dec. 6, 2019; Joint Reply (ACC, CRA, TFI, & NITL) 5–6, Dec. 6, 2019; Kinder Morgan Reply 9, Dec. 6, 2019; WCTL & SEC Reply 5, Dec. 6, 2019; ISRI Reply 10, Dec. 6, 2019; NGFA Reply 5–6, July 6, 2020; *see also* Dow Comments 3, Nov. 6, 2019; IARW Comments 2, Nov. 6, 2019.)

[16] The Board received two sets of joint comments in this proceeding. The first group, composed of ACC, CRA, TFI, and NITL, filed reply comments on December 6, 2019. The second group, composed of ACC, CRA, TCI, and TFI, filed comments on June 5, 2020, and reply comments on July 6, 2020.

[17] (*See, e.g.,* Dow Comments 3, Nov. 6, 2019; IARW Comments 2, Nov. 6, 2019; Dow Reply 1, 3–6, Dec. 6, 2019; Joint Reply (ACC, CRA, TFI, & NITL) 5–6, Dec. 6, 2019; Kinder Morgan Reply 9, Dec. 6, 2019; WCTL & SEC Reply 5, Dec. 6, 2019; ISRI Reply 10, Dec. 6, 2019; NGFA Reply 5–6, July 6, 2020.)

[18] *See NPRM,* EP 759, slip op. at 5–6 (providing overview of comments received in Docket No. EP 754 related to the adequacy of demurrage invoices).

[19] Similarly, the existing case-by-case formal and informal adjudicatory approach has not ensured that rail users generally have easy access to the kind of information needed to readily assess Class I carrier demurrage charges. Rather, the record establishes that access to information varies a great deal depending on each carrier's program and practices. (*See* PCA Comments 2, June 5, 2020; Dow Reply 3–6, Dec. 6, 2019; NGFA Reply 4, July 6, 2020.)

757, slip op. at 15 (STB served Apr. 30, 2020). Although a carrier's failure to comply with the minimum invoicing requirements to be set forth at section 1333.4 would not be conclusive in litigation regarding a particular demurrage invoice, such noncompliance should be taken into account under 49 U.S.C. 10702 and 10746, along with all other relevant evidence, in determining the reasonableness and enforceability of demurrage charges.[20]

Contrary to carriers' arguments, the final rule does not contradict Board precedent, the RTP, or the purpose of demurrage. First, the ICC's decision in *Maintenance of Records,* 367 I.C.C. 145 (1982), cited by CSXT and CN, does not prevent the Board from adopting minimum information requirements here. As an initial matter, the Board may modify its rules as long as its actions are rational and fully explained.[21] *Maintenance of Records* itself was a modification based largely on changes in carrier practices due to technological advances. There, the ICC determined that certain recordkeeping requirements, such as those requiring carriers to maintain separate records for each open station, prepare daily car reports, and forward the reports daily to recordkeeping offices were unnecessary because computers could retain the data at a central location in a comparably efficient and less expensive way. *Maintenance of Records,* 367 I.C.C. at 146. As one rail user points out, however, present rail industry practices and technology are very different than they were when the ICC decided *Maintenance of Records* in 1982. (ISRI Reply 11–12, Dec. 6, 2019.) Moreover, as the Board observed, carriers use the minimum information in the ordinary course of business today and some carriers already provide certain demurrage information to rail users on online platforms. *See NPRM,* EP 759, slip op. at 10; *SNPRM,* EP 759, slip op. at 4. Unlike the more prescriptive rules that predated *Maintenance of Records,* the Board's final rule in this proceeding gives Class I carriers the flexibility to invoice in the format of their choosing, including electronic options, so long as they include the minimum information requirements on or with the invoices and provide machine-readable access to the minimum information. Accordingly, the final rule does not, as CSXT argues, ''turn the clock back to long-rejected policies.'' (CSXT Comments 3, Nov. 6, 2019.)

The Board also finds that the final rule adopted here is consistent with the provision of the RTP at section 10101(2), which focuses on minimizing the need for Federal regulatory control and ensuring expeditious Board decisions when required. The record in this proceeding and in *Oversight Hearing on Demurrage & Accessorial Charges,* Docket No. EP 754, supports the conclusion that limited and focused regulation would help parties resolve future demurrage disputes more efficiently and effectively without the need for costly and time-consuming litigation. Additionally, to the extent that parties may need to litigate demurrage disputes in the future, the minimum information requirements adopted here will facilitate expeditious handling and resolution of those disputes, consistent with section 10101(2), (15). Furthermore, by ensuring that rail users have access to sufficient information to understand demurrage charges, the final rule serves important goals of the RTP to meet the needs of the public and for carriers to remain competitive with other transportation modes. *See* section 10101(4).

The Board rejects CP's argument that the rule contradicts the purpose of demurrage because it encourages rail users to challenge demurrage invoices rather than avoid demurrage charges in the first instance. The final rule incentivizes efficient asset utilization (and helps to ensure that carriers are compensated when rail cars are unduly detained) by requiring demurrage invoices to contain sufficient information to allow rail users to verify the validity of those charges and modify their own behavior when necessary to avoid future demurrage charges. *See NPRM,* EP 759, slip op. at 10; *SNPRM,* EP 759, slip op. at 7. The final rule does not encourage rail users to challenge appropriately assessed demurrage charges. Rather, it ensures that rail users are provided sufficient information about the charges to enable them to take action to avoid future charges and, indeed, rail users have confirmed that incurring the time and expense of demurrage litigation, rather than avoiding the charges in the first place, would not serve their interests. (*See* Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020; Dow Reply 5, July 6, 2020.)

Lastly, the Board is not persuaded by the argument that minimum information requirements will stifle innovation. To the contrary, the final rule allows Class I carriers to choose how to invoice rail users, as long as they include the minimum information required on or with the invoices and provide machine-readable access to the minimum information.[22]

Therefore, as discussed below, the Board will adopt the minimum information requirements proposed in the *NPRM* and the *SNPRM.*

2. NPRM Proposed Information

Rail users generally support the minimum information requirements proposed in the *NPRM,* asserting that the information would help rail users audit invoices more effectively and learn what actions to take to avoid future demurrage charges. (*See, e.g.,* TFI Comments 3–4, Nov. 6, 2019; NACD Comments 2–3, Nov. 6, 2019; NITL Comments 9, Nov. 6, 2019.) Additionally, two rail users submit requests for clarification. First, ISRI asks the Board to clarify its proposal that Class I carriers be required to provide ''[t]he number of credits and debits attributable to each car (if applicable).'' (ISRI Comments 4–5, June 5, 2020.) Specifically, ISRI asks whether this proposal would require carriers to ''determine in advance for each car included in an invoice whether credits apply'' or whether rail users would need to apply for credits that would appear on future invoices, if granted. (*Id.* at 5.) ISRI requests that, if the Board did not intend to require the former, then the Board mandate that credits be carried over for 30 to 60 days before expiring. (*Id.*) Second, ILTA asks the Board to change the ''and/or'' language in the requirement that Class I carriers provide ''the identity of the shipper, consignee, and/or care-of party, as applicable'' to ''and'' so that Class I carriers are required to identify all applicable parties. (ILTA Comments 4, June 4, 2020.) Class I carriers do not respond to ISRI's or ILTA's requests for clarification.

Several Class I carriers state that they already provide rail users with most (or all) of the information proposed in the *NPRM,* either on invoices or their online

[20] Noncompliance could also be the subject of complaints and/or investigation under 49 U.S.C. 11701 and 11704, and the nature of the invoicing error would likely be a consideration in any such proceeding (*e.g.,* a one-time inaccuracy in the date that a waybill was created is not the same as general noncompliance or frequent or systemic errors).

[21] *See Nat'l Cable & Telecommc'ns Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981–82, 1001 (2005) (finding that an agency ''is free within the limits of reasoned interpretation to change course if it adequately justifies the change''); *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 863 (1984) (''An initial agency interpretation is not instantly carved in stone.'').

[22] The Board notes that the information requirements adopted here are minimum, not maximum, requirements. To the extent that Class I carriers, responding to the competitive market pressures suggested by CP or for other reasons, wish to provide rail users with information not specified in the minimum information requirements in the format of their choosing, the Board encourages them to do so.

platforms.[23] However, KCS and CN express concerns that handling carriers may not always receive complete waybill information from connecting carriers and, therefore, may not have access to the date the waybill was created; the identity of the shipper, consignee, and/or care-of party, as applicable (if not the invoiced party); and the origin station and state of the shipment. (KCS Comments 5, Nov. 6, 2019; CN Comments 7–8, June 5, 2020.) KCS states that it is ''willing to work with other carriers to try to obtain this information on a regular basis in the future, but currently does not always have all of the information the Board's rules would require.'' (KCS Comments 5, Nov. 6, 2019.) CN asks the Board to specify that ''a railroad is only required to provide information that is available to it.'' (CN Comments 7, June 5, 2020.)

NGFA objects to CN's proposal. NGFA argues that the proposal would create an incentive for carriers to avoid collecting information needed by rail users so that they would not have to provide the information on demurrage invoices. (NGFA Reply 13, July 6, 2020.)

The Board finds that adopting the minimum information requirements proposed in the *NPRM* will ensure that rail users have access to information that will help them readily assess the validity of demurrage charges, properly allocate demurrage responsibility, and modify their own behavior, as appropriate, to minimize future demurrage charges. Such actions will help provide for the efficient use of rail assets, consistent with section 10746. Accordingly, the Board will adopt the minimum information requirements proposed in the *NPRM* with the following clarifications.

