302954

ENTERED
Office of Proceedings
August 30, 2021
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 768

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

ASSOCIATION OF AMERICAN RAILROADS' REPLY TO PETITION FOR RULEMAKING

Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller Jr. *(admitted in MD)*
ASSOCIATION OF AMERICAN RAILROADS
425 Third Street, SW
Suite 1000
Washington, DC 20024
(202) 639-2100

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street, N.W.
Washington, DC 20009
(202) 294-1399

Counsel for the Association of American Railroads

August 30, 2021

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 768

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

ASSOCIATION OF AMERICAN RAILROADS' REPLY TO PETITION FOR RULEMAKING

INTRODUCTION

The Association of American Railroads ("AAR") submits this Reply to the Petition for Rulemaking. Petitioners are "non-railroad entities who supply Private Railcars to railroads." Petition at 2. They invoke 49 U.S.C. § 11122(a) – a statute related to Board regulation of "car service" – as the statutory foundation for their effort to persuade the Board to develop an entirely new regulatory regime they label "reverse demurrage," which would establish rigid service standards and dictate operational choices for transportation using private cars. *Id.* at 1, 14. In particular, Petitioners seek to impose charges on railroads whenever waybilled private railcars moving "in transit" have not moved from one "car location message" (or "CLM") location to the next within 72 hours, for any reason. *Id.* at 24 (proposed 49 C.F.R. § 1334.1(g)). They explain that the regulations they seek would "provide greater incentives for railroads to utilize the Private Railcars in their possession more efficiently" for the purpose of "protect[ing] the huge investment non-railroad entities have made acquiring and maintaining them." *Id.* at 2.

The Board should reject the Petition outright. Petitioners seek to invoke regulatory powers the Board does not have to solve a problem that does not exist. Petitioners point to no actual problem of "car service" that could be reached by Section 11122, but instead seek to

regulate the *transportation services* railroads provide to shippers – not to car owners – by establishing a new regime of service standards and penalties governing those services. The proceeding Petitioners desire is ill-conceived and would be a waste of the Board's resources, for four reasons:

- The Board does not have the authority to do what Petitioners ask because the Board's "car service" authority does not extend to the micromanagement of rail transportation services, much less the subset of those services that happen to entail the use of private cars;
- In any event, there is no car service problem or any other problem warranting a new regulatory scheme;
- The kind of micromanagement of railroad transportation service Petitioners propose would be misguided and inconsistent with the well-established legal framework governing railroad service levels; and
- Petitioners' proposed rulemaking would raise a host of complex issues relating to car supply, railroad operations, and the Board's regulatory authority that Petitioners – with their narrow and pecuniary interests as private car owners – have not even begun to address. The endeavor would be a profoundly poor subject of the Board's regulatory attention.

If the Board nonetheless contemplates initiating a burdensome regulatory proceeding, it should first require that Petitioners come forward with evidence demonstrating some specific set of public interest harms and the manner in which their proposal purportedly addresses them. If the Board then wishes to explore certain facets of the issues raised by Petitioners, the Board should do so in a manner that allows for an appropriate scoping of the issues *prior* to putting forward any concrete rulemaking proposal – such as via a request for comments on a particular set of issues of interest to the Board in advance of soliciting reactions to a specific set of proposed rules.

I. THE REGULATIONS PETITIONERS SEEK ARE OUTSIDE THE BOARD'S AUTHORITY TO REGULATE "CAR SERVICE"

The sole basis for regulatory action invoked by Petitioners is 49 U.S.C. § 11122(a), concerning "car service" regulations. Petition at 1, 14. They try to invoke this authority by emphasizing their role as the suppliers (as owners or lessees) of private railcars and limiting the scope of their regulatory proposal to supposed "delays" associated with such railcars.

