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Office of Proceedings
July 26, 2021
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 768

PETITION FOR RULEMAKING TO ADOPT RULES GOVERNING PRIVATE RAILCAR USE BY RAILROADS

PETITION FOR RULEMAKING

I. INTRODUCTION

Pursuant to 49 C.F.R. §1110.2(b), the North America Freight Car Association ("NAFCA"), The National Grain and Feed Association ("NGFA"), The Chlorine Institute ("CI"), and The National Oilseed Processors Association ("NOPA") (together "Petitioners") hereby submit this Petition for Rulemaking ("Petition") requesting the Board to exercise the authority granted to it by 49 U.S.C. §§1321 and 11122(a)(2) to promulgate regulations governing the use by the Nation's Class I railroads of freight railcars supplied to them by rail car owners, shippers, and other non-railroad entities ("Private Railcars"). As explained in this Petition, an update to the rules governing the railroads' use of Private Railcars is long overdue because the railroad industry has evolved to the point that approximately 73% of the railcars in service today nationwide – approximately 1.2 million railcars - are no longer owned by railroads, but are Private Railcars which are purchased or leased, and maintained, by non-railroad entities at little or no cost to the railroads that use them.

The non-railroad entities who supply Private Railcars to railroads have collectively invested tens of billions of dollars to acquire the railcars through lease or purchase and they incur additional significant ongoing costs to maintain them, in large part for their use by the Class I railroads to provide railroad freight service. While there are rules and policies in place by which suppliers of certain types of Private Railcars receive some compensation from railroads for their use of Private Railcars, current regulations and policies do not adequately protect this enormous investment by creating sufficient incentives for the Class I railroads to use Private Railcars efficiently. When Private Railcars in the possession of Class I railroads are handled inefficiently due to irregular service or other actions by a railroad that result in Private Railcars being held too long in the railroad's possession and control, the investment in those railcars is adversely affected and the business of the party supplying the railcars suffers.

As explained in more detail in this Petition, Petitioners propose that the Board should resolve the current imbalance by adopting a regulatory mechanism that utilizes existing principles governing demurrage and accessorial charges to provide greater incentives for railroads to utilize the Private Railcars in their possession more efficiently. More efficient use of Private Railcars by railroads will protect the huge investment non-railroad entities have made acquiring and maintaining them, and will result in the national railcar fleet being of a more rational size to utilize existing rail system capacity and meet demand. The overall goal of this proposal, either as submitted herein, or modified during a notice-and-comment rulemaking proceeding that Petitioners urge the Board to commence, is to maximize the Class I railroads' efficient use of Private Railcars without unduly infringing upon the railroads' freight operations over their respective systems, recognizing that some level of service variability is inherent in any railroad's operations.

II. IDENTITY AND INTEREST OF PETITIONERS

A. North America Freight Car Association

NAFCA is an organization made up of private (non-railroad owned) railcar manufacturers, owner/lessors, owner/lessees, lessees, other rail shippers and entities that support the railcar industry. Its members include some of the largest railcar manufacturers and lessors in the industry, as well as rail shippers who collectively lease or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.[1] Combined, NAFCA's members own or lease in excess of 700,000 railcars.

B. The National Grain and Feed Association

The NGFA is a U.S-based, not-for-profit trade association established in 1896 that consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. The NGFA also consists of 29 affiliated State and Regional Agribusiness Associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute. NGFA members collectively own or lease tens of thousands of Private Railcars that are supplied to the Class I railroads in order to receive rail service.

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[1] http://www.nafcahq.com/home.

C. The Chlorine Institute

CI is a 185-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. CI exists to support the chlor-alkali industry in advancing safe, secure, environmentally compatible, and sustainable production, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, plus the distribution and use of hydrogen chloride and vinyl chloride monomer. The Institute's North American Producer members account for more than 91 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. CI's mission chemicals are used throughout the U.S. economy and are key to the protection of public health, so it is critical that CI's members can safely ship their products by rail in a cost-effective manner. CI's members primarily ship their commodities in rail tank cars, which is a category of railcar that has consisted of nearly 100% Private Railcars for decades.

D. The National Oilseed Processors Association

Founded in 1930, NOPA is a national trade organization representing the U.S. soybean, canola, flaxseed, safflower seed and sunflower seed crushing industries. NOPA's members include 13 companies that operate a total of 61 soybean and five softseed solvent extraction plants across 22 states and produce meal and oil used in human food, animal feed, fuel and industrial applications. Collectively, NOPA's members process 94% of all soybeans in the United States. NOPA members rely upon all modes of transportation, including rail, barge and trucks. As such, many members rely on the Class I railroads for transportation of their commodities, and those NOPA members incur the costs of supplying fleets of railcars to the Class I railroads in order to receive freight rail service.