To address ISRI's concern that the Board's proposal would require rail users to apply for credits, the Board clarifies that the final rule does not create an obligation for rail users to apply for credits. Rather, the Board intends that Class I carriers will list the number of credits and debits attributable to each car on the invoice (if applicable).[24] Furthermore, the Board declines ILTA's request to change the ''and/or'' language in the requirement that Class I carriers provide ''the identity of the shipper, consignee, and/or care-of party, as applicable'' because the ''as applicable'' language already conveys that Class I carriers should identify all applicable parties on the invoice.

In response to KCS's and CN's concerns about access to select waybill information, the Board clarifies that Class I carriers are not required to provide rail users with information to which the Class I carriers do not have access in the normal course of business from their partner carriers. Although CN and KCS do not quantify the degree to which they may lack information from other rail carriers in a movement, the Board would not expect this situation to occur frequently because Class I carriers have many reasons for collecting the minimum information required by the final rule, including for their own performance metrics and to substantiate demurrage charges should they be challenged, and carriers share information in the ordinary course of business during interchange. Where a carrier cannot provide information required by the rule because it has not received the information from another carrier, the invoicing carrier should make a note to that effect on the invoice. In response to NGFA's concern, the Board observes that it expects that this situation would arise infrequently, and the Board will consider further regulatory action if the situation is becoming widespread.

3. Billing Cycle

In the *SNPRM,* the Board invited comment on a proposal to require Class I carriers to include on or with demurrage invoices the billing cycle covered by the invoice. *SNPRM,* EP 759, slip op. at 5. Many rail users support the inclusion of the billing cycle, asserting that it would make invoices easier to understand and validate.[25] Dow argues that this information would be particularly useful when demurrage events span more than one invoicing period because some carriers bill demurrage monthly by the date it accrues rather than by the date the demurrage event ends. (Dow Comments 2, June 5, 2020.) Dow also contends that billing cycle information would simplify research into invoice events because many of the carriers' online platforms make demurrage event data available only by billing cycle. (*Id.*)

CN opposes this requirement, arguing that there is no basis in the record for it. (CN Comments 10, June 5, 2020.) NSR does not object, but requests additional clarity about whether its current process for providing billing cycle information[26] would satisfy the Board's proposed requirement. (NSR Comments 7, June 5, 2020.) In addition, UP, CN, CSXT, and BNSF state that they currently provide billing cycle information on their invoices or online platforms. (UP Comments, V.S. Prauner 2, June 5, 2020; CN Comments 10, June 5, 2020; CSXT Comments 3, June 5, 2020; BNSF Comments 2–3, June 5, 2020.)

The Board will include a billing cycle requirement in the final rule. The billing cycle information, which is a basic feature on recurring invoices, would help rail users verify demurrage charges that span multiple invoicing periods and compare invoiced charges to the demurrage information available on Class I carriers' online platforms. (Dow Comments 2, June 5, 2020.) Although CN opposes the addition, the record establishes that such information would assist rail users in better understanding their invoices; most carriers indicate that they already provide this basic information; and no carriers indicate that this requirement would be burdensome. In response to NSR's request, the Board clarifies here that providing rail users with the dates of the invoicing period over which rail cars incurred demurrage would be sufficient to satisfy the billing cycle requirement.

4. Original ETA and Interchange Date and Time

As discussed in the *SNPRM,* several commenters identified the original ETA and, if applicable, the date and time that cars are received at interchange, as information that would give rail users greater visibility into how carrier-caused bunching[27] and other delays may affect demurrage charges. *See SNPRM,* EP 759, slip op. at 5–8 (describing comments received in response to the *NPRM* related to the original ETA and the date

[23] (*See* KCS Comments 5, Nov. 6, 2019; CSXT Comments 5, Nov. 6, 2019; UP Comments 2, Nov. 6, 2019; CP Comments, V.S. Melo 2, Nov. 6, 2019; CN Comments 4, Nov. 6, 2019; NSR Reply 1, Dec. 6, 2019; *see also* NSR Comments 1, Nov. 6, 2019 (stating that it does not oppose the specific categories of information that the Board proposed in the *NPRM*).)

[24] The Board also clarifies that the final rule does not prevent rail users from seeking additional credits that were not discernable at the time the invoice was issued.

[25] (*See* ILTA Comments 2, June 4, 2020; AFPM Comments 5, June 5, 2020; IWLA Comments 2; June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 2, June 5, 2020; NACD Comments 3, June 5, 2020; NITL Comments 3, June 5, 2020; PCA Comments 2, June 5, 2020; FRCA Comments 1, June 5, 2020; ISRI Comments 3, June 5, 2020.)

[26] NSR states that ''[e]ach invoice indicates the time period during which the car incurred demurrage charges. If a railcar incurs charges over multiple months, the customer will be charged when the demurrage cycle has ended. The railcar is summarized on a monthly invoice with other equipment during the billing period. That single invoice will reflect the billing cycle for that month. Additionally, the customer will receive information showing the full range of dates where that particular car incurred charges.'' (NSR Comments 7, June 5, 2020.)

[27] The Board has described bunching as ''rail car deliveries that are not reasonably timed or spaced.'' *See Demurrage Liability,* EP 707, slip op. at 23.

and time that cars are received at interchange). In response, the Board invited additional comment on revisions to proposed section 1333.4 that would require Class I carriers to provide on or with their demurrage invoices (1) the original ETA of each car (as established by the invoicing carrier); and (2) the date and time that each car was received at interchange, if applicable. *Id.* For the former, the Board invited comment on how to define ''original ETA,'' [28] and whether the original ETA may differ depending on whether the rail car is loaded or empty. *Id.* at 7 n.12. For the latter, the Board invited comment on whether the requirement that Class I carriers provide the date and time that cars are received at interchange, if applicable, should be limited to the last interchange with the invoicing carrier. *Id.* at 7. Lastly, the Board invited comment on whether Class I carriers should be required to provide these items to the invoiced party upon reasonable request (rather than on or with every invoice) and, if so, what would constitute a reasonable request. *Id.* at 7–8.

*Original ETA.* In response to the *SNPRM,* rail users express additional support for an original ETA requirement. Several rail users contend that by comparing the original ETA to the car's arrival time, rail users will be better able to identify carrier-caused bunching, verify credits when applicable, and know when to dispute demurrage charges.[29] AFPM also contends that this requirement would encourage carriers to apply increased scrutiny to their demurrage invoices before sending them. (AFPM Comments 6, June 5, 2020.) Although several rail users acknowledge that they would need to consider other facts and circumstances besides the original ETA to determine whether demurrage charges arise from carrier-caused bunching, they argue that the original ETA would help them determine when to conduct further inquiries with the carriers. (Dow Reply 3–4, July 6, 2020; Joint Reply (ACC, CRA, TCI, & TFI) 3–4, July 6, 2020; NITL Reply 6, July 6, 2020.) Dow and joint commenters (ACC, CRA, TCI, and TFI) argue that the original ETA and date and time of interchange are the only metrics that allow rail users to identify demurrage charges that may arise from carrier-caused bunching and other delays beyond rail users' reasonable control. (Dow Reply 1, July 6, 2020; Joint Reply (ACC, CRA, TCI, & TFI) 3, July 6, 2020.) Additionally, Dow contends that the original ETA would help inform transit variability so that rail users can ''fine tune [their] shipments and the number of cars at a destination to better prevent demurrage.'' (Dow Reply 4, July 6, 2020.)

BNSF, CP, CN, UP, NSR, and CSXT oppose an original ETA requirement, although they state that they already provide rail users with ETA information.[30] BNSF, CN, and UP argue that ETAs are most useful when they are consistently updated with current information to account for the variability of traffic movements across the rail network. (BNSF Comments 16, June 5, 2020; CN Comments 8–9, June 5, 2020; UP Comments, V.S. Prauner 2, June 5, 2020.) BNSF asserts that rail users may ''keep a historical record of the original ETA and any updates as a car moves across the network, but that original ETA is not meaningful to the customer in its demurrage planning'' because ''actual events'' are more important than ''historical estimates.'' (BNSF Comments 16–17, June 5, 2020.)

BNSF and UP also contend that original ETAs do not give rail users meaningful information about the causes of demurrage.[31] CN asserts that the relevant data for bunching is not the original ETA but rather ''the actual arrival time of shipments, and whether the arrival times for all of a receiver's inbound traffic are clustered in a way that it could prevent the receiver from loading or unloading the cars without incurring demurrage.'' (CN Comments 9, June 5, 2020.) UP also argues that ''[t]he only way to identify whether and why bunching occurred is through the railroad and customer working cooperatively.'' (UP Comments 4, June 5, 2020.)

Additionally, Class I carriers assert that an original ETA requirement would create confusion about carriers' service obligations. CP and UP emphasize that that they do not guarantee specific transit times. (CP Comments 5, June 5, 2020; UP Comments 4, June 5, 2020.) Likewise, NSR and BNSF argue that a carrier's common carrier obligation does not require them to adhere to ETAs. (NSR Comments 7–8, June 5, 2020; BNSF Reply 2–3, July 6, 2020.) BNSF also contends that the Board has recognized in demurrage cases that ''transit delays inherent in rail operations do not, on their own, excuse a shipper from demurrage.'' (BNSF Reply 3–4, July 6, 2020.) Furthermore, CN argues that the Board's proposal could have unintended consequences, such as disrupting private service agreements between carriers and rail users by suggesting that ''failure to deliver by an original ETA could be indicative of service failure'' and incentivizing carriers to include a ''sizeable cushion'' rather than the most accurate ETA forecasts to avoid potential demurrage challenges. (CN Comments 9–10, June 5, 2020; *see also* BNSF Reply 5, July 6, 2020 (asserting that carriers may change the way they estimate ETAs to avoid litigation with rail users).)