But there is no doubt that the system of rules and financial penalties Petitioners seek would be regulation of *transportation service*, not car service. The sole focus of their Petition is the regulation of the manner in which railroads big and small move waybilled railcars from origin to destination across their networks. The specific rule Petitioners propose makes this clear by applying only to supposed delays to "in transit" railcars – *i.e.,* cars that have been waybilled and are moving in rail transportation service. Petitioners want the Board to establish rigid standards relating to the details of how railroads provide transportation during the course of a car's movement across the network – but standards that only apply when the shipment is *in a private car* (or *is* a private car). Indeed, the very definition of a "private railcar" spells out that it is a conveyance "provided to a rail carrier *for freight transportation of commodities for a charge*." Petition at 23 (proposed 49 C.F.R. § 1334.1(c)) (emphasis added). Likewise, their definition of "private railcar provider" (which is what they claim to be) confirms that they are "shipper[s], receiver[s], or other part[ies] who own[]or lease[] a private railcar and provide[] it *to a railroad for transportation*." *Id.* (proposed 49 C.F.R. § 1334.1(d)) (emphasis added). Petitioners acknowledge that their goal is to create *transportation service* standards by portraying their proposal as a substitute for "contract service-standard provisions" in railroad transportation contracts, which (according to Petitioners) "the vast number of shippers do not possess the

commercial strength" to demand. Petition at 10-11. In other words, Petitioners want transportation service guarantees under another name.

In the arena of car supply, the Board's authority stems from the obligation that ICCTA imposes on railroads, in discharging their common carrier obligation, to "furnish safe and adequate car service." 49 U.S.C. § 11121. This means that railroads must supply railcars in response to reasonable demands for transportation service.[1] And the Board has authority to establish regulations for the purpose of ensuring that there is an adequate supply of railcars to meet shipper demand for transportation. *See* 49 U.S.C. § 11122; *SCOT-5*, 5 I.C.C.2d at 865.[2]

The Board's authority over car service, however, does not extend to the *transportation* provided using those cars. Justice Brandeis made this clear in 1924, applying the Esch Car Service Act: the term "car service" means "the use to which the vehicles of transportation are put; *not the transportation service rendered by means of them*." *Peoria & Pekin Union Ry. v. United States*, 263 U.S. 528, 533 (1924) (emphasis added). This understanding of the meaning of "car service" has led the courts of appeals to reject the contention that the agency's authority

---

[1] *Shippers Committee, OT-5 v. The Ann Arbor R.R.,* 5 I.C.C.2d 856, 866 (1989) ("*SCOT-5*"), *aff'd sub nom, Shippers Committee, OT-5 v. I.C.C.*, 968 F.2d 75 (D.C. Cir. 1992).

[2] The history of the Board's regulation of car service is consistent with this scope. For example, the Car Service Rules, originally devised by the Board and for many years overseen by AAR, help to ensure that empty railroad-marked cars can be efficiently positioned for loading as part of meeting the overall demand for efficient car service. (Private cars by contrast are controlled by the owners and move loaded less often. *See SCOT-5*, 5 I.C.C.2d at 872-73 (describing inefficiencies associated with private cars); *Allied Corp. v. Union Pacific R.R.*, 1 I.C.C.2d 480, 489 (1985) (same)).

Similarly, the Board has applied Section 11122 to address whether railroads may be required in some circumstances to supply private railcars for loading, and the economic terms for the use of private cars when the railroad chooses to discharge its car service obligation by allowing their use (*e.g.*, the freight rate differentials, compensation for mileage, etc.). *See, e.g., SCOT-5*, 5 I.C.C.2d 856 (requiring use of private cars only when railroad cars unavailable); *LO Shippers Action Committee v. Aberdeen & Rockfish Ry.*, Docket No. NOR 39117 (ICC decided Aug. 12, 1987), *aff'd sub nom. LO Shippers Action Committee v. I.C.C.*, 857 F.2d 802 (D.C. Cir. 1988) (rejecting claim by shippers that they were entitled to allowances for use of private cars sufficient to recover full cost of car ownership).

over car service allows it to regulate transportation services. For example, the Seventh Circuit, citing the *Peoria* case, held that the Interstate Commerce Act's provisions relating to car service (then Sections 1(11) and 1(14)) did not authorize the ICC to require railroads to "order 'tariff' publication of operating schedules," because schedules "directly related to transportation services [and] do not fall within the definition of 'car service.'" *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 607 F.2d 1199, 1205 (7th Cir. 1979).[3]