III. FACTUAL BACKGROUND

A. The National Railcar Fleet Is Now Mostly Private Railcars

As recounted by the Interstate Commerce Commission ("ICC"), when railroads were first chartered in the United States they owned none of the railcars used on their systems.[2] By 1845, however, they owned all of the railcars used in transportation.[3] In *Private Cars*, the ICC noted "[t]here was some use of privately owned cars as early as 1867 but it was not until about 1885 that sufficient of them were in use to make them a factor to be reckoned with in the transportation problems of the country."[4] Even so, by 1918, only 8% of the railcars in service nationwide were Private Railcars.[5] The percentage of Private Railcars in the national fleet has increased each subsequent decade to the point that over 73% of all railcars in service in North America are Private Railcars. While it is difficult to precisely determine the number of railcars in service nationwide and their respective ownership at any one point in time, Petitioners estimate that there are around 1.6 million railcars in service in the Nation's railcar fleet and approximately 1.2 million of them are Private Railcars. These include 100% of rail tank cars, 100% of railcars transporting dried distillers grain, approximately 85% of processed grain hopper railcars, and 90% of coal hopper railcars used west of the Mississippi River.[6] In contrast, the North American Class I railroads now

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2 *In the Matter of Private Railcars,* 50 I.C.C. 652, 656 (1918) ("*Private Cars*").

3 *Id.*

4 *Id*. at 657.

5 *Id*. at 673.

6 These are estimated numbers compiled by Petitioners and their members. Petitioners anticipate that the commencement of a rulemaking proceeding in response to this Petition will result in the Board being provided with more accurate and comprehensive data about the numbers of private railcars in service and their use by industry stakeholders, and that, if necessary, an appropriate protective order can be adopted to facilitate that data collection.

directly own and maintain railcar fleets that, in the aggregate, make up less than 20% of the railcars in service nationwide.[7]

Consequently, over the past 100 years, rail shippers and other non-railroad parties have invested far more in railcars used by the Class I railroads than have the railroads themselves. This investment has occurred in large part because the railroads long ago shifted to shippers the responsibility of providing the railcars required for their service in order to free up capital for power, system infrastructure, and other aspects of the railroads' businesses. As such, a shipper's investment in Private Railcars is often made as a condition for receiving rail service at particular rates and other terms. It is also made to ensure that adequate numbers of railcars are available to meet the shipper's production goals and other business requirements rather than rely on a railroad to provide the railcars.

Petitioners anticipate and expect that current data on the makeup of the Nation's railcar fleet and Private Railcar ownership costs will be submitted into the record of the proceeding commenced by the Board in response to this Petition. However, the clear justification for the proposal set forth in this Petition can be demonstrated from available public data and studies. For example, in 2011 NAFCA commissioned a study of the ownership distribution of the nation's railcar fleet.[8] Among the study's many findings, which covered the period from 2000-2008, were:

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[7] The remaining railcars, approximately 160,000 in number, are contained in a pool of railcars under the control of TTX Company. https://www.ttx.com/. TTX is, in turn, owned by the seven American Class I railroads and other railroad entities, so these cars are not directly owned and maintained by any one Class I railroad. According to TTX's website, approximately 130,000 of TTX's cars are "flat cars and intermodal wells," and the remaining cars are boxcars. TTX's pool does not include covered hopper cars, gondola railcars, tank railcars, or other car types used to move freight such as agricultural commodities, chemicals, coal, etc.

[8] Economic and Environmental Benefits of Private Railcars in North America, Thomas Corsi and Ken Casavant (January 2011) ("Corsi Casavant Study"). This study is available on NAFCA's website.

1. Private railcars represented 87% of the new investment in the 453,495 railcars put into service between 2000 and 2008;

2. Between 2006 and 2008 alone, non-railroads invested over $14.8 billion in 169,644 private railcars; and

3. The total replacement cost (in 2011 dollars) for the entire private fleet of freight carrying railcars in 2008 was estimated to equal approximately $90 billion (using an average replacement cost of $87,065 per railcar).[9]

According to the NAFCA study, in 2008 the Private Railcar fleet was approximately 1,000,000 railcars,[10] which is 200,000 fewer than the current estimate. Moreover, the average purchase price of a railcar has increased and the other costs of owning and maintaining Private Railcars have also increased over the past 10 years. But just applying the average replacement cost calculated in the study to the roughly 1.2 million Private Railcars in service today produces a conservative and understated total replacement cost of nearly $105 *billion***,** a figure that does not account for (1) the annual cost of maintaining the railcars; (2) storage costs; (3) compliance costs; and (4) additional costs assessed by the Class I railroads for the transportation of newly manufactured Private Railcars to their first loading location as well as more recent rates and charges assessed for movement of empty Private Railcars to repair shops (a cost that shippers do not incur if the railroad is moving its own empty railcars).

In summary, there is no question that suppliers of Private Railcars to the Class I railroads have made substantial investments that deserve the same protections as the investments the

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https://celectcdn.s3.amazonaws.com/files/0019/6182/economic_and_environmental_benefits_of_private_railcars_in_north_america.pdf.

