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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

UNION PACIFIC RAILROAD COMPANY'S REPLY TO PETITION

CRAIG V. RICHARDSON
JAMES B. BOLES
TONYA W. CONLEY
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-5543

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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I. Introduction

The Board should reject Petitioners' proposal to regulate the handling of private freight cars. Petitioners' proposed rule would penalize railroads if they do not move private freight cars in transit on their systems at least once every 72 hours. Petitioners ask for more than Congress allows the Board to give. The Board may not regulate the terms of railroads' arrangements for the use of private freight cars, other than the compensation to be paid. In addition, Petitioners do not claim a freight car shortage exists. They have not shown any other need for the proposed rule. Railroads already have powerful operational and commercial incentives to handle all freight cars so as to maximize the efficient use of railroad resources. These strong incentives align with the interests of *all* shippers in a national rail network that is both efficient and fluid. A rule that coerces railroads to prioritize movements of private freight cars would reduce overall network efficiency and favor shippers who use private freight cars over other shippers. The proposed rule would not even guarantee faster service for shippers using private cars because it regulates only the amount of time cars may remain idle at any one location, not the total amount of time cars may be idle while en route. The proposed rule would also place additional burdens on the Board, which would be tasked with resolving fact-intensive disputes about the causes of

delays in handling private freight cars. The Board should deny Petitioner's request to institute a rulemaking proceeding.

II. The Board lacks authority to regulate the terms of railroads' arrangements for the use of freight cars, other than the compensation to be paid.

The Board lacks authority to promulgate the proposed rule. Petitioners say the Board's authority arises from 49 U.S.C. § 11122(a)(2).[1] Section 11122(a)(2) says the Board's rules on "car service" may include "the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier." However, statutory history requires the Board to disregard the reference to "freight cars," which reflects an inadvertent error in the process of recodifying the Interstate Commerce Act.

The Interstate Commerce Commission once had broad authority to regulate the terms of arrangements for railroads' use of freight cars, but Congress eliminated the ICC's authority to regulate terms other than compensation in the Railroad Revitalization and Regulatory Reform Act of 1976.[2] Before the 4R Act, the ICC had authority under 49 U.S.C. § 1(14)(a) to regulate (i) the compensation railroads pay to use locomotives, freight cars, or other vehicles, and (ii) the other terms of arrangements for railroads' use of locomotives, freight cars, or other vehicles. In the 4R Act, Congress amended § 1(14)(a) to eliminate the ICC's authority to regulate the "other

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[1] *See* Petition at 14–15; *id.* at 17 ("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 cars efficiently so as to optimize the national railcar fleet.").

Petitioners do not invoke § 11122(a)(1), which allows the Board to regulate "the compensation to be paid for the use of a locomotive, freight car, or other vehicle." When the Board regulates the compensation for the use of freight cars, the rate of compensation must be determined by considering specified statutory factors. *See* 49 U.S.C. § 11122(b). Petitioners' proposed penalties would not comply with the provisions of § 11122(b).

[2] Pub. L. No. 94–210, 90 Stat. 31 (1976) (4R Act).

terms" of arrangements for railroads' use of "freight cars."[3] The reference to "freight cars" was added back to the statutory language when Congress recodified the Interstate Commerce Act in 1978, creating the current version of § 11122(a)(2).[4] However, as the Board has explained, "the 1978 Recodification requires that substantive differences between the pre-1978 and post-1978 statute must be resolved in favor of the pre-1978 language."[5] Specifically, Section 3(a) of the 1978 Recodification states:

> Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced.[6]

Because § 11122(a)(2) purports to give the Board broader authority to regulate arrangements for railroads' use of freight cars than the pre-1978 language in § 1(14)(a)(ii), the difference "must be resolved in favor of the pre-1978 language."[7] In short, the Board lacks statutory authority to adopt the proposed rule governing arrangements for railroads' use of freight cars.

III. Petitioners have not shown a need for the proposed rule.

Even if the Board had authority to adopt rules governing arrangements for railroads' use of freight cars, other than the compensation to be paid, it still could not adopt the proposed rule. Petitioners say the rule would "meet the statutory goal of 49 U.S.C. § 11122(a) to 'encourage the purchase, acquisition, and efficient use of freight cars.'"[8] However, they have not shown a need for new rules to encourage the purchase, acquisition, or efficient use of freight cars. They do not

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[3] *Id.*, § 212, 90 Stat. 46.