Petitioner's own discussion of the Board's "car service" regulatory authority confirms the lack of any nexus between that authority and the transportation regulation they seek. As they explain, the Board's car service authority extends – as in *SCOT-5* – to the question whether there are "sufficient regulatory incentives in place to ensure that there was an adequate national fleet of railroad-owned and privately-owned grain hopper cars." Petition at 16.[4] Petitioners, however, do not even attempt to demonstrate any inadequacy in any part of the Nation's fleet of railcars. Rather, their goal is to receive a financial windfall in the form of penalty payments when railroads' conduct the day-to-day operational details of their freight transportation services in a manner that causes private railcars (perhaps part of trains, perhaps not) to spend more time than Petitioners deem appropriate moving from one location to another – perhaps awaiting pickup by a smaller railroad at an interchange track, undergoing running repairs, paused in a freight

---

[3] During "emergency" car shortages, "Car Service" orders can extend to compelling shippers to move loaded cars to destination rather than using them as rolling warehouses (and paying demurrage) pending reconsignment when market conditions improve, but this only proves the rule that "car service" is about avoiding car shortages, not about expediting transportation. *See ICC v. Oregon Pacific Indus., Inc.*, 420 U.S. 184 (1975).

[4] Similarly, Petitioners' invocation of Commissioner Lamboley's concurring statement in *SCOT-5* (Petition at 17) only highlights that the Board's cases, and authority, regarding car service relate to "common carrier obligations and corollary carrier rights of 'first-use'" of their own railcars, and not matters of rail transportation like Petitioners desire to regulate.

classification yard or siding, or even staged along the route awaiting a slot at the receiver's facility. That is transportation regulation, pure and simple.

In short, just because Petitioners and other private car owners may own or lease railcars does not allow them to invoke the Board's car service authority as a way of regulating the way transportation services are provided with those cars.

II. THE PETITION PROVIDES NO EVIDENCE OF ANY PROBLEM IN NEED OF A "SOLUTION," MUCH LESS A REGULATORY ONE

Even if the Board had the authority to regulate in the way Petitioners propose, Petitioners completely fail to demonstrate the existence of any "problem" warranting a regulatory solution. The Petition presents only two sets of factual assertions:

- First, ***a majority of railcars used on the Nation's rail networks are owned by non-railroads***. Petition at 6-7. AAR may quibble with the precise statistics referenced by Petitioners, but we do not contest that there has been and continues to be a great deal of investment in railcars by non-railroads or that those railcars constitute a major investment by their owners.

- Second, Petitioners list ***five anecdotal "examples" of alleged operational inefficiencies*** involving the use of private railcars. Petition at 13-14. Though no details are provided, these examples appear to reflect a hodgepodge of possible operating circumstances, including shortages of locomotive power and crews, delays in the movement of empty railcars to an interchange, delays in the provision of empty cars for loading, and a situation where cars were "lost" for a period of time.

These two propositions are the only basis Petitioners offer for the entirely new "reverse demurrage" regime they propose. This handful of anecdotes – with no specifics, no evidence of any generalized patterns, and no data or other reason to believe that private cars experience any different treatment from railroad-owned cars – is not a basis for industry-wide rulemaking.[5]

---

[5] *See, e.g., Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 230 (1938) ("uncorroborated hearsay or rumor does not constitute substantial evidence"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 399 (3d Cir. 2004) (anecdotal evidence properly rejected as support for agency action); *cf. Weinberger v. Hynson, Westcott & Dunning, Inc*., 412 U.S. 609, 629 (1973) (agreeing with

The suggestion that these anecdotes evince a broader car supply problem is undermined by the Petition itself, which affirmatively demonstrates that there is no lack of incentives for non-railroads to make investments in railcars. As Petitioners emphasize, private railcars are a large and growing part of the U.S. railcar population. Petition at 6-7. This should not be surprising. As the Board and its predecessor agency have noted, there are many good reasons why shippers might support investment by non-railroads in railcars over which they can exercise greater control.

> "[P]rivate car owners have control over their equipment and can demand that it be returned immediately after it is unloaded. This control gives shippers who own or lease their own cars a number of transportation and marketing advantages. They can direct that their cars be used for temporary or long-term storage. The shippers can use these cars to store their product near their customers, and consignees can hold cars at destination when they cannot unload them promptly without paying the demurrage that would accrue on rail-owned cars."

