

BEFORE THE
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 768

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

CSX TRANSPORTATION INC.'S REPLY TO PETITION FOR RULEMAKING

CSX Transportation, Inc. (“CSXT”) respectfully submits this Reply to the Petition for Rulemaking filed by Petitioners on July 26, 2021.¹ The Petition asks the Board to institute a rulemaking to create a new regulatory regime imposing “reverse demurrage” in any instance where a private railcar incurs a particular amount of “idle time” on a railroad’s system. Petitioners argue that such a Board-imposed regulatory fee on delayed private car movements is necessary to incentivize railroads to move private cars efficiently. But this premise is simply not true. Railroads have every incentive to move cars as quickly and efficiently as possible, whether they be a railroad’s own system cars, another railroad’s system cars, or private cars. CSXT in particular has worked hard over recent years to improve the velocity of cars on its network. CSXT knows that moving cars more quickly to and from customer locations drives its ability to earn existing and additional business, particularly from trucks and other rail carriers. Moving cars as efficiently and safely as possible is the core of CSXT’s business model.

¹ Petition for Rulemaking to Adopt Rules Governing Private Railcar Use By Railroads, Ex Parte 768 (filed July 26, 2021) (“Petition”). The Petition was jointly filed by the North America Freight Car Association, the National Grain and Feed Association, the Chlorine Institute, and the National Oilseed Processors Association, who are referred to herein as “Petitioners.”

As explained in the Reply filed by the Association of American Railroads (“AAR”), “reverse demurrage” rules cannot be grounded in Section 11122, as suggested by Petitioners. *See Peoria & Pekin Union Ry. v. United States*, 263 U.S. 528, 533 (1924); *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 607 F.2d 1199, 1205 (7th Cir. 1979). Furthermore, the AAR notes that decades of legal precedent demand a detailed, case-specific factual showing in any regulatory challenge to the dispatching practices of a carrier. CSXT joins the AAR’s comments, and submits these additional comments to emphasize why the new regulations proposed by the Petition would be unnecessary and harmful.

First, there is no market failure to justify additional regulation of railroad dispatching practices. CSXT has prioritized car velocity because it enables CSXT to compete more effectively. CSXT receives no benefit from car delays—on the contrary, cars that dwell occupy valuable track space and obstruct operations, making it harder for CSXT to operate efficiently. That is true whether the delayed cars are railroad-owned system cars or private cars.

Second, the “reverse demurrage” proposed by the Petition would create market distortions and unintended consequences. Private cars would be privileged over system cars, since a railroad could face financial penalties for a private car delay that it would not face for system car delays. Shippers who rely on system cars would thus be disadvantaged over shippers who own cars. This unequal regulatory treatment would encourage freight customers to invest in private cars when they might not otherwise. It may also introduce inefficiencies into operational and interchange practices.

Finally, the burdens of this proposal outweigh any perceived benefits. If adopted, a reverse demurrage rule would spawn contentious litigation between the carriers and its customers over the multifaceted reasons railcars are delayed during transit, with little to no perceivable

benefit to customers, while risking unintended consequences from incentivizing preferred dispatching for private cars that customers are not demanding in the marketplace. The STB should reject this proposal.

I. The Board Does Not Need to Create New Incentives for Railroads to Move Private Cars.

The Petition's suggestion that a new system of regulatory penalties is needed to create incentives for railroads to avoid private car delays does not match the realities of the marketplace. Indeed, avoiding unnecessary car delays is a key CSXT business goal. CSXT's business depends on efficient car movements that keep its network fluid and allow it to compete with other modes, including trucks, water vessels and other railroads. CSXT is relentless in its pursuit of minimizing car delays, and CSXT's track record shows there is no need for a new regulatory regime.

CSXT's website prominently displays three key service metrics: train velocity, terminal dwell, and cars online.² All three metrics underscore the importance of moving cars efficiently and quickly through the network. Train velocity measures how efficiently CSXT is moving trains through its network; terminal dwell tracks the total amount of time that cars spend in terminals; and cars online measures the number of active freight rail cars on CSXT's lines. These metrics provide a public measuring stick for CSXT performance that is used by customers, investors and other stakeholders and by CSXT internally to assess its service. They all measure direct service benefits to customers. Faster velocities and lower terminal dwell reduce cycle times, which both produces more reliable service and creates opportunities for customers to

² <https://investors.csx.com/metrics/default.aspx#key-metrics>

reduce their private car fleets. In turn, that more efficient service reduces cars online at any time, and effectively increases CSXT's capacity to handle greater traffic volumes.

CSXT thus has ample incentives to minimize delays in moving railcars. Cars that are delayed in yards or on sidings occupy track space and hinder other operations. If a block of cars is delayed in a yard, switching and classification operations might have to work around the delayed block, and potentially move it around the yard to complete other work. This causes operational inefficiency and can create bottlenecks.

Importantly, the problems caused by car delays and CSXT's incentive to minimize them have nothing to do with who owns the cars. A railroad-owned railcar sitting in a yard occupies the same amount of track and causes the same amount of congestion as a private railcar sitting in a yard. CSXT has the same incentive to avoid or minimize the private car delay as it does the system car delay. Both are equal impediments to the efficient operations that are the goal of CSXT's business.

To be sure, car delays do happen, particularly in challenging operational conditions, such as those recently caused by global supply chain disruptions and COVID-19 challenges. But those delays are not due to a lack of sufficient incentive to avoid car delays. And they certainly are not susceptible to being addressed by a one-size-fits-all regulatory regime that imposes a violation of federal law and automatic financial penalties for any private car delayed over 72 hours.