[4] Act of Oct. 17, 1978, Pub. L. No. 95–473, 92 Stat. 1337, 1421.

[5] *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144, slip op. at 5 (STB served Mar. 22, 2021).

[6] Pub. L. No. 95–473, § 3(a), 92 Stat. 1466.

[7] *N. Am. Freight Car Ass'n*, slip op. at 5.

[8] Petition at 14 (quoting 49 U.S.C. § 11122(a)).

claim a freight car shortage exists. Nor do they show railroads use freight cars inefficiently. The proposed rule is not only unnecessary, it would be counterproductive: it would reduce the efficient use of freight cars and favor one group of shippers over all others by creating an artificial, regulatory incentive for railroads to prioritize movements of private freight cars. These outcomes would be inconsistent with sound public policy.

A. Petitioners do not claim the proposed rule is needed to ensure an adequate supply of freight cars.

The only time the ICC ever relied on its pre-4R Act authority under 49 U.S.C. § 1(14)(a) to promulgate rules governing railroads' movements of freight cars was in 1969, in response to a long-standing, nationwide freight car shortage.[9] Many railroads and shippers opposed the rules, arguing they would prove counterproductive. But when the ICC's decision was challenged, the Supreme Court concluded that the ICC acted within its statutory authority because "its finding that there was a nationwide shortage of freight car ownership" was "supported by substantial evidence,"[10] and it reasonably explained how it expected the rules would help alleviate the shortage.[11]

The ICC's action provides a cautionary tale. The ICC rescinded its rules just eight years after promulgating them, acknowledging they had not increased freight car ownership and likely contributed to a deterioration in car utilization.[12] The ICC's unsuccessful experiment confirmed

[9] *See Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969).

[10] *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 746 (1972).

[11] *See id.* at 754; *see also id.* at 755–56 ("[T]here is a sufficient relationship between the Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority under the Esch Act.").

[12] *See Investigation of Adequacy of Freight Car Ownership*, 362 I.C.C. 844 (1980).

the wisdom of the agency's prior view "that the day-to-day handling and distribution of freight cars should be left to private management."[13]

Even if the Board were inclined to ignore past lessons, Petitioners present no evidence of a nationwide freight car shortage or other long-term freight car supply issue that justifies Board intervention in the marketplace to "encourage the purchase [or] acquisition . . . of freight cars."[14] Petitioners do not claim shippers lack access to a sufficient number of freight cars. They do not claim the current regulatory environment discourages shippers from acquiring freight cars. To the contrary, they say shippers have made and are continuing to make significant investments to acquire freight cars.[15] They do not claim promulgation of the proposed rule would lead shippers to acquire more freight cars. Rather, they imply the proposed rule would encourage shippers to acquire *fewer* freight cars.[16] Petitioners contend the proposed rule is necessary to "protect the investment Private Railcar owners and lessees make in their fleets."[17] However, shippers that own or lease private freight cars acquired them with knowledge of the regulatory environment, including agency precedent rejecting claims that shippers are entitled to guaranteed returns on

[13] *Id.* at 847. The ICC also cited § 1(14)(a) in adopting rules requiring railroads to publish schedules containing specific time limits for their performance of certain transportation functions when handling perishable commodities—rules it rescinded just three years later, recognizing that "carriers should maintain control over their day-to-day operations" and "complicated rules often create more problems than they solve." *Need for Defining Reasonable Dispatch*, 364 I.C.C. 168, 169–70 (1980). A court later explained that the ICC had jurisdiction to order publication of such schedules under former 49 U.S.C. § 6(1). *See Atchison, Topeka & Santa Fe Ry. v. ICC*, 607 F.2d 1199, 1204 (7th Cir. 1979). (Former 49 U.S.C. § 6(1) was recodified as 49 U.S.C. § 10762, and was ultimately repealed in the ICC Termination Act of 1995).

[14] 49 U.S.C. § 11122(a).

[15] *See* Petition at 1–2; *see also id.* at 5–7.

[16] *See id.* at 2 ("More efficient use of Private Railcars by railroads . . . will result in the national railcar fleet being of a more rational size to utilize existing rail system capacity and meet demand.").