SCOT-5, 5 I.C.C.2d at 866. The growing investment in private railcars that Petitioners tout proves that the market is working and there is no inadequacy in the supply of railcars warranting a new regulatory regime aimed at boosting investment incentives.

Petitioners' assertions regarding the lack of incentives for railroads to *operate* private cars efficiently are similarly unfounded. First, Petitioners' anecdotes prove nothing. They are just five isolated, non-specific, and unproven anecdotes. Only one, and perhaps two (the first and maybe the fourth), appear to involve operational issues having anything to do with the "transit idle time" rule that Petitioners propose, which would apply only to situations where private cars are waybilled and en route ("in transit") to a receiver.

FDA that "testimony of physicians and the extant literature" regarding a drug's effectiveness is "anecdotal" and thus insufficient to constitute the "substantial evidence" of effectiveness required for approval of a new drug application); *United States v. An Article of Drug Neo-Terramycin Soluble Powder Concentrate*, 540 F. Supp. 363, 380 (N.D. Tex. 1982) ("anecdotal evidence" cannot constitute "substantial evidence").

Given the many hundreds of thousands of railcar movements that occur annually, Petitioners could find some number of anecdotes relating to perceived operational delays with respect to *all types* of equipment, across *all categories of equipment ownership:* privately-owned cars, cars owned by the handling railroad, cars owned by other railroads (so-called "foreign railroad-marked cars to which car hire applies), and TTX cars. This is the nature of railroad operations, not anything uniquely applicable to private railcars. Unplanned events are the norm in the complex outdoor factory floor that comprises the rail network. And in many cases holding cars at one location for some period of time, or postponing their arrival at the next CLM waypoint, may actually expedite overall origin-to-destination trip time. Metering the flow in any network – railroad or otherwise – is a well-recognized way to avoid the kind of congestion that can magnify overall delays. Ironically, by focusing on each 72-hour increment of a railcar's journey from origin to destination, Petitioners' proposal would micromanage rail operations and likely degrade rather than improve overall service.

Second, Petitioners' assertion that railroads lack incentives to move private cars over the road expeditiously is incorrect. There are strong incentives to operate private cars every bit as efficiently as railroad-owned or TTX-owned cars. Quite simply, railroad operations do not differentiate according to car ownership in making up trains, handling trains, dispatching switch engines to shipper facilities, or any number of operational activities. Private cars move in the same trains as railroad-owned cars. Petitioners seem to acknowledge (at 6) that railroads have ample incentives to handle their own cars expeditiously (such as their ownership stake in those cars and their obligation to pay car hire for foreign cars), and those same incentives will drive efficient operations for all the cars in the trains, on the mainlines, and in the rail yards and terminals across the rail network.

These incentives are magnified by the fact that the kinds of "delays" that Petitioners perceive would imply that a railroads' operations are deviating from plan. Any such deviation almost by definition involves additional costs that railroads would seek to avoid if possible. And those extra costs would be magnified in the world Petitioners assume in which private cars – alone among all the cars on a train, in a yard, or otherwise – were singled out for special, inferior treatment.

In addition, like all railcars in motion to destination, private railcars consume scarce railroad resources and impose costs on railroads if they are idled in an unplanned or unexpected way en route: idle railcars consume track capacity (whether mainlines, sidings, or yards), incur opportunity costs (with railroads earning less revenue if slower service results in fewer shipments using these cars in a given period), and entail competitive/commercial costs for railroads if their shippers suffer delayed deliveries or longer cycle times, no matter who owns the equipment (and perhaps especially if the shipper owns or leases it). At bottom, Petitioners' contention that railroads lack incentives to operate privately-owned railcars efficiently is a fantasy that ignores the realities of railroad operations.