Rail users respond by arguing that an original ETA requirement would not cause the outcomes that carriers describe. Several rail users contend that an original ETA requirement would not create transit-time guarantees since rail users know, via carriers' contracts and tariffs, that carriers do not guarantee transit times. (Dow Reply 4, July 6, 2020; ISRI Reply 4, July 6, 2020; Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020; NITL Reply 5, July 6, 2020.) Dow and joint commenters (ACC, CRA, TCI, and TFI) suggest that the Board could clarify in the final rule that the original ETA is required for demurrage purposes only and not to create a transit-time guarantee. (Dow Reply 4–5, July 6, 2020; Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020.) However, joint commenters (ACC, CRA, TCI, and TFI) also argue that ''[i]f the railroad caused the shipment to arrive late, even by a day, it should not be entitled to penalize the rail user with demurrage.'' (Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020.)

Dow and joint commenters (ACC, CRA, TCI, and TFI) further argue that, for private cars, original ETA should be defined as ''the estimated date and time of constructive placement as determined by the delivering carrier immediately upon proper release of a car by the shipper to the rail carrier (for single-line

[28] The Board sought comment on whether, for example, original ETA should be generated promptly following interchange or release of shipment to the invoicing carrier and be based on the first movement of the invoicing carrier. *SNPRM,* EP 759, slip op. at 7 n.12.

[29] (*See* ILTA Comments 2, June 4, 2020; AFPM Comments 6, June 5, 2020; FRCA Comments 1, June 5, 2020; ISRI Comments 4, June 5, 2020; IWLA Comments 2, June 5, 2020; NACD Comments 4, June 5, 2020; NITL Comments 3–4; June 5, 2020; PCA Comments 2, June 5, 2020; Dow Reply 3, July 6, 2020; NGFA Reply 10, July 6, 2020.)

[30] (*See* BNSF Comments 16–17, June 5, 2020; NSR Comments 7, June 5, 2020; UP Comments 4, June 5, 2020; CP Comments 5, June 5, 2020; CSXT Comments 3, June 5, 2020; CN Reply 5, July 6, 2020.)

[31] (BNSF Comments 16–17, June 5, 2020 (arguing that ''[i]nnumerable circumstances could cause changes to the original ETA of a particular movement, including industry behavior at origin or destination (if cars must be held en route)''); UP Comments 4, June 5, 2020 (noting that rail cars could miss their estimated ETAs ''because a surplus of cars ordered by the customer caused congestion in a yard or multiple shippers sent cars to the same receiver facility and that facility's capacity was exceeded'').)

movements) or the carrier's receipt of a car in interchange (for joint-line movements)'' as ''determined under applicable AAR interchange rules.'' (Dow Comments 3, June 5, 2020; *see also* Joint Comments (ACC, CRA, TCI, & TFI) 4, June 5, 2020 (proposing a similar definition).) They contend that an original ETA must be estimated immediately upon the delivering carrier receiving control of the car because carrier-caused delays can occur at origins and interchanges. (Dow Comments 3, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 5, June 5, 2020; *see also* NGFA Reply 9, July 6, 2020 (expressing concerns that a rail car ''could sit idle at origin for days or a week or more due to missed pulls with the original trip plan never generated, creating bunching issues at the origin shipper that are not documented by the carrier'').) [32]

NSR states that it opposes a rule that would require carriers to develop an ETA immediately upon receipt of a car in interchange, as this would require ''the reconfiguration of [NSR's] trip plan software, an incredibly complicated reconfiguration that would take years to implement due to the legacy infrastructure.'' (NSR Reply 4–5, July 6, 2020.) CN opposes any definition that would require it to provide an ETA before a trip plan is created. (CN Reply 5, July 6, 2020.)

In the *SNPRM,* the Board invited comment on whether the original ETA may differ depending on whether the rail car is loaded or empty. *SNPRM,* EP 759, slip op. at 7. In response, joint commenters (ACC, CRA, TCI, and TFI) assert that different definitions are not necessary because carriers' demurrage rules generally apply the same calculation and constructive placement methods to all private cars. (Joint Comments (ACC, CRA, TCI, & TFI) 5, June 5, 2020.)

The Board is persuaded that the original ETA provides useful information to rail users for verifying credits, when applicable, and identifying delays that impact demurrage. Although not dispositive as to the cause of bunching, original ETAs will allow rail users to better understand whether there are delays in shipment beyond carriers' initial expectations and will lead to better communication between carriers and rail users about the causes of demurrage. Likewise, original ETAs may give rail users more insight into which demurrage charges to probe further to determine whether carrier-caused bunching is present. Furthermore, original ETAs will assist certain rail users in verifying credits because at least one Class I carrier issues credits based on rail cars that do not meet their original ETAs. (*See* NSR Reply 2–3, July 6, 2020.) Given these benefits and the fact that carriers already generate original ETAs in the ordinary course of business, inclusion of the original ETA as a minimum requirement is appropriate.

The Board rejects the argument that updated (or ''real-time'') ETAs render original ETAs less useful. The Board recognizes that updated ETAs help rail users account for transit variability and plan for rail cars' arrival; however, they may be less useful when rail users need to verify demurrage charges on invoices that may be issued weeks later. In contrast, allowing rail users to readily compare significant deviations between original ETAs and car arrivals once invoices are issued could lead to better information exchange about the causes of delay. BNSF states that rail users may record original ETAs and updates as needed from the information carriers provide on their online platforms. However, the Board finds it unreasonable to expect rail users to keep records of fluctuating ETAs for all rail cars to prepare for the possibility that some of those rail cars ultimately accrue demurrage. As discussed in the *NPRM,* minimum information requirements are intended to ensure that rail users do not need to undertake unreasonable efforts to gather information that can be provided by carriers in the first instance. *NPRM,* EP 759, slip op. at 10.

The Board agrees with the Class I carriers' assertion that rail cars may not be delivered by their original ETAs due to a variety of causes, including rail users' behavior, carrier-caused delays, or other variables. Accordingly, a missed original ETA would not—without more— establish that carrier-caused bunching (or any other event) occurred but rather would give rail users information about delays that may then prompt them to conduct further investigations or adjust their own conduct to better account for transit variabilities and avoid future demurrage charges. In any given case, additional facts and circumstances would need to be considered in determining whether demurrage charges arise from carrier-caused bunching. The fact-specific nature of bunching issues is precisely why the Board has determined that demurrage disputes pertaining to bunching are best addressed in individual cases. *See Demurrage Liability,* EP 707, slip op. at 23–24; *see also Pol'y Statement,* EP 757, slip op. at 11–12.

The Board recognizes Class I carriers' concern that rail users may misinterpret original ETAs as guaranteed transit times or as a service standard that would override private agreements between rail users and carriers, and clarifies here that that is not the purpose or effect of the original ETA requirement. The requirement to provide an original ETA established here obligates carriers only to provide rail users with this information on or with demurrage invoices; it does not constitute, or require carriers to provide, service guarantees. The requirement does not create a separate service standard for carriers. Finally, inclusion of an original ETA requirement in the final rule does not change the fact that the Board will determine whether demurrage charges are reasonable under section 10702 and comport with the statutory requirements specified in section 10746 in the context of case-specific facts and circumstances. Accordingly, the existence of the original ETA in the minimum information requirements does not establish whether a delay in shipment renders a demurrage charge unreasonable. (*See* Joint Reply (ACC, CRA, TCI, & TFI) 7, July 6, 2020.) [33]

With respect to CN's and BNSF's assertions that an original ETA requirement would incentivize carriers to cushion their ETA forecasts, the Board expects that Class I carriers have other motivations to give rail users accurate estimates about rail car arrivals, including to provide good customer service, improve their performance metrics,[34] and ensure that the rail network runs efficiently by

[32] In addition, ISRI requests that the Board require Class I carriers to provide ETAs for all cars listed in a pipeline report detailing the ''cars in the system for future deliveries,'' because ''[a]t least one Class I railroad that provides its customers with a pipeline report fails to consistently include an ETA for the cars listed.'' (ISRI Comments 4, June 5, 2020.) However, this proceeding focuses on the information that Class I carriers must provide on or with demurrage invoices and ISRI's request is beyond that scope.

[33] The Board rejects AFPM's suggestion that certain rail users who own or lease the cars they use should be allowed to charge carriers demurrage when they miss their original ETAs, as AFPM's request is beyond this scope of this proceeding, which focuses on the information that Class I carriers must provide on or with demurrage invoices. (AFPM Comments 2, June 5, 2020.)

[34] *See, e.g.,* UP Comments 3, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges,* EP 754 (stating that its on-time delivery rates were the best they had been in two years); NSR Comments 3, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges,* EP 754 (describing measures taken to improve on-time delivery performance); CSXT Comments 3, May 8, 2019, *Oversight Hearing on Demurrage & Accessorial Charges,* EP 754 (explaining that bunching issues had decreased with continued improvements to operating performance and resulting transit times).

giving rail users the best opportunity to plan for the efficient use of rail assets. Although it may be appropriate to make adjustments to ETAs based on real-time information, providing the most accurate estimates available is in the interest of both rail carriers and their customers.

The Board will adopt the definition of original ETA discussed in the *SNPRM,* which will require Class I carriers to generate ETAs promptly following interchange or release of shipment to the invoicing carrier based on the first movement of the invoicing carrier. *SNPRM,* EP 759, slip op. at 7. The Board declines to adopt the proposal to require carriers to generate ETAs ''immediately'' following interchange or release of shipment since the inclusion of the word ''promptly'' in the definition is sufficient to ensure that there is not undue delay at origin or interchange before ETAs are created for rail cars. The Board also expects that it would not be in Class I carriers' interests, from an efficiency standpoint, to hold rail cars at their yards without trip plans.[35]

*Interchange Date and Time.* Many rail users also support a requirement that Class I carriers provide the date and time that cars are received at interchange, asserting that such information would be useful in identifying upstream carrier-caused bunching.[36] ILTA argues that ''having the interchange information would allow rail users to calculate transit time on an upstream carrier's line and allow impacted users to credibly approach the upstream carrier to take responsibility for delays it may have caused.'' (ILTA Comments 2, June 4, 2020.) Dow asserts that it would use the date and time of interchange, along with the original ETA, to ''identify circumstances that may warrant a deeper inquiry into whether demurrage charges arise from carrier-caused bunching and delays beyond Dow's reasonable control.'' (Dow Reply 3–4, July 6, 2020.) NITL acknowledges that ''there can be multiple factors causing car delays that result in demurrage'' and argues that interchange information, along with original ETAs, ''would assist rail customers and railroads in their investigations of invoiced charges.'' (NITL Reply 6, July 6, 2020.)