[9] *Id*. at 4-5.

[10] $90 billion divided by an average replacement cost of $87,065 equals 1,033,710 Private Railcars.

railroads have made in their own fleets, which now make up a distinct minority of the Nation's railcar fleet over which the Board has jurisdiction.

B. Insufficient Incentives Exist for Class I Railroads to Efficiently Utilize Private Railcars

It has been public policy throughout the history of the railroad industry to permit railroads to utilize economic incentives to encourage the efficient use of railroad-owned railcars, and the foundation of that policy is protecting the railroads' investment in railcars. One of the oldest economic incentives to encourage the efficient use of railroad railcars is demurrage, which is regulated by the Board pursuant to 49 U.S.C. §10746. As the ICC and this Board have noted in numerous decisions construing demurrage, it has been a relatively simple concept historically: a customer should have incentives to return a railroad's railcars back to it as quickly as possible, and so railroads have been permitted to assess charges for demurrage that allow a railroad to recover the costs it incurs from the delay and to include a "penalty" to create incentives for a shipper to reduce or eliminate delays in the future. As summarized most recently by the Board in the 2020 *Policy Statement on Demurrage and Accessorial Rules and Charges*, "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 retained beyond a specified period of time (i.e., "free time") for loading and unloading."[11] Over time, the ICC and the STB have allowed railroads

[11] Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges* (served April 30, 2020) at 1-2 ("*Demurrage Policy Statement*"); STB Docket No 42068, *Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co*. (served April 12, 2004)("*Capitol Materials*"), *citing Chrysler Corp. v. New York Central R. Co*., 234 I.C.C. 755, 759 (1939).

to assess demurrage and storage charges on Private Railcars that reside on tracks on railroad property.[12]

Many of the rules governing demurrage and accessorial charges and other mechanisms to increase efficiency of railcar usage were developed when the railroads provided the majority of railcars for service nationwide. The underlying policy assumption was that railroads had always supplied the majority of the railcars in service, and they would continue to make such investments into the future which the agency needed to protect.[13] Consequently, in virtually every case, current railroad common carrier demurrage, storage, and accessorial[14] practices and charges were implemented and drafted for the purpose of creating incentives for a railroad's customers and other parties to maximize *their* efficient use of railroad and private railcars for the *railroad's* benefit. In contrast, there are no Board regulations and very few, if any, Class I railroad tariff provisions, that create incentives for *a railroad* to maximize the efficiency with which it possesses and uses Private

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12 Docket No. NOR 42060 (Sub–No. 1), *North America Freight Car Assn v. BNSF Railway* (served January 26, 2007).

13 *See e.g, Allied Corp. v Union Pacific Railroad Co*., Docket No. 38921, 1 I.C.C.2d 480 (1985), where the ICC stated (emphasis supplied):

> *Underlying our SCOT-5 conclusion [in 1981] is the fact that railroads have always been and will likely continue to be the principal source of rail cars for the shipping public*. The statute is in fact designed to ensure that they recover their investment in rail cars [See 49 U.S.C. 11121(a)(1)(B)]. Allied's approach, by putting UP's costly car fleet on standby status, would make it virtually impossible for the railroad to obtain a reasonable return on its investment. That would be unfair to UP and contrary to sound public policy.

14 "Accessorial charges are generally understood to include anything other than line-haul or demurrage charges." *Demurrage Policy Statement* at 13. Some accessorial services apply demurrage principles in that they are purportedly designed to create incentives for a shipper to behave in a manner the railroad deems to be efficient. For example, rail carriers routinely impose charges on rail customers for delays in loading or unloading both railroad-owned and private equipment at origin and destination, for diversions of trains, changing loading origins, and for many other actions not directly related to the line-haul movement.

Railcars, such as monetary penalties when the railroad is the cause of the delay giving rise to a charge,[15] or a penalty if a railroad holds on to a Private Railcar on its system for an extended period of time. In the proceeding that eventually produced the *Demurrage Policy Statement*, the Board received written and oral testimony from many parties on the need for there to be such "reciprocity" with respect to Private Railcar use. The Board ultimately declined to explore this aspect of Private Railcar use in the *Demurrage Policy Statement*, but nevertheless stated "[t]he Board acknowledges rail users' claims that providing such reciprocity may also promote more efficient car supply, and that the shift in rail-car ownership from railroad-owned to private cars documented in the record of the Oversight Proceeding, see NPPS, EP 757, slip op. at 9-10, raises issues from the perspective of private car users," and that "t]he Board remains open to argument and evidence in future cases in which these issues may be raised."[16]

In addition to the lack of sufficient reciprocal incentives in the Board's regulations and policies, it is important also to note that there are at present no viable commercial mechanisms for the vast majority of rail shippers to negotiate such incentives, such as rail contract service-standard provisions. Pursuant to such provisions, which were prevalent after passage of the Staggers Rail Act of 1980 but ceased to be included in most rail transportation contracts long ago, the contracting