Third, the only argument Petitioners make about railroads' "incentives" is simply that providers of private railcars are not entitled to demurrage "reciprocity," and that railroads thus lack this specific spur to avoid alleged "delays." Petition at 9-10. There are many problems with this reciprocity-based line of argument. Most fundamentally, a mere desire for reciprocity in so-called "demurrage" is not a substitute for evidence of any industry-wide problem with car supply or transportation service. But taking Petitioners' argument at face value, it collapses of its own weight. The "reverse demurrage" label is a misnomer, as the penalty payments Petitioners desire have nothing to do with "demurrage." Demurrage is the means by which non-railroads (shippers

and receivers) are incentivized to handle railroad-owned railcars efficiently (to empty them promptly, to make room for their delivery, etc.), and without which there would be insufficient incentives to take these actions, which enhance the efficiency of the entire railroad network. Petitioners' scheme, by contrast, would regulate the behavior of rail carriers in moving trains across their networks, and in ways that likely would run counter to the goal all railroads have to operate their networks efficiently and move all railcars expeditiously. Nor do providers of private railcars suffer any lack of economic consideration. They are entitled to compensation from railroads for the cars they provide (often via their transportation contracts) in the form of lower freight rates or mileage allowances, they benefit economically from all of the other advantages they obtain from controlling the usage of their cars rather than relying on railroads to supply railroad-owned cars (*see SCOT-5*, 5 I.C.C.2d at 866), and they negotiate attractive economic terms with the financial lessors, car builders, and others that reflect the level of utilization their private railcars will achieve.

Finally, in situations where specific railroad conduct harms shippers by delaying the arrival of freight at destination (using private cars or otherwise), the Board's regulatory processes are already available to address those concerns on the concrete facts. As we discuss in more detail in the next section, shippers have a variety of remedies, including potential claims before the Board that the railroad failed to discharge its common carrier obligation, claims in state and federal court that the railroad failed to move shipments with "reasonable dispatch," and claims under transportation contracts that the railroad failed to provide the agreed level of service. Petitioners themselves suggest that "[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)." Petition at 11. The fact that

Petitioners cannot point to a reservoir of such cases to show the existence of a pervasive and systematic service problem – much less one centered on shipments in privately-owned cars – is ample proof that there is not a problem that requires the Board to impose some new regulatory solution for the pecuniary benefit of private owners of railcars.

III. THE PRESCRIPTIVE TRANSPORTATION SERVICE REGULATORY SCHEME PETITIONERS PROPOSE IS CONTRARY TO ESTABLISHED LEGAL STANDARDS AND MISGUIDED

Seen for what it is – a call for a sweeping new scheme of regulation governing how railroads move waybilled cars across their networks – the proposal is unjustified and contrary to the Board's existing statutory and regulatory landscape.

The Board's authority to regulate the level of transportation service provided by railroads derives from only two potential sources: railroads' common carrier obligation to respond reasonably to demands for service and the terms of service offered by railroads in their tariffs. Since 1980, shippers have been able to avail themselves of a third means of enforcing service-level obligations: the commitments railroads negotiate in their contracts with shippers as part of an overall economic bargain. All of these obligations extend to the shippers that have requested or arranged the transportation.[6] They do not attach to the provision of the railcars used in carrying out that transportation. And well-established Board precedent rules out the kind of one-size-fits-all rules that Petitioners propose, much less ones applicable only to a subset of railcars. The Board does not sit as a master dispatcher, with authority to micromanage the day-to-day operations of railroad operations and the levels of service (much less the specific steps along a

---

[6] *See, e.g., Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, Finance Docket No. 33989 (STB served May 15, 2003) at 8 ("obligations as a [common] carrier extend to shippers of non-exempted commodities"); *Western Resources, Inc. v. The Atchison, Topeka & Santa Fe Ry*., Docket No. NOR 41604 (STB served May 17, 1996).

railcar's path from origin to destination) that those operations yield. And the Board is affirmatively precluded from doing so when transportation is provided under contract, no matter what equipment is used.

First, Petitioners do not offer – nor could they offer – any of the salient predicates for Board action to regulate the service levels that railroads provide their shippers: *i.e.,* a failure to provide a level of service sufficient to discharge a railroad's common carrier obligation, or service that falls short of "reasonable dispatch." These preconditions for Board action cannot be circumvented simply by complaining about railroad incentives or even service that occasionally is not as fast as shippers (or car owners) might desire. When presented with claims by shippers that railroads have not lived up to their service obligations – including tariff terms requiring "reasonable dispatch" – the Board dismisses complaints absent evidence that the railroad provided enforceable commitments regarding the "day-to-day operating details" of its "transportation," such as the "frequency of service." *Bell Oil Terminal, Inc. v. BNSF Ry*., Docket No. NOR 42169 (served Dec. 23, 2020) at 1, 3. The regulatory framework Petitioners seek here would jettison all of these predicates, contrary to law.