Dow and joint commenters (ACC, CRA, TCI, and TFI) contend that Class I carriers should provide the date and time for every interchange. (Dow Comments 3, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 5, June 5, 2020.) ISRI and NITL state that information about all interchanges would be helpful but ask that, at a minimum, the Board require Class I carriers to provide information about the last interchange with the invoicing carrier. (ISRI Comments 6, June 5, 2020; NITL Comments 4, June 5, 2020.)

BNSF, CSXT, and NSR state that they provide rail users with the date and time of interchange on their online platforms. (BNSF Comments 18, June 5, 2020; CSXT Comments 3, June 5, 2020; NSR Comments 8, June 5, 2020.) However, BNSF argues that an invoice requirement ''would be counterproductive as it would create confusion over the relevance of such data and potentially encourage unnecessary disputes over appropriate demurrage charges.'' (BNSF Comments 16, 18, June 5, 2020.) BNSF, UP, and NSR assert that they do not use interchange information to calculate demurrage. (BNSF Comments 18, June 5, 2020; UP Comments 4, June 5, 2020; NSR Reply 2–3, July 6, 2020.) Additionally, NSR argues that this requirement, if adopted, should be limited to the last interchange since it ''has no visibility into the operations of its interchange partners, and does not have access to information regarding any trip plan or ETA that may have been generated upstream by other carriers.'' (NSR Comments 8, June 5, 2020.)

The Board will require Class I carriers to provide, on or with demurrage invoices, the date and time they received rail cars at interchange, if applicable. The Board finds that interchange information may assist rail users in identifying where delays occurred on joint-line movements, which would in turn allow rail users to know when to adjust their own conduct to account for upstream transit variabilities and conduct further inquiries when necessary. These further inquiries may be especially important when demurrage disputes involve concerns about upstream bunching. *See Pol'y Statement,* EP 757, slip op. at 11–12. As with the original ETA, however, the Board clarifies that the date and time of interchange does not establish whether upstream bunching occurred and, instead, must be considered in the context of other relevant facts and circumstances.

The Board will limit this requirement to the last interchange with the invoicing carrier. In the *SNPRM,* the Board stated that Class I carriers would likely have access to the date and time of interchange because this information is used in the ordinary course of business to track car movement and place cars. *SNPRM,* EP 759, slip op. at 7. According to NSR, Class I carriers do not have access to information about upstream interchanges with other carriers in the ordinary course of business; accordingly, the Board will limit this requirement to the information that Class I carriers can provide without the potential burden of having to consult with other carriers.

*Reasonable Request Proposal.* Rail users and rail carriers that commented on the Board's alternative proposal to require carriers to provide original ETA and date and time of interchange only upon reasonable request oppose the proposal. Several rail users argue that a reasonable request provision would be burdensome and cause unnecessary delays in collecting information.[37] CSXT and UP also contend that a reasonable request provision is unnecessary because rail users can access the original ETA and date and time of interchange on demand through their online platforms. (CSXT Comments 3, June 5, 2020; UP Comments 5, June 5, 2020.) The Board will not include a reasonable request provision in the final rule because the comments offer no indication that it would benefit rail users or Class I carriers.

5. Ordered-In Date and Time

Rail users identified the date and time that cars are ordered into a rail user's facility as information that would help them validate invoices more efficiently. In response, the Board invited comment in the *SNPRM* on a modification to proposed section 1333.4 that would require Class I carriers to provide the ordered-in date and time on or with demurrage invoices. *SNPRM,* EP 759, slip op. at 8–9.

Rail users replied that access to the ordered-in date and time would allow them to verify demurrage invoices more efficiently by comparing carriers' information to their own records and determining the basis for carriers' demurrage assessments, understand how their own actions impacted the demurrage charges, and calculate credits, if applicable.[38] Dow also

[35] Because no commenter indicates that the original ETA would differ depending on whether a rail car is loaded or empty, the Board will make no such distinction in the final rule.

[36] (*See* AFPM Comments 6, June 5, 2020; FRCA Comments 1, June 5, 2020; ISRI Comments 5, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 5, June 5, 2020; NACD Comments 4, June 5, 2020; NITL Comments 4–5, June 5, 2020; PCA Comments 2, June 5, 2020.)

[37] (*See* Dow Comments 5, June 5, 2020; AFPM Comments 6, June 5, 2020; ISRI Comments 6–7, June 5, 2020; NGFA Comments 6, June 5, 2020; NITL Comments 5, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 7, June 5, 2020.)

[38] (*See* ILTA Comments 3–4, June 4, 2020; IWLA Comments 2, June 5, 2020; NACD Comments 4,

Continued

emphasizes that this information is a ''crucial demurrage metric because demurrage stops accruing at that time'' and reiterates that including this information is consistent with the Board's proposal to require the date and time of constructive placement, at which the accrual of demurrage starts. (Dow Comments 5, June 5, 2020.) Joint commenters (ACC, CRA, TCI, and TFI) support this requirement but argue that carriers should be required to provide ''the actual date and time the carrier receives the order to place the cars at the receiving facility'' since at least one carrier ''appears to purposefully record a different ordered-in date and time in its system.'' (Joint Comments (ACC, CRA, TCI, & TFI) 7, June 5, 2020.)

In response, CP argues that the Board should not require carriers to provide the date and time the rail user places the order in all circumstances because this information would not always impact the demurrage calculation and could cause administrative confusion. (CP Reply 4–5, July 6, 2020.) For example, CP explains that it allows rail users that operate closed-gate facilities to order in cars while the cars are en route, for which CP records the date that the cars arrive at the serving yard and are available for placement. (*Id.* at 3.) In this scenario, CP states that the order for placement upon arrival keeps the demurrage clock from starting. (*Id.* at 3–4.) Furthermore, CP states that it allows certain rail users to order in cars for the current day and up to three days in the future and, in these circumstances, records the date selected for car placement because this date stops the accrual of demurrage. (*Id.* at 4.) Likewise, NSR states that it provides rail users with the ''effective order date'' on invoices, which is the date ''selected by the customer from their service schedule'' and ''represents the date the railcar is to be delivered.'' (NSR Comments 8, June 5, 2020.) NSR states that the ordered-in date and time that a rail user enters online is not used for demurrage purposes but is provided in an order confirmation email. (*Id.*)

CN states that it already provides rail users with the ordered-in date and time but objects to the inclusion of this requirement because rail users would already have this information in their own records. (CN Comments 11, June 5, 2020.) CN also argues that the disputes the Board references in the *SNPRM*[39] would not be resolved by access to ordered-in date and time information. (*Id.*) CSXT, UP, and BNSF also indicate that, if applicable, they provide the ordered-in date and time on their invoices or online platforms. (CSXT Comments 3, June 5, 2020; UP Comments, V.S. Prauner 2, June 5, 2020; BNSF Comments 2–3, June 5, 2020.)

The comments received in response to the *SNPRM* do not change the Board's view that the ordered-in date and time, which is essential to the calculation of demurrage at closed-gate facilities, would be valuable on or with demurrage invoices for both demurrage accrual and verification purposes. *See SNPRM,* EP 759, slip op. at 8. Although, as CN points out, rail users may record the ordered-in date and time themselves, the Board finds that documentation of the ordered-in date and time, which would stop the accrual of demurrage, would be very useful when viewed along with the other information on demurrage invoices, including the event that starts demurrage accrual and the resulting credits and charges, as applicable. Additionally, as rail users explain, having access to the ordered-in date and time recorded by Class I carriers may help rail users identify discrepancies between the carrier's records and the rail user's records. CN argues that the issues stakeholders raised in comments and testimony in *Oversight Hearing on Demurrage & Accessorial Charges,* Docket No. EP 754, which the Board referenced in the *SNPRM,* EP 759, slip op. at 9, would not be resolved through the ordered-in date and time, but the Board did not state that the ordered-in date and time would be dispositive in these or any other specific disputes. Rather, as the Board stated in the *SNPRM,* the ordered-in date and time requirement is intended to give rail users easier access to information for their own verification purposes. *Id.* Furthermore, the comments from six Class I carriers stating that they currently provide rail users with the ordered-in date and time confirm that providing this information would not be overly burdensome for Class I carriers.

Since Class I carriers' comments demonstrate that the date and time the carrier receives the order from the rail user to place the cars is not used to calculate demurrage in all circumstances, the Board will not define the ordered-in date and time requirement as narrowly as joint commenters request. (*See* Joint Comments (ACC, CRA, TCI, & TFI) 7, June 5, 2020.) Rather, the ordered-in date and time will mean the date and time at which demurrage first stops accruing with respect to a closed-gate facility. Depending on the carrier's individual system, this may be the date and time the carrier receives the order to place cars from the rail user, the date selected by the rail user for car placement, or another similar metric.[40]

6. Other Information Requirements Proposed by Rail Users

In addition to the proposals discussed above, rail users identify an array of other information that they contend would be useful on demurrage invoices.[41] In response, CSXT states its general opposition to the additional items. (CSXT Reply 2, Dec. 6, 2019.) Moreover, CSXT, NSR, and UP argue that online platforms are the best way to provide an array of information. (*See* CSXT Reply 4, Dec. 6, 2019 (stating that CSXT already provides almost all of the requested information ''through one of its various platforms''); NSR Reply 1, Dec. 6, 2019 (stating that NSR provides most of the requested information online); UP Reply 3, Dec. 6, 2019 (arguing that an online platform can meet rail users' needs in a ''customized, tailored way'').)