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[15] In Docket No. EP 754, *Oversight Hearing on Railroad Demurrage and Accessorial Practices*, the Board received oral and written testimony from shippers and railroads about various "credit" and "debit" programs and practices, and the Board members engaged in dialogues about how these programs and practices could be fixed to account for instances where the railroad was at fault for the free time being exceeded and debits and associated charges accrued. For Private Railcar providers, however, true "reciprocity" and "commercial fairness" goes beyond merely waiving charges or issuing loading or unloading credit days. Such measures would relieve the shipper/car owner of wrongly assessed charges or perhaps would give credits against future charges, but they would not either (1) provide appropriate compensation to the car provider for the inability to use the Private Railcar to conduct business operations; or (2) provide sufficient economic incentives for the railroad to use the Private Railcars provided to it more efficiently. *See* Supplemental Submission of NAFCA in Docket No. EP 754 at 2-3.

[16] *Demurrage Policy Statement* at 18.

railroad would agree to provide transportation services within an agreed upon cycle time or other timeframe, subject to monetary penalties for non-performance. In today's railroad industry, which is controlled by a few Class I railroads, the vast number of shippers do not possess the commercial strength to condition their provision of Private Railcars to a railroad on the agreement by the railroad to pay monetary penalties if the railroad holds onto the shipper's railcars for too long. As such, railroads at present have little or no commercial incentive (other than revenue generation) to efficiently use Private Railcars in their possession.

In the absence of a rail transportation contract, rail service is provided pursuant to the "common carrier obligation" in 49 U.S.C. §11101(a) to provide rail service upon reasonable request. A railroad's failure to fulfill its common carrier obligation by holding onto Private Railcars too long, misplacing them, or committing some other service failure is legally actionable under 49 U.S.C. §11704(b) and (c). However, the common carrier obligation, despite existing in transportation law for centuries, has never been clearly defined, either in agency decisions, court cases, or by the Board in a policy statement or adjudication.[17] This lack of clarity and guidance as to the definition of the common carrier obligation, and the circumstances in which it is considered violated, have posed a strong deterrent to many rail shippers to pursue formal adjudications in court or at the STB under 49 U.S.C. § 11704. Petitioners assert that a notice-and-comment rulemaking proceeding, with the objective of adopting regulations such as those proposed in this Petition to require monetary penalties paid by railroads for inefficient use of Private Railcars by holding on to them beyond a reasonable period of time, would be useful in exploring the

[17] Francis P. Mulvey, PhD and Michael F. McBride, Railroads' Common Carrier Obligation: Its Legal and Economic Context, (April 2020), published in Vol. 87, No. 1, Journal of the Ass'n of Transportation Law Professionals 39 (2020). The paper was originally prepared for the U.S. Department of Agriculture.

appropriate and reasonable parameters of the common carrier obligation to provide rail freight service.

C. The Lack of Sufficient Incentives for Class I Railroads to Utilize Private Railcars Efficiently Has Resulted in Private Railcar Providers Incurring Substantial Costs

The lack of sufficient regulatory and commercial incentives for railroads to efficiently use Private Railcars in their possession has resulted in harm to non-railroad entities who make the enormous investment in Private Railcars, as well as the incurrence of other substantial damages and costs as a result of such inefficient usage. Rail shippers have large financial incentives to invest in railcars and size their fleets carefully, taking into account such factors as plant production rates for inflow of raw materials, output of finished commodities or other production (such as electricity generation by a coal-fired power plant), and, most important, the estimated service schedules provided by the serving railroad and overall cycle times between origins and destinations. Shippers constantly strive to size their railcar fleets and operate and maintain them in a manner that minimizes the overall cost of owning or leasing the Private Railcars and that enables a shipper to earn a reasonable return on its investment in its railcar fleet. If there are too many railcars in a fleet for a shipper's production rates and transportation needs, they constitute expensive unused assets that result in costs not associated with any revenues. By the same token, a railcar fleet that is too small (or if too few railcars are available because a portion of the fleet is too long in the possession and control of railroads) can result in missed sales opportunities caused by sub-optimal production, because insufficient raw materials would then be received and finished outbound products could not be made and delivered to end-use customers. In the worst case, a lack of sufficient railcars in use caused by a railroad's failure to pick up or deliver railcars for an extended period of time can result in plant shutdowns and employee layoffs. Accordingly,

shippers strive to acquire and maintain optimally sized fleets of Private Railcars based on their production and other business needs, the serving railroad's scheduling and other demands, and the time in which the railroad states it expects to need to pick up the railcars, deliver them to their destination, and return the empty Private Railcar to the origin or to a different location.