Second, but just as important, the particulars of what railroad operating activity might fall short of the common carrier obligation or "reasonable dispatch" standards are ill-suited to prescriptive command-and-control regulation. Case law establishes that there is no one-size-fits-all definition of reasonable dispatch. Rather, it is inherently contextual: "such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in light of the circumstances and conditions surrounding the transaction." *Chesapeake*

& Ohio Ry. v. Martin, 283 U.S. 209, 213 (1931).[7] The legal test is thus one of reasonableness under all the surrounding circumstances. *See*, *e.g., United Transp. Sys. v. PIE Import Export*, 889 F. Supp. 94 (S.D.N.Y. 1995). The kind of rulemaking Petitioners propose would override this longstanding legal principle by prescribing (as a regulatory presumption that would be binding unless rebutted through costly litigation) a specific number of hours beyond which no waybilled private railcar should fail to move from one "CLM" location to the next *regardless of the distance involved (which could be hundreds of miles) and other operational circumstances.*

The Board's own regulatory experience confirms the inappropriateness of regulations like those proposed by Petitioners. Before 1980, the ICC sought to compel the railroads to abide by detailed service standards for the movement of perishable shipments. The standards specified how many hours railroads could spend on such activities as interchanging railcars, pulling cars from origin facilities and completing light running repairs. *Investigation into the Need for Defining Reasonable Dispatch (Perishable Commodities*) ("*Reasonable Dispatch (Perishables)*"), 355 I.C.C. 162, 173 (1977). The ICC did this despite knowing that shippers were "not overly concerned about the amount of time it may take for a railroad to perform the functions listed in the performance standards" and that "the primary concern of shippers is [instead] that transportation be performed reliably between given points" *Id.* at 173.

The standards were swiftly rescinded three years later, after the agency's regulatory framework was upended by the Staggers Act. The ICC explained that "establishing such standards would be inconsistent with our current policy of encouraging (especially in the absence of market dominance) service competition regulated by the marketplace." *Reasonable Dispatch*

---

[7] *See also Imperial News Co. v. P-I-E Nationwide, Inc.,* 905 F.2d 641, 644 (2d Cir. 1990) (quoting *Chesapeake & Ohio Ry*.); *Elroy Enterprises, Inc. v. Roadway Express, Inc*., 746 F. Supp. 284, 287 (E.D.N.Y. 1990) (same).

(Perishables), 364 I.C.C. 168, 169 (1980). With three years of experience with the standards under its belt, the ICC also emphasized the folly of trying to specify the maximum number of hours that a car ought to be paused at an interchange point or otherwise "delayed in transit."

> "We find especially compelling earlier carrier arguments questioning the propriety of penalizing them for missing a particular time limit if the lost time is made up later in the movement. It would be tremendously difficult to frame rules that are appropriate in all instances. Where possible, we believe the carriers should maintain control over their day-to-day operations. It has been our experience that complicated rules often create more problems than they solve."

Id. at 169-70.

Designing and implementing any "delay-in-transit" service standard scheme like that which Petitioners propose would inevitably call for the Board to micromanage railroad operations in an impermissible and misguided manner. This would both contravene existing legal standards and also disregard the Board's obligation under ICCTA to allow the market to dictate the level of service that railroads provide to shippers so long as they do not fall short of their common carrier obligations.

Third, Petitioners ignore that their proposed new regime could not apply to many of the shipments moving in privately-owned railcars: movements under contract and movements of exempt commodities. Transportation under contract, of course, is outside the Board's regulatory authority, and a railroad providing service under contract "shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." 49 U.S.C. §§ 10709(b), (c)(1).[8] These principles, of course, apply regardless of who

[8] This means that disputes about whether the railroad provided adequate service are for the courts, not the Board, to resolve; the Board may not regulate services governed by such a contract, *see, e.g., PCI Transportation, Inc. v. Fort Worth & Western R.R.,* Docket No. NOR 42094 (Sub-No. 1) (STB served Apr. 25, 2008) at 4 (dismissing demurrage complaint); and the common carrier obligation does not apply 49 U.S.C. § 11101 (obligation extends only to "transportation or service subject to the jurisdiction of the Board under this part").

owns the freight car used to provide the transportation. Indeed, Petitioners acknowledge that the transportation they obtain from railroads is pursuant to contracts that put service terms beyond the reach of the Board's regulatory authority. Petition at 10-11.