The Board declines to incorporate additional items beyond those discussed in the *NPRM* and *SNPRM* into the final

June 5, 2020; Dow Comments 5, June 5, 2020; ISRI Comments 7, June 5, 2020; NITL Comments 5–6, June 5, 2020; AFPM Comments 7–8, June 5, 2020.)

[39] *See SNPRM,* EP 759, slip op. at 9 (providing examples of comments and testimony received in *Oversight Hearing on Demurrage & Accessorial Charges,* Docket No. 754, describing issues with demurrage accruing on rail cars that had been ordered into a facility).

[40] As CP indicates, there are scenarios when an ordered-in date and time does not have a bearing on demurrage. For example, when a rail user orders in a car when the car is still en route to CP's serving yard, CP states that it records the ordered-in date and time based on when the car arrives in the serving yard rather than when the rail user places the order. (CP Reply 3, July 6, 2020.) Because CP indicates that the demurrage clock would not start in such a scenario, the Board would not expect such instances to result in a demurrage charge.

[41] This information includes: Dwell time, (ACC Comments 2, Nov. 6, 2019; AFPM Comments 6–7, Nov. 6, 2019); railroad service events or, alternatively, those events that result in the issuance of credits, (AFPM Comments 7, Nov. 6, 2019; ISRI Comments 10, Nov. 6, 2019); car inventory at open gate facilities, (ISRI Comments 10, Nov. 6, 2019); destination station, state of shipment, and information to confirm that a carrier has not issued overlapping charges, (AFPM Comments 6–7, Nov. 6, 2019); date and time of notification to the rail user if different than constructive placement, car type and ownership, the standard transportation commodity code of the commodity shipped, payment information, and station of constructive placement, (CPC Comments 4–5, Nov. 6, 2019); location, date, and time a train is ''laid down,'' sequence number, monthly summary listing all demurrage charges, and reasons for the charges, (WCTL & SEC Comments 11–12, Nov. 6, 2019); date and time that a car order is placed with the carrier, information about whether cars were spotted or pulled within the relevant service window, and any missed switch dates and scheduled non-switch dates, (NGFA Comments 5–6, June 5, 2020); the time the waybill was created, ''[r]ailcar origin railroad pick-up date/time,'' and original estimated transit time of each railcar, (ILTA Comments 3–4, June 5, 2020).

rule at this time. The Board's minimum information requirements are not intended to encompass every piece of information that may be useful to rail users or that may bear on demurrage. Rather, the minimum information adopted in the final rule represents what the Board has determined will have the greatest impact on rail users' ability to validate demurrage charges, properly allocate demurrage responsibility, and modify their behavior if their own actions led to the demurrage charges. Many of the other items suggested by rail users would provide additional detail about the movement of rail cars but are not as central to an initial assessment of demurrage charges as the minimum information requirements adopted here. Moreover, in adjudicated cases, parties may seek discovery to gain further information about the causes of delays and demurrage. Several Class I carriers indicate that they provide, in some format, much of the information rail users identified in their comments, and the Board encourages them to continue to do so.

*Alternative Visibility Platforms*

In the *NPRM,* the Board invited comments on the adequacy of other billing or supply chain visibility tools or platforms (other than invoices or accompanying documentation) to provide rail users with access to the proposed minimum information. *NPRM,* EP 759, slip op. at 9 n.13. In response, Class I carriers state that their existing online platforms provide rail users with most (or, in some cases, all) of the information that the Board proposes.[42] UP asserts that its online platform benefits rail users by allowing them to create custom reports with information unique to their needs. (UP Comments 5, Nov. 6, 2019.) CP indicates that its online platform provides rail users with access to current information as shipments move across the rail network, as well as the ability to log concerns in real time, which obviates the need ''to review historical information to identify improper demurrage charges due to railroad-caused bunching.'' (CP Comments 3, June 5, 2020.)

Class I carriers ask that, if the Board adopts minimum information requirements, the Board allow them to provide the information on their online platforms, instead of on or with invoices.[43] CSXT argues that the demurrage information currently on its online platform is ''easily accessible'' and contends that if the Board were to require carriers to provide all of the required information on the invoice itself or determine that ''software platforms are acceptable only if all information is made available or downloadable in one central location,'' it would have to undertake a substantial and costly software redesign. (CSXT Comments 6, June 5, 2020.) UP also argues that invoices with all of the minimum information the Board proposes would not be useful to rail users since ''[a] combination of too many fields and fields that are irrelevant to most customers will make invoices cluttered and unreadable.'' (UP Comments 5, June 5, 2020.) Likewise, CSXT objects to a rule that would require it to compile the information into one invoice document because its physical invoice ''is already challenged in terms of available physical space'' and ''[i]t would be difficult to add additional categories without rendering the invoice unreadable.'' (CSXT Comments 8 & n.17, June 5, 2020.)

Conversely, several rail users describe carriers' current online platforms as impractical and cumbersome. (WCTL & SEC Comments 10, Nov. 6, 2019; Joint Reply (ACC, CRA, TFI, & NITL) 2, Dec. 6, 2019; Dow Reply 3, Dec. 6, 2019; ISRI Reply 2, July 6, 2020.) Joint commenters (ACC, CRA, TFI, and NITL) explain that locating information is a ''multistep process'' in which ''[a] customer cannot simply enter a demurrage invoice number and download a report of all of the car-event data for each car on the invoice'' but rather must access information for each car separately and often in multiple locations on the carrier's online platform. (Joint Reply (ACC, CRA, TFI, & NITL) 3, Dec. 6, 2019.) Dow specifically describes online portals belonging to four Class I carriers as cumbersome and identifies obstacles rail users may face in auditing demurrage invoices on these platforms, such as needing to search for certain information on a car-by-car basis, manually enter car marks, and navigate through multiple pages on the portal to access demurrage data. (Dow Reply 3–6, Dec. 6, 2019.) Likewise, PCA argues that since carriers are ''far from consistent in the level of information provided, the ease of access of that information, and the transparency of their demurrage procedures,'' rail users are often forced to ''cobble together'' the information on carriers' online platforms. (PCA Comments 2, June 5, 2020.) Nonetheless, certain rail users state that they do not object to Class I carriers providing the minimum information on their online platforms if they provide it in a format that rail users can download into a single, machine-readable file. (Dow Reply 8, July 6, 2020; ISRI Reply 2, 5, July 6, 2020.)

The record belies Class I carriers' claims that their current online platforms are more useful to rail users than invoices with minimum invoicing requirements. Rail users state they must, in many cases, search for, organize, and consolidate the information themselves from multiple locations on Class I carriers' online platforms. The final rule will ensure that rail users need not make unreasonable efforts to access basic information necessary to efficiently review and validate their demurrage invoices. In addition, Class I carriers will have flexibility to provide the minimum information either on the invoices or with the invoices as accompanying documentation. Furthermore, since demurrage issues may not be apparent until rail cars are delivered and demurrage is charged, the Board is unconvinced by CP's argument that allowing rail users to submit concerns on an online portal while shipments are in transit eliminates the need to review information on or with demurrage invoices.

Accordingly, the Board determines that Class I carriers must provide the minimum information described in section 1333.4 on demurrage invoices or with demurrage invoices as accompanying documentation. Class I carriers may provide the invoices as paper invoices, invoices attached to emails, invoices that are accessible on their online platforms, or other similar formats where the information is consolidated.[44]

*Machine-Readable Data*

In response to the *NPRM,* many rail user commenters voiced a preference for ''machine-readable'' data containing the minimum information. *See SNPRM,* EP 759, slip op. at 9–10 (describing comments received in response to the *NPRM* related to machine-readable data). The Board, therefore, invited additional comment on matters associated with modifying its regulations to require Class I carriers to provide rail users access to machine-

[42] (*See* KCS Comments 5, Nov. 6, 2019; CSXT Comments 10, Nov. 6, 2019; UP Comments 2, Nov. 6, 2019; CP Comments 4, Nov. 6, 2019; CN Comments 4, Nov. 6, 2019; BNSF Comments 2–3, June 5, 2020; NSR Reply 1, Dec. 6, 2019.)

[43] (CN Comments 7, June 5, 2020; CP Comments 6, June 5, 2020; CSXT Comments 2, June 5, 2020; NSR Comments 2, June 5, 2020; BNSF Comments 19, June 5, 2020; UP Comments 7, June 5, 2020.)

[44] The Board also clarifies that the final rule in this proceeding is a default rule, and Class I carriers and rail users may enter into separate agreements about how to convey and receive demurrage information.

readable data in a format to be chosen by the individual Class I carrier, such as a machine-readable invoice, a separate electronic file containing machine-readable data, or a customized link so rail users could directly download data in a machine-readable format. *Id.* at 10. The Board also invited comment on ways to prevent information inaccessibility for rail users without resources for coding or new upfront costs, and on any other issues pertaining to the accessibility of machine-readable data for small rail users. *Id.* Finally, the Board invited comment on how to define ''machine-readable,'' including the following definition proposed by commenters: ''A structured data file format that is open and capable of being easily processed by a computer. A format is open if it is not limited to a specific software platform and not subject to restrictions on re-use.'' *Id.*

In response to the *SNPRM,* rail users broadly support a requirement for machine-readable data, arguing that it will allow rail users to analyze demurrage invoices more efficiently and effectively by reducing the need for manual review, which is resource-intensive and imprecise.[45] Moreover, AFPM states that it supports the flexible compliance options identified by the Board, while other rail users request specific formatting requirements. (AFPM Comments 8, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 9, June 5, 2020 (requesting machine-readable invoices by email as attachments or direct links); NGFA Comments 7, June 5, 2020 (requesting customized links to machine-readable data); NITL Reply 7, July 6, 2020 (requesting machine-readable data in a ''single centralized location'').) In addition to machine-readable data, NGFA contends that rail users should be able to request paper or PDF invoices, (NGFA Comments 6, June 5, 2020), and NACD argues that invoices should ''continue to be available in standard format'' since small rail users would find analyzing machine-readable data difficult and costly, (NACD Comments 4–5, June 5, 2020).