The present lack of sufficient incentives for railroads to efficiently utilize Private Railcars has resulted in the costs from their inefficient use of Private Railcars being borne entirely by the party supplying the Private Railcars, who has in some cases invested hundreds of millions of dollars to acquire and maintain those railcars for the benefit of receiving rail service. Consequently, rules and policies that were originally adopted for the purpose of protecting investments in rail cars by encouraging their efficient use are not being applied to Private Railcars, which as noted above are around 73% of the railcars nationwide. A few representative examples of such inefficiencies and the resulting costs from Petitioners' members are summarized below:

- In just the months of April and May 2021, the Private Railcars of a member of one Petitioner were held by a Class I railroad for between 72 and 700 hours on over 200 separate occasions, and in dozens of instances the delay was between 300 and 500 hours per railcar. This same shipper experienced similar delays on the system of another Class I railroad on over 100 occasions during the same time period.

- Another member of a Petitioner recorded numerous instances between 2020 and 2021 where Class I railroads held its Private Railcars for between eight and 61 *days*, including two instances where the railroads simply "lost" the Private Railcar.

- Other Petitioner members shipping unit trains of Private Railcars have not had entire trains available for their use for up to a week because Class I railroads did not have sufficient locomotive power or crews available.

- Another member of a Petitioner reports that the significant delays in Class I deliveries of its Private Railcars containing raw materials and products have resulted in lost production and that the company had to forego the use of its Private Railcars for alternative truck deliveries in order to obtain raw material supply sources to mitigate the harm. The railroads' failure to efficiently use the

member's Private Railcars has also forced it to incur the cost of special switches to other rail service providers to maintain adequate railcar supply.

- A Class I railroad's failure to return cars to interchange points for up to two weeks were a contributing factor to a Petitioner's member shutting down a production line at one of its plants, thus both stranding the company's investment in Private Railcars and causing business damages.

As set forth in more detail below, Petitioners submit that the time has come for the Board to update its rules and policies to meet the statutory goal of 49 U.S.C. §11122(a) to "encourage the purchase, acquisition, and efficient use of freight cars" by adopting appropriate incentives so that the nation's Class I railroads more efficiently utilize the Private Railcars in their possession. The aim of these regulatory changes should be to protect the investment Private Railcar owners and lessees make in their fleets in order to receive rail service, while not unduly affecting the ability of railroads to plan and execute their network operations. Petitioners believe that the appropriate mechanism is to implement a monetary penalty/incentive when a railroad holds on to a Private Railcar beyond a reasonable time that takes into account reasonably expected service variations.

IV. THE BOARD HAS AUTHORITY TO ADOPT REGULATIONS THAT PROVIDE INCENTIVES TO RAILROADS TO OPERATE PRIVATE RAILCARS MORE EFFICIENTLY

The STB has general authority to promulgate regulations on all matters that are the subject of its jurisdiction. 49 U.S.C. §1321. The Board's discretionary authority to issue regulations governing the use of Private Railcars by railroads has existed since at least 1918, and currently resides in 49 U.S.C. §11122(a), which provides in pertinent part, "[t]he regulations of the Board on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include – (1) [compensation] . . . (2) the other terms of any arrangement for the use by a rail carrier of a . . . freight car . . . not owned by the rail carrier using the . . . freight car,

. . . whether or not owned by another carrier, shipper, or third person; and (3) sanctions for nonobservance." The predecessor to this provision, 49 U.S.C. §1(14), was first enacted in 1917[18] and originally stated:

> The Commission shall, after hearing on a complaint or on its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car now owned by any such common carrier, and the penalties or other sanctions for nonobservance of such rules.

In *Private Cars,* the ICC interpreted Section 1(14) to mean "Congress has thus recognized the use of privately owned cars in transporting the commerce of the country, and has provided for their control by the Commission through rules and regulations of carriers hauling them."[19] The ICC further determined that the provision granted it the power "to fix the compensation to be paid for the use of any car not owned by the carrier,[20] and also that it empowered the agency to adopt rules designed to encourage the more efficient use of Private Railcars.[21] The ICC's later use of this authority to promulgate car-service regulations designed "to restore the incentive to the various roads to augment their supply of freight cars . . ." was upheld by the Supreme Court in *Allegheny*.[22]

In 1976, Section 1(14) was amended to substantially the form it now takes in 49 U.S.C. § 11122(a),[23] including the insertion of the "specific statutory mandate to 'encourage the purchase,

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18 In *United States v. Allegheny-Ludlum Steel Corp,* 406 U.S. 742, 744 (1972)("*Allegheny*"), the Supreme Court explained that the Esch Car Service Act of 1917, 40 Stat. 101, 49 U.S.C. §1(14) was enacted "[b]ecause of critical freight-car shortages experienced during World War 1."

19 *Private Cars,* 50 I.C.C. at 672.

20 *Id.* at 681.

21 *Id.* at 692. In *Private Cars,* carriers were required to publish in their tariffs "a rule to the effect that private cars when unloaded at destination, unless otherwise ordered by the owner or lessee, will be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee . . . ." The ICC further directed that railroads should not charge demurrage for privately owned cars that were on the tracks of their owners.

