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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 768

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

MOTION FOR LEAVE TO FILE RESPONSE TO
REPLIES OF RAILROAD PARTIES

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 seek leave to file the attached brief Response that rebuts certain aspects of the Replies by the Association of American Railroads ("AAR"), Union Pacific Railroad Company ("UP") and CSX Transportation Inc. ("CSX")(together "Railroad Parties") to the Petition for Rulemaking filed herein on July 26, 2021. Although the Board's rules do not permit the submission of a reply to a reply as a matter of right, 49 C.F.R § 1104.13(c), the Board has waived this restriction in situations where good cause has been shown in the interest of compiling a full record.[1] Good cause exists here because the Railroad

[1] *See, e.g.*, F.D. 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016); F.D. 35157, *The City of Alexandria, Virginia – Petition for Declaratory Order* (served Nov. 6, 2008); F.D. 35765, *Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order* (served May 20, 2014). *See also* 49 C.F.R.

Parties Replies contain several novel and therefore unanticipated arguments asserting that the Board does not have statutory authority to grant the Petition and adopt the proposed regulations it requests. Petitioners submit that a brief rebuttal to those arguments (which Petitioners submit are erroneous) would assist the Board in having a complete record upon which to make a decision.

Neither this Motion nor the proposed brief Response included herewith raise any new legal issues or expand the nature of this proceeding. Further, accepting this Response into the record will not prejudice any party because the Board has not yet issued any rulings on the merits of the Petition. Accordingly, and for the reasons stated above, Petitioners request that the Board grant this Motion for leave to file Petitioners' Response to the Railroad Parties' Replies to the Petition for Rulemaking.

Respectfully submitted,

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§1100.3 ("The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.").

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of September, 2021, a copy of the foregoing Motion for Leave to File Response to Replies of Railroad Parties was served by email on all parties on the official Service List for this proceeding.

/ss/ Thomas W. Wilcox

BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. EP 768

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

RESPONSE TO REPLIES OF RAILROAD PARTIES

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 brief Response to certain aspects of the Replies submitted by the Association of American Railroads ("AAR"), Union Pacific Railroad Company ("UP") and CSX Transportation Inc. ("CSX")(together "Railroad Parties") to the Petition for Rulemaking ("Petition") filed herein on July 26, 2021. The bulk of the Railroad Parties' Replies consist of their respective one-sided versions of the relevant issues and the litany of supposed (and speculative) terrible outcomes that the Board and industry stakeholders have come to expect from Class I railroads in response to any proposal that would change the regulatory *status quo*.[1] These aspects of the Railroad Parties'

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[1] Interestingly, the Railroad Parties, led by AAR, wrongly assert that the Petitioners have labelled their proposal as "reverse demurrage," a term that intentionally appears nowhere in the Petition. AAR Reply at 1. Referring to Petitioners' proposal in this overly simplistic manner is not correct. Petitioners firmly maintain that demurrage *principles* may be utilized to develop appropriate mechanisms to create incentives for railroads to use Private Cars efficiently, but that

Replies should be tested and analyzed in a rulemaking proceeding commenced by the Board in response to the Petition, which Petitioners implore the Board to institute.[2] This Response rebuts the novel and therefore unanticipated arguments raised by AAR and UP[3] that the Board does not have the statutory authority under 49 U.S.C. §11122(a) to promulgate the rules that Petitioners have proposed.

1. AAR

First, AAR seeks to counter the extensive discussion at pages 14-17 of the Petition explaining the history of 49 U.S.C. §§1(14) and 11122(a) and the clear and unambiguous grant of authority those statutes provide to the Board to adopt regulations concerning the use of Private Cars by engaging in a strained and convoluted effort to recast Petitioners' proposal into the equivalent of agency action taken under an entirely different statutory provision that was found to be beyond the scope of that other statute. Specifically, the Petition explains how 49 U.S.C. §11122(a) was first enacted as 49 U.S.C. §1(14) in 1917, 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.

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such mechanisms must also take into account service variability inherent in railroad operations. Actual "reverse demurrage" on the other hand, would seek to impose on railroads the same rigid standards they apply to shippers, such as strict 24 hours (or less) unloading times and other requirements subject to large monetary penalties for non-compliance, which Petitioners do not seek to impose on Class I railroads (and which may not be realistic for Private Railcars, any more than they are realistic in at least some circumstances for railroad-provided cars).

[2] Petitioners' note that their desire for the Board to address the serious imbalances regarding the railroads' use of Private Railcars summarized in the Petition is shared by many other industry stakeholders who own and or lease Private Railcars, many of whom have filed replies in support of the Petition and also requesting that the Board commencing a notice and comment rulemaking proceeding on Petitioners' proposal.

[3] For its part, CSX merely states without elaboration that it "joins the AAR's comments" regarding the Board's authority. CSXT Reply at 2.