BNSF, NSR, CP, CN, and UP state that they already provide rail users with some form of machine-readable data.[46] NSR states that it supports the use of machine-readable data but urges the Board not to make a requirement ''so prescriptive that it would stifle carrier and technological innovation on carriers' online platforms.'' (NSR Comments 2, 6, June 5, 2020.) CSXT states that it does not oppose providing machine-readable data on its online platform as long as ''the Board does not mandate any particular format or require that the information be provided in one place only or in a single data file.'' (CSXT Comments 6, June 5, 2020.) UP also asks the Board to specify that carriers can meet the machine-readable data requirement by making data available to rail users via their online platforms. (UP Comments 5–6, June 5, 2020.)

Regarding the definition of ''machine-readable,'' joint commenters (ACC, CRA, TCI, and TFI) and NITL support the definition proposed by some commenters in response to the *NPRM:*[47] ''a structured data file format that is open and capable of being easily processed by a computer. A format is open if it is not limited to a specific software platform and not subject to restrictions on re-use.'' (Joint Comments (ACC, CRA, TCI, & TFI) 8, June 5, 2020; NITL Comments 6, June 5, 2020.) Joint commenters (ACC, CRA, TCI, and TFI) contend that this definition would obviate the need for special coding and, therefore, ensure that small rail users can access machine-readable data. (Joint Comments (ACC, CRA, TCI, & TFI) 8, June 5, 2020.) NGFA agrees with this definition but would add the condition that a format is open if it ''can be read and interpreted automatically by a computer program without the need for manual intervention.'' (NGFA Comments 6–7, June 5, 2020.) In response to the *SNPRM,* Dow proposes an alternative definition, suggesting that the Board adopt a definition similar to the one used for the Federal Information Policy[48] and define machine-readable as ''an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.'' (Dow Comments 6, June 5, 2020.) UP argues that the Board should specify that CSV and Excel files meet the definition of machine-readable data. (UP Comments 5–6, June 5, 2020.)

Rail users convincingly argue that machine-readable data will facilitate efficient auditing by allowing them to validate invoices electronically, thereby reducing the time and resources they must dedicate to manual review. Furthermore, Class I carriers appear to recognize the benefits of machine-readable data, as most provide some machine-readable data now or plan to do so in the future. Accordingly, the Board will adopt a machine-readable data requirement to ensure that all rail users have the option to access machine-readable data containing the minimum information discussed above. As proposed in the *SNPRM,* the Board will give Class I carriers the discretion to determine how to provide rail users with access to machine-readable data, such as, for example, through a machine-readable invoice, a separate electronic file, a customized link, or another similar option. *SNPRM,* EP 759, slip op. at 10.

The Board will adopt a definition for machine-readable data that is ''data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost.'' This definition, which is similar to the definition referenced in the *SNPRM,* is also consistent with the definition adopted for the Federal Information Policy at 44 U.S.C. 3502(18). However, unlike the Federal Information Policy definition, the Board's definition specifies that the data must be provided in an ''open format,'' to be defined as ''a format that is not limited to a specific software program and not subject to restrictions on re-use'' so that Class I carriers may choose the program with which to provide machine-readable data in an open format (*e.g.,* CSV). The open format will also ensure that rail users will not need access to specific software programs to process the data. Moreover, to accommodate those small rail users that state that they would find machine-readable data difficult to manage, the requirement for Class I carriers to provide machine-readable data to rail users will be in addition to, not in lieu

[45] (*See* ILTA Comments 1, 3, June 4, 2020; AFPM Comments 8, June 5, 2020; Dow Comments 5–6, June 5, 2020; IWLA Comments 2–3, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 8, June 5, 2020; Lansdale Comments 1, June 5, 2020; NGFA Comments 6, June 5, 2020; NITL Comments 6, June 5, 2020; PCA Comments 2, June 5, 2020.) *See also SNPRM,* EP 759, slip op. at 9–10 (describing comments received in response to the *NPRM* related to machine-readable data).

[46] BNSF states that rail users can sign up for emailed reports in Excel format and export reports in comma-separated values (CSV), Excel, and PDF formats from its online platform. (BNSF Comments 5, June 5, 2020.) NSR states that rail users can download spreadsheets, including Excel and CSV files, with detailed supporting information for the demurrage charges reflected on invoices. (NSR Comments 3, June 5, 2020.) CP indicates that it makes ''a substantial amount'' of the information identified by the Board available in a spreadsheet. (CP Comments 4–5, June 5, 2020.) CN states that it currently provides machine-readable data ''on request to certain customers'' and is working to provide downloadable machine-readable data to all customers. (CN Comments 12, June 5, 2020.) According to UP, invoices can be downloaded as CSV files on its online platform with additional supporting information downloadable in Excel format. (UP Comments 5, June 5, 2020.) Additionally, CSXT currently provides access to some downloadable machine-readable data, according to one rail user's comments. (*See* Dow Reply 6, Dec. 6, 2019.)

[47] *See SNPRM,* EP 759, slip op. at 9 (referring to proposal by joint commenters (ACC, CRA, TFI, and NITL) and Dow).

[48] *See* 44 U.S.C. 3502(18).

of, the requirement to provide the minimum information on or with their standard invoices, as discussed above.[49] The text is set forth in new section 1333.5.

*Appropriate Action To Ensure Demurrage Charges Are Accurate and Warranted*

In the *NPRM,* the Board proposed to require Class I carriers to ''take appropriate action to ensure that the demurrage charges are accurate and warranted'' prior to sending demurrage invoices. *NPRM,* EP 759, slip op. at 10. In response to commenters' concerns that this provision would create more uncertainty and potential litigation over its meaning, the Board invited further comment in the *SNPRM* from Class I carriers about the actions they currently take, and from all stakeholders about the actions Class I carriers reasonably should be required to take, to ensure that demurrage invoices are accurate and warranted. *SNPRM,* EP 759, slip op. at 10–11.

In response to the *SNPRM,* rail users propose a variety of actions that they argue Class I carriers should be required to take to ensure invoice accuracy, such as establishing auditing procedures,[50] showing how charges are calculated; [51] providing supporting documentation,[52] offering concise explanations for the charges,[53] certifying practices to the Board,[54] consulting with rail users,[55] and ensuring the accuracy of crew reporting.[56]

Class I carriers continue to oppose the appropriate-action proposal as unnecessary and overly restrictive. CN argues that the Board should not mandate any minimum level of appropriate action since carriers ''should have flexibility to exercise judgment to pursue an approach that works for [their] particular circumstances, including whether to reasonably rely on technological innovations to enhance accuracy or to enlist more manual review.'' (CN Comments 13, June 5, 2020.) CSXT contends that the proposed requirement ''places carriers in an untenable situation, as they may either fall short of a vague standard of 'appropriateness' or be unable to utilize the prescribed solutions that the Board mandates to ensure accuracy.'' (CSXT Comments 9, June 5, 2020.) UP contends that an appropriate-action requirement is unnecessary since it already has ''achieved a 95% accuracy rate.'' (UP Comments 7, June 5, 2020.) Additionally, BNSF, CN, NSR, and UP detail the actions they currently take to ensure invoice accuracy. (BNSF Comments 14–15, June 5, 2020; CN Comments 12–13, June 5, 2020; NSR Comments 9–10, June 5, 2020; UP Comments 6, June 5, 2020.)

Upon considering the comments on this issue, the Board is persuaded that the proposed appropriate-action requirement should not be adopted in the final rule. Class I carriers convincingly argue that the proposed requirement lacks sufficient detail. Because there are many different reasonable ways to facilitate invoice accuracy, and because deciding whether a particular method is reasonable may depend on a carrier's individual systems and procedures for auditing invoices and potential future advancements in technology, the Board also declines to adopt the specific requirements proposed by rail users.

For these reasons, the final rule adopted in this decision will not include the proposed appropriate-action requirement. Nevertheless, existing requirements, including those at 49 U.S.C. 10702 and 10746, continue to apply to carriers' demurrage invoicing practices. As the Board has made clear previously, it expects that all carriers will take reasonable actions to ensure the accuracy of their invoicing processes and that their demurrage charges are warranted. *See Pol'y Statement,* EP 757, slip op. at 15–16 (emphasizing that the Board expects rail carriers to ''bill for demurrage only when the charges are accurate and warranted, consistent with the purpose of demurrage,'' and that rail users should be able to review and dispute charges without incurring undue expense). That being so, the Board strongly encourages carriers to adopt rail users' suggested actions where warranted and practicable, such as conducting regular audits, consulting with rail users when necessary, and providing additional information upon reasonable request. Class I carriers' invoicing protocols and procedures should be considered, in the context of all other relevant facts and circumstances, when determining whether demurrage charges are reasonable and enforceable in individual cases.

*Other Requests for Board Action*

Rail users make a variety of other requests, including asking the Board to set a timeframe for Class I carriers to issue invoices, establish dispute resolution procedures, impose penalties for noncompliance with the rule, and apply the rule to accessorial charges. In addition, UP asks that the Board establish a separate process by which Class I carriers can obtain waivers from the final rule. The Board will discuss each of these requests below.