[17] *Id.* at 14.

their investments in private freight cars.[18] In sum, Petitioners never try to show the proposed rule is needed to ensure an adequate supply of freight cars. Indeed, their evidence shows the proposed rule is not needed to encourage private investment in freight cars.

B. Petitioners do not show railroads are using private freight cars inefficiently.

Petitioners' justification for the proposed rule is that it would incentivize railroads to use private freight cars more efficiently.[19] However, § 11122(a) authorizes the Board to adopt rules to ensure an *adequate supply of freight cars*—the statute does not grant the Board carte blanche to substitute its own judgment for railroad decisions regarding day-to-day handling of freight cars.[20] And, as history shows, even when the ICC promulgated car service rules with the legitimate objective of addressing a persistent car shortage, the rules *reduced* efficiency.

Even if § 11122(a) authorized the Board to adopt the proposed rule simply to improve the efficient use of private freight cars, Petitioners have not shown railroads are using private freight cars inefficiently. Petitioners represent several thousand shippers who own or lease hundreds of thousands of freight cars.[21] Yet they offer just a handful of vague stories about sporadic service issues involving unnamed railroads *during the pandemic*.[22] They do not even say whether any of their stories involve the particular issue addressed by the proposed rule—*i.e.*, freight cars held at

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[18] *See LO Shippers v. Aberdeen & Rockfish Ry. Co., et al.*, 4 I.C.C.2d 1, 9–11 (1987), *pet. for review denied sub nom. LO Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988). Moreover, although the current regulatory environment does not contain inflexible service rules like the proposed 72-hour rule, shippers can potentially pursue claims for damages based on rail transportation contracts or, in the absence of a contract, the statutory common carrier obligation. *See* Section III.E., *infra*.

[19] *See* Petition at 2.

[20] *See Allegheny-Ludlum Steel*, 406 U.S. at 744 (discussing Congress's reasons for enacting 49 U.S.C. § 1(14)(a)).

[21] *See* Petition at 3–4.

[22] *See id.* at 13–14.

one location for more than 72 hours. Petitioners also say railroads lack adequate incentives to handle private freight cars efficiently because railroads do not own the cars,[23] but they offer no evidence that railroads handle private freight cars less efficiently—or even differently—than railroad-owned freight cars. In sum, Petitioners offer no reason to believe the proposed rule is needed to incentivize railroads to use private freight cars more efficiently.

C. Railroads have powerful incentives to handle all freight cars efficiently.

Petitioners are simply wrong when they say railroads lack adequate incentives to handle private freight cars efficiently. Railroads have powerful commercial and operational incentives to keep all freight cars moving between their origins and their destinations, and they have no incentive to allow freight cars to sit idle in yards for longer than necessary.

Railroads have clear commercial incentives to keep freight cars moving between origins and destinations: they earn revenue by delivering freight. If loaded freight cars are not moving to their destinations, railroads are not earning revenue. If empty freight cars are not moving to loading points, railroads are losing opportunities to earn revenue. Railroads' commercial incentives to keep *all* freight cars moving are fully aligned with the interests of shippers.

Railroads also have clear operating incentives to keep freight cars moving. As history shows, one of the most significant threats to network fluidity is the accumulation of freight cars in yards. When freight cars accumulate in yards, operations become more difficult and costly. Congestion can quickly compound as cars miss scheduled connections and still more cars arrive. These service issues can then ripple across the network, as trains to and from crowded yards are

[23] *See id.* at 13.

themselves delayed. Railroads' operational incentives to keep *all* freight cars moving are fully consistent with the interests of shippers.

Railroads' intrinsic incentives not to hold freight cars unnecessarily explain why the proposed rule is not a "reciprocal application of the railroads' demurrage charges."[24] Railroads charge demurrage to shippers using private freight cars to incentivize shippers to accept delivery of their cars within a reasonable time, rather than use railroad-owned tracks and yards as free storage space.[25] But railroads need no additional incentive to prevent private freight cars from sitting idle on railroad property. And railroads do not charge demurrage when private freight cars sit idle on private property, so allowing shippers to charge railroads when railroads hold private freight cars on railroad property would not create "reciprocity."[26]

In sum, railroads do not need additional incentives to encourage efficient use of freight cars. Railroads have intrinsic incentives to handle freight cars as efficiently as possible, while addressing the demands of all shippers using their networks. Imposing rules that change those incentives will reduce overall network efficiency and create winners and losers among shippers, as discussed in the next section.