22 406 U.S. at 754.

23 *See,* STB Docket No. 42144 *et al., NAFCA, et al. v. Union Pacific Railroad Company* (served March 22, 2021), slip op. at 5.

acquisition, and efficient utilization of freight cars.'"[24] While there have been few cases since *Allegheny* construing §11122(a), it is nevertheless well-established that this provision provides the basis for the Board to promulgate the regulations proposed in this Petition, which are intended for the purpose of increasing the incentives for railroads to use Private Railcars more efficiently, as the Board "is statutorily required to encourage."[25] For example, in *Shippers Committee,* the ICC specifically explored whether there were sufficient regulatory incentives in place to ensure that there was an adequate national fleet of railroad-owned and privately owned grain hopper railcars, namely through the so-called "OT-5"[26] process by which the railroads accepted new privately owned hopper railcars for use on their systems. In that proceeding, the ICC examined the incentives under existing laws and rules for railroads and shippers, respectively, to invest in hopper railcars to meet the "statutory goal in 11122 of an adequate car fleet."[27] The ICC found certain practices of the Class I railroads that restricted their acceptance of private covered hopper railcars into interstate service were unlawful because "the ability of carriers to exclude private cars from their lines through the OT-5 process has created needless uncertainty for private car owners that discourages capital investment in private cars that may be useful in meeting the nation's transportation needs."[28] While the ICC changed the OT-5 rules to help private railcar owners, it

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[24] *Shippers Committee, OT-5 v. The Ann Arbor RR Co*, 5 I.C.C. 2d 856, 863 1989 WL 239462 (1989)("*Shippers Committee").*

[25] *LO Shippers Action Committee v. ICC*, 857 F.2d 802, 805 (D.C. Cir. 1988).

[26] *See* Circular No. OT-5-K, published by the Association of American Railroads, and entitled Rules Governing Assignment of Reporting Marks, Mechanical Designations, and Applications for the Use of Private Equipment. Circular OT-5 is an industry rule, but the STB retains authority over the reasonableness of railroad practices governing car use. OT-5 has since been replaced for the most part by OT-57, with differences which are not relevant to this Petition.

[27] *Shippers Committee*, 5 I.C.C.2d at 865.

[28] *Id.*

also adhered to a historical policy that railroads had the right to use their own cars in preference to Private Railcars in order to protect "the enormous investment" in their hopper car fleets.[29]

In 1989, private hopper railcars were only about one-half of all hopper railcars in service, well below the current 85% of hopper railcars that are Private Railcars. Even so, the rising trend of increased Private Railcar ownership at that time led one ICC Commissioner to state his concern that this trend should have prompted the ICC to conduct a periodic review of its railcar use policies to examine whether the policies favoring the protection of railroad investment in hopper railcars needed to be reexamined. Specifically (emphasis supplied):

> While I generally agree with the result reached, I believe continued, formal oversight on these matters would have been appropriate. . . . . While we, of course, have the authority to entertain complaints at any time, I believe an established, periodic review would be helpful. *I believe such review is also important because of future projections of car ownership, shortages, etc. The present statistics and trend lines presented here are sobering. If it comes to pass that shippers will soon own the bulk of covered hopper cars in use, some of our conclusions here regarding common carrier obligations and corollary carrier rights of "first-use" may need to be reexamined. If this degree of private ownership occurs, then at a certain point, shippers will begin to have similar economic, investment, and/or risk considerations for car purchases as carriers, arguably making railroad "first-use" claims less persuasive."*[30]

In summary, 49 U.S.C. § 11122(a)(2) broadly governs terms of arrangements of Private Railcar use by railroads, including the promulgation of regulations that create incentives for railroads to use those railcars efficiently so as to optimize the national railcar fleet. Given that § 11122(a) specifically authorizes the Board to adopt "sanctions for noncompliance," there is every reason why such regulations should include monetary penalties or for noncompliance.

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29 *Id*.

30 *Id*. at 877-78 (concurring statement of Commissioner Lamboley).

V. PETITIONERS' PROPOSED REGULATORY SOLUTION

Petitioners suggest that a reasonable basis for new regulations to meet the statutory goal of encouraging the purchase, acquisition, and use of Private Railcars is found in the general policies and goals applicable to demurrage, which can readily be applied to a railroad's use of Private Railcars while still taking into account that some service variability is unavoidable. More specifically, as set forth in the attached regulatory language that would add new Part 1334 to Title 49, Chapter X of the Code of Federal Regulations (or other appropriate Chapter), the Board would establish by regulation a "private railcar delay charge" that could be assessed by a private railcar provider if a railroad exceeded an "allowable transit idle time," defined in proposed §1334.1(g) as:

> Seventy-two (72) consecutive hours of idle time at any point on a railroad's system while the private loaded or empty railcar is being transported under a bill of lading or similar documentation between the time the private railcar is released for transportation to when it is either constructively placed or actually placed at the private railcar provider's facility or designated location. Whether allowable transit idle time has been exceeded shall be determined by Car Location Message (CLM) Event Sighting Codes published by Railinc and CLM's successor(s), and a private railcar delay charge may be assessed for any private railcar for which the CLM location city of CLM sighting code has not changed for more than seventy-two hours.