1. Time Limits for Invoice Issuance, Dispute Resolution Procedures, and Penalties

Several rail users ask the Board to set time limits for invoice issuance, (*see* NCTA Comments 3–4, Nov. 6, 2019; FRCA Comments 5, Nov. 6, 2019), take further action with respect to dispute resolution,[57] and impose penalties for carriers that issue demurrage invoices that do not comply with the rule, (*see* FRCA Comments 5–6, Nov. 6, 2019; FRCA Comments 2, June 5, 2020). No Class I carrier responds directly to these requests.

The Board will not pursue these requests at this time. The Board notes that, by separate decision, it provided guidance on the general principles it expects to consider when evaluating the reasonableness of carriers' invoicing timeframes in future cases and discussed requests to establish additional dispute resolution procedures.[58] *See Pol'y Statement,* EP 757, slip op. at 16 n.50, 17. With respect to the issue of penalties, the Board

[49] As discussed above, Class I carriers and rail users may enter into separate agreements to convey and receive only machine-readable data without the standard invoice option.

[50] (*See* ILTA Comments 3, June 4, 2020; ISRI Comments 10, June 5, 2020; NITL Comments 7, June 5, 2020; Dow Comments 7, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 9, June 5, 2020.)

[51] (*See* Dow Comments 7, June 5, 2020; Joint Comments (ACC, CRA, TCI, & TFI) 9, June 5, 2020.)

[52] (*See* AFPM Comments 9, June 5, 2020; IWLA Comments 3, June 5, 2020; ILTA Comments 3, June 4, 2020; NGFA Comments 8, June 5, 2020; NITL Reply 3, July 6, 2020.)

[53] (*See* AFPM Comments 9–10, June 5, 2020; NACD Comments 5, June 5, 2020; NGFA Comments 8, June 5, 2020.)

[54] (*See* FRCA Comments 2, June 5, 2020 (arguing that the Board should require carriers to ''certify that their rules and practices comply with the Board's standards''); NGFA Comments 8, June 5, 2020 (asserting that carriers should be required to ''inform the Board in writing of the specific steps each one takes to ensure the accuracy of its respective demurrage invoices, with the [Board] subsequently making such carrier statements publicly available on its website'').)

[55] (*See* NGFA Comments 3, June 5, 2020 (arguing that prior to issuing invoices, carriers should ''notify and consult with the affected rail customer to validate the accuracy and legitimacy of the charge'').)

[56] (Joint Reply (ACC, CRA, TCI, & TFI) 17, July 6, 2020.)

[57] (*See* IWLA Comments 2, Nov. 4, 2019; ILTA Comments 3, Nov. 6, 2019; IARW Comments 2, Nov. 6, 2019; NITL Comments 9–10, Nov. 6, 2019; WCTL & SEC Comments 9, Nov. 6, 2019; NAFCA Reply 2, Dec. 6, 2019; NGFA Reply 15, July 6, 2020.)

[58] Parties currently have access to mediation, arbitration, and assistance through the Board's Rail Customer and Public Assistance program, which can be reached by telephone at 202–245–0238 or email at *rcpa@stb.gov,* to resolve demurrage disputes.

expects that Class I carriers will make a concerted effort to comply with the requirements of the rule and finds that it is premature to address specific penalties for non-compliance at this time.[59]

2. Accessorial Charges

NAFCA, AM, and NGFA ask the Board to apply the minimum information requirements to accessorial charges. (NAFCA Comments 2, Nov. 6, 2019; AM Comments 7, Nov. 6, 2019; NGFA Comments 2, June 5, 2020.) Class I carriers did not comment on this issue.

The Board declines to extend the final rule to accessorial charges at this time. There are many kinds of accessorial charges and some, such as those imposed for weighing rail cars or requests for special trains, do not serve the same efficiency-enhancing purpose as demurrage. In their comments, rail users do not identify any specific accessorial charges to which the minimum information requirements should apply, or otherwise justify the extension of the final rule to accessorial charges generally. The Board encourages Class I carriers to provide the minimum information for those accessorial charges designed to enhance the efficient use of rail assets to the extent practicable. Should sufficient evidence be presented in the future that invoicing issues are arising with respect to specific accessorial charges, the Board can revisit this issue and propose any warranted modifications to the rule.

3. Waivers

UP requests that, if the Board adopts minimum information requirements, then it also establish a process whereby carriers could obtain waivers from the rule by ''attesting that either all of the required information is provided to customers or explain why a particular data set is not provided or unavailable.'' (UP Comments 7, June 5, 2020.) UP asserts that this process would need to take place prior to the final rule's effective date so that carriers know whether they need to reprogram their systems. (*Id.*)

NGFA objects to this suggestion, arguing that UP's waiver idea is impractical since it would require extensive Board monitoring to ensure that carriers' online platforms do not become noncompliant after waivers had been granted. (NGFA Reply 14–15, July 6, 2020.)

The Board declines to adopt UP's proposal. Pursuant to 49 CFR 1110.9, ''[a]ny person may petition the Board for a permanent or temporary waiver of any rule,'' and UP fails to explain why the Board's established waiver process is not sufficient to address its concerns. Furthermore, absent unique circumstances, the Board does not anticipate that the waiver process would be used to allow Class I carriers to provide the minimum information by means other than on or with an invoice as described above.

*Time Frame for Compliance*

Several Class I carriers request specific amounts of time to comply with the final rule. NSR asks for a minimum of three months to complete its reprogramming, and KCS requests at least six months. (NSR Comments 1, Nov. 6, 2019; KCS Comments 6–7, Nov. 6, 2019.) CSXT contends that if it is required to implement a software redesign ''sooner than nine months from the Board's decision,'' it will need to delay or reprioritize current projects. (CSXT Comments 7–8, June 5, 2020.) CP likewise states that it could comply within six months but requests at least one year to ''minimize disruption to existing projects and allow CP to prioritize its use of its resources appropriately.'' (CP Comments 6, June 5, 2020.)

The Board will allow Class I carriers until October 6, 2021, to provide the minimum information on or with demurrage invoices and comply with the machine-readable data requirement, as this timeframe allows Class I carriers a significant amount of time for reprogramming while also ensuring that rail users can benefit from improved demurrage invoicing practices without extended delay.

*Exclusion of Class II and Class III Carriers*

In the *NPRM,* the Board explained that it did not propose to require Class II and Class III carriers to comply with the rule because the demurrage issues raised by stakeholders before the Board predominantly pertained to Class I carriers and compliance costs would be more difficult for smaller carriers. *NPRM,* EP 759, slip op. at 10. The Board invited comment on the proposed exclusion of Class II and Class III carriers. *Id.*

Although some rail users recognize that demurrage issues most frequently involve Class I carriers, (*see* AFPM Comments 8, Nov. 6, 2019; ISRI Comments 10, Nov. 6, 2019), several express concerns about excluding Class II and Class III carriers,[60] particularly those with larger, more sophisticated operations, (*see* FRCA Comments 5, Nov. 6, 2019; AFPM Comments 8, Nov. 6, 2019). ISRI urges the inclusion of Class II and Class III carriers for uniformity across the industry, (*see* ISRI Comments 10, Nov. 6, 2019; ISRI Comments 10–11, June 5, 2020), and others fear that Class I carriers will seek to evade the rule by tasking Class II and Class III carriers with demurrage invoicing where possible, (*see* NITL Comments 10, Nov. 6, 2019; AF&PA Comments 10, Nov. 6, 2019). ILTA acknowledges that Class II and Class III carriers have fewer resources to comply with the rule but argues that small carriers should nonetheless be required to comply since small rail users must pay demurrage charges. (ILTA Comments 4, June 4, 2020.) Some rail users suggest that the Board should apply the rule to all carriers and grant waivers on a case-by-case basis to accommodate the smallest carriers. (NITL Comments 10, Nov. 6, 2019; AF&PA Comments 10, Nov. 6, 2019; AM Reply 5–6, Dec. 6, 2019.) Others suggest that the Board exclude some or all Class III carriers from the rule, but not Class II carriers. (AFPM Comments 8, Nov. 6, 2019 (exclude all Class III carriers, but not Class II carriers); FRCA Comments 5, Nov. 6, 2019 (require Class II carriers and Class III carriers affiliated with large holding companies to comply).)[61]

ASLRRA supports the Board's proposal to exclude Class II and Class III carriers. (ASLRRA Comments 3, Nov. 6, 2019; ASLRRA Reply 4, July 6, 2020.) It asserts that more than half of small carriers operate as handling line carriers and, as such, do not always receive all of the information the Board would propose to include in the minimum information requirements from connecting Class I carriers. (ASLRRA Comments 3, Nov. 6, 2019.) ASLRRA further contends that rail users' proposed additions ''would place an insurmountable burden on [small rail carriers].'' (ASLRRA Reply 4, Dec. 6, 2019.) ASLRRA argues that the suggestion that small carriers could file

[59] Violating a regulation or order of the Board could subject a carrier to appropriate remedial action. *See, e.g.,* 49 U.S.C. 11701, 11704, 11901.

[60] (*See* FRCA Comments 5, Nov. 6, 2019; AFPM Comments 8, Nov. 6, 2019; Barilla Comments 3, Nov. 6, 2019; CPC Comments 5, Nov. 6, 2019; IWLA Comments 3, June 5, 2020.)