II. A "Reverse Demurrage" Regulation Would Create Poor Incentives and Adverse Consequences.

If reasonable railroad dispatching decisions are not recognized or supported by the law, the "reverse demurrage" regime would create a system in which the movement of private cars would be prioritized over the movement of system cars. Consider a railroad with two blocks of

cars it can move out of a yard on the next train—a block of privately-owned cars loaded with merchandise and a block of system cars loaded with grain. Today a railroad might choose based on its best judgment about network efficiency, or based on which block had been waiting longer, or based on which block was larger. But if “reverse demurrage” rules were adopted, railroads instead might prioritize movement of the private railcars, regardless of other factors. Requiring railroads to privilege private car movements would create at least four unintended and undesired consequences.

First, “reverse demurrage” may incentivize railroads to prioritize private railcar shipments over system car shipments, and thus could result in a decrease in service for system car users. The Board should not adopt a new regulatory regime that would create winners and losers among rail customers simply because some private railcar owners would like to be among the “winners.” Nor should it create two classes of customers—those that use private cars and those that use system cars.

Second, “reverse demurrage” would create a strong incentive for system car users to join the “winners” by purchasing private cars. Many rail customers prefer to use private cars for a number of reasons, which may include use of a dedicated fleet, expanded storage options, and lower freight rates. But others clearly prefer to use system cars for a number of reasons, which may include more usage flexibility and lower upfront costs. A new “reverse demurrage” regulation will unnecessarily introduce another factor into the mix with results that are difficult to predict, *e.g.*, it may cause more shippers to shift to private cars and therefore strand certain system car assets that were purchased by railroads with expectations based on the current regulatory landscape.

Third, “reverse demurrage” would encourage inefficient movements. Under the Petition’s proposal, railroads are penalized for any private car “idle time” over 72 hours. Thus, the regulations would incentivize railroads to take steps to keep cars moving above all else (regardless of whether that movement was the best way to shorten the car’s overall transit time or to mitigate overall network congestion). For example, if a car were approaching 72 hours of idle time at a yard, a railroad facing “reverse demurrage” charges would be incentivized by regulation to move it somewhere else—to a siding, to another yard—even if that additional movement would delay the ultimate delivery of that car to its destination. CSXT is relentless in its drive to improve efficiency and increase transit times to compete with trucks and other modes, and it would resist making dispatching changes that are inefficient simply to avoid violation of the rule. But the Board’s rules matter, and carriers would be expected to balance less efficient routings or dispatching practices against the requirements of the federal regulation.

Fourth, reverse demurrage may change the balance of incentives that help maintain fluidity at key gateways, such as Chicago. The Board should not incentivize carriers to push traffic into a congested Chicago when holding the railcars outside of Chicago is more efficient. Similarly, cooperation between railroads during periods of stress may be reduced if waiting to interchange railcars for recovery from flooding or a hurricane shutdown requires the delivery carrier to accept the risk of violating the federal regulation to keep private railcars moving.

III. The Burden of The Proposed Regulations Exceeds The Perceived Benefits.

In EP 752, CSXT joined the freight rail industry in urging the STB to perform a cost-benefit analysis before imposing any new regulations. As the AAR explained, understanding the pros and cons of a proposal is sound public policy because, as history has demonstrated, ill-advised regulatory mandates can impose an enormous cost and other short- and long-term disruptions to a stable and healthy marketplace. That proposal remains under consideration by

the STB. The concept of a “reverse demurrage” rule is a textbook example of the kind of proposed rule that will do more harm than good and would fail any serious regulatory impact analysis.

The benefits from this proposal are marginal, at best. As noted above, carriers have powerful market-driven incentives to move cars expeditiously through the network. Moreover, the universe of shipments that would be covered by this proposed rule is small, because a substantial majority of CSXT traffic is under contract (which Congress placed outside of the STB’s jurisdictional reach). If railroads’ reasonable dispatching decisions are accepted as a defense, the results may be immaterial—although it will apparently require litigation to secure such a defense.

The burdens are substantial. Unintended incentives may encourage inefficient dispatching practices, or encourage carriers to favor one class of customers over another in their operating decisions. Injecting inefficient incentives into the freight rail network in a time of historic logistics challenges from the pandemic era would only cause further complexity. Further, a “reverse demurrage” program would lead to unnecessary bureaucracy and litigation. Petitioners propose a process in which private railcar owners and railroads would litigate over whether the railroad was the cause of a particular delay and whether it exercised adequate “due diligence,” presumably through STB complaint proceedings.³ They also propose that each railroad might bring STB proceedings to establish appropriate “reverse demurrage” rates.⁴ This additional regulatory process has real efficiency costs, both in consuming scarce Board resources and in the parties’ time and expense.

³ See Petition at 24 (proposed § 1334.2).

⁴ See *id.* (proposed § 1334.3)

In short, a “reverse demurrage” regime would have multiple negative consequences, from harming service to system car users; to interfering in rail customers’ market decisions on car usage; to forcing shippers to pay for premium service; to encouraging inefficient movements; to creating a burdensome new form of regulatory litigation. There is no cause for the Board to explore a proposed new regulation that would carry so many negative consequences, particularly in the absence of any evidence that railroads require further incentive to transport private railcars as quickly as possible.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2021, a copy of the foregoing Reply to Petition for Rulemaking was served by first class mail or email on the service list for Ex Parte No. 768.

/s/ Matthew J. Warren
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