The allowable transit idle time of 72 hours is far in excess of the time railroads allow for their customers to hold onto railroad and Private Railcars in order to allow for a reasonable level of service variability. Indeed, typical railroad tariffs today permit shippers as little as 24 hours to unload a railcar and return it to the delivering railroad. Moreover, the 72-hour time period would be calculated using processes and data already utilized in the industry. As proposed, the applicable charge for exceeding the allowable transit idle time would be the greater of either (i) the applicable demurrage charge that a rail carrier assesses its customers pursuant to the railroad's tariffs or other

common carrier publications for holding on to railroad-owned or leased railcars beyond the free time established by the railroad, or (ii) the applicable storage charge that a rail carrier could assess the Private Railcar provider pursuant to the rail carrier's tariffs or other common carrier publications for holding onto or storing the private railcar beyond the free time established by the railroad.[31] A railroad would have the ability to seek a ruling from the Board that paying the railroad's charges for exceeding the allowable transit idle time was inappropriate in an appropriate proceeding that could include arbitration; in such a proceeding the railroad would bear the burden of proof.

Petitioners believe that the application of the general principles governing demurrage and reciprocal application of the railroads' demurrage charges are both appropriate and reasonable. In the *Demurrage Policy Statement*, the Board confirmed well-established precedent that storage and comparable accessorial charges "are primarily a penalty to deter undue car detention, and to a lesser extent, compensation to the railroad for expenses incurred."[32] Further, "[t]he compensatory function of demurrage is achieved, along with its incentivizing function, by permitting the delivering carrier to retain the charges assessed for a rail user's undue detention of rail assets."[33] Also, as stated previously, it is well-established that the policy permitting demurrage, storage and other charges and practices by railroads is in large part for the purpose of protecting their prior investment in railcars. There is no reason why such principles could not be applied to the railroads' undue detention of Private Railcars in order to meet the statutory goals of §11122(a).

This Petition accordingly requests that the Board adopt regulations to be published in 49 C.F.R. pursuant to the Board's authority under 49 U.S.C. §11122(a)(2). The regulations would

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31 *See* proposed §1334.2.

32 *Demurrage Policy Statement* at 5.

33 *Id.*

establish terms governing the arrangement of the use of Private Railcars by railroads, and sanctions (i.e., charges) for non-compliance with the terms, in order to promote the statutory directive to "encourage the purchase, acquisition, and efficient use of [private] freight cars." The proposed regulations are based on the same principles that have supported the railroads' authority to charge shippers demurrage, storage and other charges when they possess railroad and private railcars "too long," *i.e*. "a penalty to deter undue [private] car detention, and to a lesser extent, compensation to the [private car owner] for expenses incurred," in order to protect the investment in the private cars and encourage efficient operations. [34]

The principles developed by the ICC and the STB when construing railroad demurrage practices adopted pursuant to §10746 are equally applicable to the goal of requiring railroads to adopt and maintain practices that protect shippers' investments in Private Railcars by encouraging their efficient use through penalties. This rule can easily be applied reciprocally to Private Railcars. The STB has also determined that "When a shipper uses a railroad-owned rail car, it is depriving the railroad of an asset – the use of that rail car," and "when a shipper's privately owned rail cars are idled on the railroad's tracks, it is depriving the railroad of the use of that track."[35] The very same thing can be said when a railroad keeps a Private Railcar for too long or leaves the Private Railcar on its tracks or the tracks of third-party for an extended period of time: it is depriving the shipper of an important asset – the use of its railcar. Similarly, the Board has held that "A railroad has a right to set a reasonable time – free time – for a shipper to finish using rail assets and return them to the railroad. If it keeps an asset for too long . . . it should compensate

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[34] See, e.g., *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42012 (served July 20, 2010) at 4, *citing Chrysler Corp. v. N.Y. Cent. R.R. Co*. 234 I.C.C. 755, 759 (1939).

[35] *Id.*

the railroad for the extended use of its asset (rail cars or track)."[36] Petitioners do not disagree with this principle, but in today's rail industry, where shippers own or lease the vast majority of railcars in service, a shipper should have a right to expect the railroad to use its Private Railcars and return them within a reasonable time or be subject to a monetary charge that compensates the shipper for costs it incurs because of the delay, and that also contains a sufficient penalty to provide an incentive to the railroad to return the Private Railcar more quickly to the shipper or its designated receiver.