In short, Petitioners' proposed regulation would establish one-size-fits-all transportation service standards that would contradict governing law. Their self-serving proposal to apply those standards to transportation provided in private cars that is not exempt from regulation or entirely outside the Board's authority would create a patchwork quilt of rigid service obligations on railroads that applied only to some subset of cars on the same train or in the same yard or other facility, and did so regardless of what origin-to-destination service standard the shipper actually cared about or was willing to pay to achieve.

IV. COMMENCING THE PROPOSED RULEMAKING WOULD BE BAD PUBLIC POLICY

Apart from the threshold legal deficiencies in the regulatory relief Petitioners propose, there are numerous prudential reasons why the Board should not commence a rulemaking to explore the issues raised by the Petition. Even scratching the surface of the array of issues implicated by the Petition would be complicated, burdensome, and lead the Board into uncharted territory where any action could encounter the law of unintended consequences. Were the Board to undertake a serious examination of the specific issues raised by Petitioners (the manner in which private cars are handled on the rail network and the investment incentives of private car owners), it would have to consider a host of complexities that Petitioners – with their parochial perspectives as owners of private railcars – have not even begun to address.

Especially in the absence of hard evidence of any serious problem warranting a regulatory solution, commencing a rulemaking would be a poor use of the Board's resources. Were the Board nonetheless interested in pursuing any of these lines of inquiry, it should begin

with a scoping of the issues and potential ways to address them rather than jumping down the rabbit hole of Petitioners' specific proposal.

A. Considering Petitioners' Proposal Would Require a Broad-Ranging Inquiry into Its Adverse Impacts on Railroad Operations

If the Board were interested in exploring how railroads handle private railcars and whether regulations should establish standards and penalties associated with the movement of those cars, it would have to dig into a wide array of issues beyond the narrow interest of these private railcar owners in receiving payments based on "demurrage reciprocity." Any such regulation would have unprecedented adverse impacts on the efficient operation of the rail network as a whole. For example, the Board would need to examine:

- The certainty that many events that Petitioners might label an invalid "delay" would reflect efficient operations when viewed from a network-wide perspective, such as staging trains to avoid plugging terminals during times of peak demand, staging trains or cars awaiting space at a customer facility, or the orderly recovery form a network disruption caused by weather, forest fires, or other events.

- The likelihood that rules like those proposed by Petitioners would create incentives for the *inefficient handling* of all railcars. For example, imposing fees on cars not moved to the next CLM location within 72 hours could lead to inefficient operational measures for the sole purpose of moving cars to avoid fees where there were valid reasons for the cars to remain where they were, and such make-work events likely would adversely affect other cars (that may or may not be privately-owned) in the same trains or blocks, or using the same rail infrastructure (yards, sidings, etc.).

- The likelihood that a new regime of penalties for the handling of privately-owned cars would create incentives for inefficient and unfair discrimination in favor of those cars and against other railcars (or movements under contract or of exempt commodities) that would not be subject to the proposed penalty system, to the detriment of those shippers.

- The potential that rules like those proposed by Petitioners would impose new burdens on the smaller railroads that play important roles in the origination and termination of rail shipments by imposing new service obligations relating to their pickup of cars at interchange or "customer location message" reporting.

B. Considering Petitioners' Proposal Would Require a Broad-Ranging Inquiry into the Incentives for Investment in Private Railcars and Their Impact on the Railroad Network

Any rulemaking that considered the implications of alleged "delays in transit" for the returns on investment realized by non-railroad owners of railcars would have to consider all of the factors bearing on those investment incentives, as well as how investments in private cars affect the overall adequacy and efficiency of car supply. Though Petitioners may wish to maintain a tight (and myopic) focus on their own claim to financial penalty payments, the Board would have to consider the other incentives that support private railcar investments and the likelihood that those cars – and their owners' control over them – impose inefficiencies on overall rail network operations. For example, the Board would need to examine:

- The full array of incentives that bear on private railcar investments, taken as a whole, and the potential that those incentives are not appropriately calibrated to the needs of the rail network as a whole – *e.g.*, whether non-railroads have incentives to invest in more railcars than are needed and offload the costs of that overinvestment (including use of limited rail network capacity) on others.