[61] As the Board stated in the decision adopting the direct-billing final rule, *Demurrage Billing Requirements,* EP 759, slip op. at 14 n.29 (STB served Apr. 30, 2020), it is unclear whether some comments on this issue are intended to address exclusion of Class II and III carriers from the minimum information requirements aspect of the rule, the direct-billing aspect, or both. For completeness, all potentially applicable comments are addressed both here and in the decision adopting the direct-billing final rule.

for individual waivers is unworkable since the waiver process would be too expensive and time-consuming for small carriers with limited resources. (*Id.* at 7.) ASLRRA also dismisses rail users' concerns that Class I carriers would assign demurrage invoicing to small carriers to avoid the rule, arguing that Class I carriers will not ''want to cede the control of their operations or practices to others or the compensation they receive for the misuse of their rail assets.'' (*Id.* at 8.)

Nothing in this record undercuts the Board's initial view that the demurrage issues raised by stakeholders in *Oversight Hearing on Demurrage & Accessorial Charges,* Docket No. EP 754, predominantly pertain to Class I carriers. *See NPRM,* EP 759, slip op. at 10, 11. Nor do the comments provide a basis for concluding that Class I carriers will seek to avoid the rule by assigning their demurrage invoicing to small carriers.[62] The case-by-case waiver approach for Class II and III carriers suggested by some rail users could be impractical and unduly burdensome for small carriers (and may be problematic for some Class II carriers, where there is a range of capabilities). For these reasons, the Board will not adopt the proposals to make Class II carriers, and, under some proposals, certain Class III carriers, subject to the rule. The Board does, however, strongly encourage Class II and Class III carriers to comply with the rule to the extent they are able to do so.[63]

*Conclusion*

Consistent with this decision, the Board adopts a final rule that requires Class I carriers to include certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information. The final rule is set out in full below and will be codified in the Code of Federal Regulations.

[62] Should sufficient evidence be presented in the future that Class I carriers are attempting to avoid the rule by assigning their demurrage claims processing to small connecting carriers, the Board can revisit this issue and propose any warranted modifications to the rule.

[63] Additionally, KCS requests that the Board exclude it from the minimum information requirements, along with Class II and Class III carriers. (KCS Comments 6, Nov. 6, 2019.) The Board declines to do so since KCS has not demonstrated that the demurrage issues raised by stakeholders in this proceeding and Docket No. EP 754 do not pertain to its demurrage practices. Moreover, the Board does not have the same concerns regarding the compliance costs for Class I carriers, including KCS, as it does for Class II and Class III carriers.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. Sections 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, section 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

As discussed above, the final rule will apply only to Class I carriers. Accordingly, the Board again certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities as defined by the RFA.[64] A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

*Paperwork Reduction Act*

In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) under OMB Control No. 2140–0021. In the *NPRM,* the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and OMB regulations at 5 CFR 1320.11, regarding: (1) Whether the collection of information, as modified, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimated in the *NPRM* that the proposed requirements for minimum information to be included on or with Class I carriers' demurrage invoices would add a total one-time hourly burden of 280 hours (93.3 hours per year as amortized over three years or 40 hours per respondent[65]) because, in most cases, those carriers would likely need to modify their information technology systems to implement some or all of the proposed changes.[66] *NPRM,* EP 759, slip op. at 13. In response to comments received from CSXT and CN that this estimate was understated, the Board increased the estimate in the *SNPRM* to 560 hours (186.6 hours per year as amortized over three years or 80 hours per respondent), which included the time Class I carriers would need to undertake the software redesign necessary to incorporate both the proposed minimum information discussed in the *NPRM* and the proposed additions discussed in the *SNPRM.*[67] *SNPRM,* EP 759, slip op. at 14.

[64] For the purpose of RFA analysis, the Board defines a ''small business'' as only including those rail carriers classified as Class III 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 ($40,384,263 or less when adjusted for inflation using 2019 data). Class II carriers have annual operating revenues of less than $250 million in 1991 dollars ($504,803,294 when adjusted for inflation using 2019 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.Rs.,* EP 748 (STB served June 10, 2020).

[65] There are seven Class I carrier respondents.

[66] The Board also provided an hourly burden estimate for the proposal that Class I carriers directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. *NPRM,* EP 759, slip op. at 13. Comments pertaining to this hourly burden estimate were addressed in a separate decision. *See Demurrage Billing Requirements,* EP 759, slip op. at 16–17 (STB served Apr. 30, 2020).

[67] In the *NPRM,* the Board estimated that the proposed requirement that Class I carriers take appropriate action to ensure that demurrage charges are accurate and warranted would add a total one-time hourly burden of 560 hours (186.6 hours per year as amortized over three years or 80 hours per respondent) because Class I carriers would likely need to establish or modify appropriate demurrage invoicing protocols and procedures. *NPRM,* EP 759, slip op. at 13. In the *SNPRM,* the Board increased this estimate to 840 hours (280 hours per year as amortized over three years or 120 hours per respondent). *SNPRM,* EP 759, slip op. at 14. Because the final rule adopted in this decision will not include the proposed appropriate-action requirement, the Board's estimate of 840 hours (280 hours per year as amortized over three years or 120 hours per respondent) to establish or modify appropriate demurrage invoicing protocols and

Continued

In response to the *SNPRM,* CSXT filed comments addressing the Board's PRA burden estimates. First, CSXT reiterates its estimate offered in response to the *NPRM* that it will take nine months to implement a program redesign to include the minimum information on or with demurrage invoices. (CSXT Comments 6–7, June 5, 2020.) However, CSXT indicates that ''its nine[-]month estimate is not limited to actual programming time.'' (*Id.* at 8.) Instead, CSXT explains that its estimate includes scheduling delays due to other priority software development projects in its technology pipeline and programming time for other unrelated software development projects. (*Id.*) Thus, CSXT's nine-month estimate is not an actual estimate of the time that Class I carriers need to comply with the rule. Without more support, CSXT does not justify its nine-month estimate.[68]

Second, CSXT argues that the Board should include additional burdens under two potential scenarios. First, if the Board requires ''that all demurrage information be downloadable to a single machine-readable file, or be housed in a central location within ShipCSX,'' then CSXT estimates that it would need approximately three months (or 955 hours). Second, if the Board requires CSXT ''[t]o include all of the proposed data fields in the existing ShipCSX demurrage module,'' then CSXT estimates it would need 1,680 hours, over a period of four to five months ''due to the multiple data programmers, sources, and systems involved.'' (*Id.* at 7–8 (footnote omitted).)[69]

CSXT's estimates of three months (955 hours) and four to five months (1,680 hours) appear to encompass the time CSXT would need to provide machine-readable data in various specific formats or in a central location. Although the final rule will not mandate any particular format for machine-readable data and, instead, will allow Class I carriers the discretion to select how to provide access to machine-readable data, the Board recognizes CSXT's stated concern that it may need more than 80 hours to modify its invoicing systems to include the required minimum information and provide machine-readable access to such information. Accordingly, the Board will increase its estimate from 560 hours (186.6 hours per year as amortized over three years or 80 hours per respondent) to 1,120 hours (373.3 hours per year as amortized over three years or 160 hours per respondent).

No other carriers commented on the Board's estimates.

This modification to an existing collection, along with CSXT's comment and the Board's response, will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

*Congressional Review Act*

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

**List of Subjects in 49 CFR Part 1333**

Penalties, Railroads.

*It is ordered:*

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

2. The final rule is effective on October 6, 2021, as set forth in this decision.

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

Decided: March 30, 2021.

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

**Jeffrey Herzig,**

*Clearance Clerk.*

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1333 of title 49, chapter X, of the Code of Federal Regulations as follows:

## PART 1333—DEMURRAGE LIABILITY

■ 1. The authority citation for part 1333 continues to read as follows:

**Authority:** 49 U.S.C. 1321, 10702, and 10746.

■ 2. Add § 1333.4 to read as follows:

### § 1333.4 Information Requirements for Demurrage Invoices

The following information shall be provided on or with any demurrage invoices issued by Class I carriers:

(a) The billing cycle covered by the invoice;

(b) The unique identifying information (*e.g.,* reporting marks and number) of each car involved;

(c) The following information, where applicable:

(1) The date the waybill was created;

(2) The status of each car as loaded or empty;

(3) The commodity being shipped (if the car is loaded);

(4) The identity of the shipper, consignee, and/or care-of party, as applicable; and

(5) The origin station and state of the shipment;

(d) The dates and times of:

(1) Original estimated arrival of each car, as generated promptly following interchange or release of shipment to the invoicing carrier and as based on the first movement of the invoicing carrier;

(2) Receipt of each car at the last interchange with the invoicing carrier (if applicable);

(3) Actual placement of each car;

(4) Constructive placement of each car (if applicable and different from actual placement);

(5) Notification of constructive placement to the shipper or third-party intermediary (if applicable);

(6) Each car ordered in (if applicable) (*i.e.,* the date and time demurrage first stops accruing with respect to a closed-gate facility);

(7) release of each car; and

(e) The number of credits and debits attributable to each car (if applicable).

■ 3. Add § 1333.5 to read as follows:

### § 1333.5 Machine-Readable Access to Information Required for Demurrage Invoices

In addition to providing the minimum information on or with demurrage invoices, Class I carriers shall provide machine-readable access to the information listed in § 1333.4. For purposes of this part, 'machine-readable' means data in an open format that can be easily processed by computer without human intervention while ensuring no semantic meaning is lost. An 'open format' is a format that is not limited to a specific software program and not subject to restrictions on re-use.

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procedures will not be included in the final estimate.

[68] CSXT also asserts that it would need to ''engage an outside vendor, adding even further cost and time'' to provide the minimum information on demurrage invoices, (CSXT Comments 8, June 5, 2020), but this argument lacks the specificity to support additional burden hours or a non-hourly dollar amount for additional costs.

[69] Additionally, CSXT estimates that it would need only two to three days (80 hours or less) of programming time if Class I carriers have full discretion to decide how to present the minimum information, (CSXT Comments 7 & n.16, June 5, 2020), but the final rule does not allow this level of discretion.