This provision was amended when Congress passed the Transportation Act of 1920, 41 Stat. 456, 476:

> The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practice with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

In its Reply, AAR attempts to argue the applicability to Petitioners' proposal of a 1924 United States Supreme Court decision wherein the Court was not asked to interpret Section 1(14), but rather Section 1(15) of the Act, which granted the Interstate Commerce Commission ("ICC") authority to react to "emergenc[ies] requiring immediate action . . . in any section of the country." Specifically, in *Peoria & P.U. Ry Co. v. United States*, 263 U.S. 528 (1924)("*Peoria*"), the Court examined the scope of 49 U.S.C. §1(15), which in part gave the ICC authority to suspend the operation of car service rules adopted pursuant to Section 1(14) whenever the ICC determined "that a shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country."

In *Peoria*, Section 1(15) had been utilized by the ICC to issue an emergency order directing a railroad to perform switching operations for another railroad with its own engines and its own tracks.[4] The Court held that this order exceeded the scope of the ICC's emergency powers under Section 1(15), which the Court determined did not extend to directing a railroad to provide such switching services, reasoning "the switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier," as opposed to "the use by one

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[4] 263 U.S. at 531.

carrier of property of another or the direction or manner and the means by which the service of transportation shall be performed."[5]

The AAR's attempt to equate the ICC's ordering of railroads to provide switching services in cases of national emergencies with the Petitioners' proposal to simply establish financial incentives for the railroads to more efficiently use the Private Railcars supplied to them is strained and misplaced, to say the least.

Similarly strained and misplaced is AAR's reliance upon *Atchison, Topeka and Santa Fe Railway Co. v. ICC*, 607 F.2d 1199 (7th Cir. 1979)("*ATSF*"), to also assert the Board does not have authority to adopt the regulations Petitioners propose. In that case, the ICC again attempted to directly compel railroads to take action concerning their performance of transportation service, this time by ordering them to publish, in tariff form, their "operating schedules involving the transportation of nonperishable commodities between major terminals and interchange points to be Required."[6] Citing *Peoria*, the Seventh Circuit held that the ICC was improperly attempting to regulate transportation service by requiring operating schedules to be published in a tariff.[7] As with the ICC's emergency action in *Peoria*, its directive in *ATSF* was in no way analogous to the proposal set forth herein by Petitioners.

Despite AAR's verbal gymnastics to the contrary, Petitioners' proposal cannot in any way be construed to ask the Board to directly order the Railroads to take any action regarding their provision of transportation services. As such, neither of these cases have any application to the issues in this proceeding nor do they diminish the Board's authority to grant the Petition for Rulemaking and commence a proceeding that leads to the adoption of regulations that establish

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5 *Id.* at 535.
6 *Id.* at 1199.
7 *Id.* at 1205.

financial incentives to encourage (not direct) railroads to more efficiently use the Private Railcars that are provided to them by their customers.

2. UP

In addition to making numerous allegations and claims as to why a regulatory proposal designed to merely encourage railroads to use more efficiently Private Railcars supplied to them is not justified or warranted – all of which would be considered and vetted in a rulemaking proceeding – UP makes the remarkable assertion that the Board has no authority to regulate the use of Private Railcars due to an alleged "inadvertent" drafting error by Congress.[8] Specifically, UP claims that the absence of the term "freight cars" from 49 U.S.C. 1(14)(a)(ii) in the "4R Act"[9] prevents the Board from adopting regulations concerning the use of private freight cars even though the term was added back into item (ii) in 1978 and has remained in the provision ever since.[10] According to UP, because of this alleged drafting error the Board can only regulate the compensation paid to Private Car owners for the use of their cars.[11] UP's argument is spurious.

First, accepting UP's argument would require the Board to completely ignore the rest of Section 11122(a), which since passage of the 4R Act in 1976 has contained (1) the mandate that "it is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars," and (2) the clear authority granted to the Board "to carry out such intent" by "establish[ing] reasonable rules, regulations, and practices with respect to car service" after notice and an opportunity for a hearing.

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8 UP Reply at 2.

9 Railroad Revitalization and Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

10 UP Reply at 3, citing *N. Am Freight Car Ass'n v. Union Pacific RR*, NOR 42144, slip op. at 5 (STB Served Mar. 22, 2021).

11 *Id.* at 2.

Second, UP's claim is easily rebutted by the fact that the ICC and the Board have construed 49 U.S.C. §11122(a) in numerous decisions after 1978 to give both agencies clear authority to regulate the terms of the use of freight cars by common carrier railroads, which decisions the Petition summarizes at pages 15-17. Accepting UP's "inadvertent drafting error" argument (which does not acknowledge these prior agency decisions) would require the Board to conclude that all of the decisions by the ICC and the Board after 1978 construing Section 11122(a) to apply to the terms for the use of freight cars were incorrectly decided, and therefore *ultra vires* and of no force and effect, an argument Petitioners note neither UP nor any other railroad has advanced since passage of the 1978 recodification of the Interstate Commerce Act.

In conclusion, for the reasons set forth above, the arguments raised by the Railroad Parties in their Replies in support of their claim that the Board does not have authority to promulgate the regulations proposed in the Petition are strained and utterly without any merit.

The remainder of the arguments in the Railroad Parties' Replies to the Petition are all matters that can and should be addressed in a notice and comment rulemaking proceeding commenced by the Board after granting the Petition, or in any other proceeding the Board deems appropriate to address this extremely important and timely industry issue.

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