While the Board has held that demurrage charges may not be assessed when Private Railcars are held on private track because the railroad is not being deprived of any of its assets, the same cannot be said for the owner or lessee of Private Railcars that have been loaded or unloaded but remain on a third-party's private track for an extended period of time despite being released to the railroad to return to origin or another loading point. In that instance, the owner or lessee of the Private Railcar is being deprived of its asset and the third-party whose tracks are being used or blocked is being deprived of the use of its facility to receive raw material, manufacture products and ship them to its customers.

VI. CONCLUSION

Petitioners strongly believe that it is past time for the Board to adjust and update its regulations and policies to provide greater incentives for Class I railroads to utilize Private Railcars in their possession more efficiently, thereby providing some protection for the billions of dollars expended by non-railroad parties who supply approximately 73% of the total railcars in use in North America. Petitioners have set forth in this Petition and the attachment a straightforward means for accomplishing this objective, and they hereby request that the Board commence a

[36] *Id.*

notice-and-comment rulemaking on this Petition and the proposed regulations at the Board's earliest opportunity.

Respectfully submitted,

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July 26, 2021

ATTACHMENT A

PROPOSED REGULATIONS

TITLE 49—Transportation

Subtitle B—OTHER REGULATIONS RELATING TO TRANSPORTATION (CONTINUED)

CHAPTER X—SURFACE TRANSPORTATION BOARD

SUBCHAPTER D—CARRIER RATES AND SERVICE TERMS

PART 1334

Section 1334.1 – Definitions

1334.1(a) *"actually placed"* is when a private railcar is delivered directly to the tracks of the facility of a private railcar provider or another location selected by the private railcar provider.

1334.1(b) *"constructively placed"* is when a private railcar is not able to be actually placed at no fault of a rail carrier and it is held at a point on a rail carrier's track short of the facility until it can be actually placed.

1334.1(c) "*private railcar*" is a railcar that is owned or leased by a party other than a rail carrier, and which is provided to a rail carrier for freight transportation of commodities for a charge.

1334.1(d) a "*private railcar provider*" is a shipper, receiver, or other party who owns or leases a private railcar and provides it to a railroad for transportation.

1334.1(e) a "*private railcar delay charge"* is a charge that is primarily a penalty to deter undue private railcar detention by a railroad while the private railcar is in the railroad's possession and control, and to compensate the private railcar provider for expenses it incurs when its private railcar is in the possession and control of a rail carrier longer than the allowable transit idle time. The charge does not include compensation for the railroad's use of the private railcar under 49 U.S.C. §11122(a)(1), or other damages or business losses that may arise from a rail carrier's excessive possession of a private railcar and which may be the subject of a formal complaint.

1334.1(f) "*released for transportation*" means the point in time where a loaded or empty railcar is transferred from the possession and control of a rail shipper or receiver into the possession and control of a rail carrier for transportation, as evidenced by a bill of lading or similar documentation.

1334.1(g) the *"allowable transit idle time"* for a private railcar shall be seventy-two (72) consecutive hours of idle time at any point on a railroad's system while the private loaded or empty railcar is being transported under a bill of lading or similar documentation between the time the private railcar is released for transportation to when it is either constructively placed or actually placed at the private railcar provider's facility or designated location. Whether the allowable transit idle time has been exceeded shall be determined by Car Location Message (CLM) Event Sighting Codes published by Railinc and CLM's successor(s), and a private railcar delay charge may be assessed for any private railcar for which the CLM location city or CLM Sighting Code has not changed for more than seventy-two hours.

1334.2 – If the allowable transit idle time for a private railcar is exceeded, the private railcar provider may assess the rail carrier a private railcar delay charge unless the rail carrier demonstrates that it was not a cause of the allowable transit idle time being exceeded despite exercising due diligence. Unless otherwise determined in a proceeding pursuant to §1334.3, the applicable private railcar delay charge shall be equal to the greater of (i) the applicable demurrage or private railcar storage charge that the rail carrier could assess the private railcar provider pursuant to the rail carrier's tariffs or other common carrier publications for holding onto or detaining a railroad-owned or leased railcar beyond the free time established by the railroad; or (ii) the applicable storage charge that the rail carrier could assess the private railcar provider pursuant to the rail carrier's tariffs or other common carrier publications for holding on to or storing the private railcar beyond the free time established by the rail carrier.

1334.3 – If a rail carrier believes that the level of the private railcar delay charge should not be the amount set forth in §1334.2, the rail carrier may seek to establish a different private railcar delay charge in an appropriate proceeding in which the rail carrier shall bear the burden of proof to demonstrate that the private railcar delay charge is unreasonable and inappropriate. Actions under this subsection shall not excuse the carrier from paying the private railcar delay charge as assessed, pending the outcome of the proceeding.

1344.4 - Actions to enforce the payment of a private railcar use charge shall be pursued pursuant to 49 U.S.C. §11704. [Section to be developed during rulemaking to address "sanctions for nonobservance." 49 U.S.C. §11122(c).]