- The implications of the greater relative efficiency of railroad-owned (and TTX-owned) railcars, given that such cars can be directed anywhere for the next loading whereas private cars more often are directed by their owners to return empty, and must be segregated from other cars for that purpose. *See* note 2 above.

- The implications of the fact that private cars fall outside of the car repair system applicable for railroad-owned cars, and thus may require special movement to repair locations and may not be maintained as regularly as railroad-owned cars, potentially resulting in increased burdens on the overall network.

- As to tank cars, the interface between Petitioners' proposed of compensation and the complex issues related to tank car compensation arising from the tank car mileage equalization process, which is at issue in other pending proceedings.

C. If the Petition is Not Rejected, Petitioners Should Be Required to Demonstrate a Concrete Need for More Regulation

Petitioners' regulatory has no evidentiary foundation. There is no proof of an actual problem that warrants any solution, and no evidence that Petitioners' proposal would not cause

more of a problem than it "solves." Nothing in the Petition supports requiring the Board or industry stakeholders to bear the significant costs of a rulemaking proceeding.

If the Board does not dismiss the Petition outright, before deciding whether to undertake a rulemaking proceeding the Board should require Petitioners to provide evidence that there is a concrete harm that must be solved, as well as explaining exactly how the regulations they propose would address that harm without causing greater collateral damage.

If the Board then concludes that it is interested in exploring some aspects of the issues raised by Petitioners, the Board should do so in a manner that allows for an appropriate scoping of the range of issues *prior to* putting forward any concrete rulemaking proposal – *e.g.*, via a request for comments on a particular set of issues of interest to the Board.[9] Such a scoping proceeding would allow the Board to develop a greater understating of the issues and the potential adverse consequences of various regulatory paths before locking in on a particular set of regulatory proposals.

CONCLUSION

For the foregoing reasons, the Board should reject the Petition. If the Board does not reject the Petition, it should, at a minimum, require Petitioners to put forward concrete evidence of the supposed problem they are trying to solve and how their proposal would address that set of

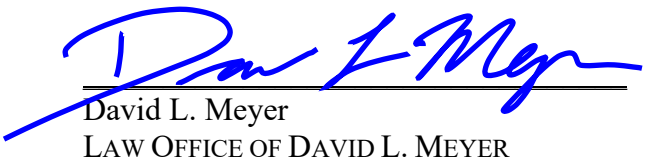
---

[9] The Board has routinely taken this approach. *See, e.g., Association of American Railroads – Petition for Rulemaking*, Ex Parte No. 752 (STB served Nov. 4, 2019) at 2 (soliciting additional information "[t]o assist the Board's evaluation of whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking process"); *Class I Railroad Accounting and Financial Reporting— Transportation of Hazardous Materials,* Ex Parte No. 681 (STB served Sept. 22, 2016) (discontinuing proceeding after comments in response to ANPR failed to support regulations); *Safe Implementation of Board-Approved Transactions*, Ex Parte No. 574 (STB served July 27, 1998) at 3 ("[b]ased on the comments in response to our ANPR" Board saw "sufficient merit to warrant further exploration of establishing procedures"); *Major Rail Consolidation Procedure*s, Ex Parte No. 582 (Sub-No. 1) (STB served Mar. 31, 2000) (ANPR seeking comment on array of issues after conducting hearings that identified need to reevaluate Board consolidation rules for major transactions)

concerns. Further, if the Board is interested in exploring any facet of the issues raised by Petitioners, before proposing any rule the Board should first invite comment aimed at determining whether any regulatory action is warranted, including the full scope of issues that would warrant consideration before any specific rules could be proposed for more focused evaluation.

Dated: August 30, 2021

Respectfully submitted,



David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street, N.W.
Washington, DC 20009
(202) 294-1399

Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller Jr. *(admitted in MD)*
ASSOCIATION OF AMERICAN RAILROADS
425 Third Street, SW
Suite 1000
Washington, DC 20024
(202) 639-2100

Counsel for the Association of American Railroads