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[24] Petition at 19.

[25] *See Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 9 (STB served Apr. 30, 2020) ("Demurrage serves a valuable purpose to encourage the efficient use of rail assets (both equipment and track) by holding rail users accountable when their actions or operations use those assets beyond a specified period of time.").

[26] Railroads have other demurrage charges designed to encourage efficient loading and unloading of *railroad-owned* freight cars on shipper property. However, by definition, those charges do not apply when shippers use private freight cars, so a rule allowing owners of private freight cars to charge railroads for holding private freight cars would not create "reciprocity." Far from it. It would create a cross-subsidy or preference for one set of shippers over all others.

D. The proposed rule would artificially incentivize railroads to favor shippers using private freight cars over shippers using railroad-owned freight cars.

Although railroads have powerful incentives to keep freight cars moving, situations arise in which they may hold cars at one location for more than 72 hours. Railroads may hold freight cars by plan when serving low-volume customers and routes. They also may hold freight cars for an extended period because they experience an unplanned service disruption. Whether the cause is planned or unplanned, railroads' current incentive is to allocate resources needed to move freight cars based on overall network efficiency, treating all shippers equitably.

The proposed rule would incentivize railroads to prioritize movements for shippers using private freight cars, even when such movements would not be the most efficient or equitable use of limited railroad resources. In deciding how to allocate resources, railroads would necessarily consider the penalties they would incur if they did not move private freight cars every 72 hours. For example, a railroad with a congested yard might prioritize shipments in private freight cars sitting idle for 48 hours over shipments in railroad-owned freight cars that have been sitting idle for much longer. A railroad might even engage in behavior that seems wasteful but is actually a rational response to the rule's penalty provision. For example, a railroad may use resources to move private freight cars a short distance just to "reset" the 72-hour clock.

Shippers who own or lease private freight cars may say they deserve priority treatment because their investments allow other shippers to have greater access to railroad-owned freight cars. However, as the ICC has recognized, shippers own and lease private freight cars because of the many benefits they obtain from controlling their car supply—benefits that give them competitive advantages over other shippers:

> Private cars do not ordinarily become part of the national car fleet, and individual carriers cannot normally control their movement. Rather, private 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.[27]

In other words, shippers do not need special regulatory incentives to own or lease freight cars. As Petitioners themselves show, shippers have been investing in freight cars for many decades under current rules—they do not need additional incentives to invest. Also, overinvestment in private freight cars creates its own set of problems. As the ICC has recognized, private freight cars typically operate less efficiently than railroad-owned freight cars, which reduces the overall efficiency of railroad networks, potentially harming shippers who rely on railroad-owned freight cars.[28] Private freight cars play an important role in the railroad transportation environment, but the Board should not adopt special rules that favor shippers who use private freight cars over shippers who use railroad-owned cars.

E. Shippers concerned about service delays have alternatives that do not require imposing a new, inflexible 72-hour rule.

Even if railroads' incentives to handle private freight cars efficiently failed in a particular set of circumstances, shippers would not need a new rule in order to obtain relief. As Petitioners

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[27] *Shippers Committee v. Ann Arbor Railroad Co.*, 5 I.C.C.2d 856, 858–59 (1989); *see also Allied Corp. v. Union Pacific Railroad Company*, 1 I.C.C.2d 480, 481 (1985), *aff'd sub nom. Allied Corp. v. United States*, 779 F.2d 41 (3d Cir. 1985).

[28] *See Shippers Committee*, 5 I.C.C.2d at 865 ("More importantly, the relief sought by SCOT-5 could have a serious detrimental impact on carrier efficiency, because cars under carrier control have been shown to be more efficient than private cars."); *id.* at 873 ("The record clearly demonstrates that the handling of private cars is operationally more difficult that the handling of railroad cars. Defendants have shown that private cars generally require more switches and a greater proportion of empty miles because private cars are typically returned to origin immediately after unloading.").

recognize, rail transportation contacts sometimes contain specific service commitments that are judicially enforceable.[29] Even when contracts do not contain specific service commitments, they generally obligate the railroad to provide service in the same manner and on the same basis as it provides service to customers that do not have a contract.[30] For shippers using common carrier rates, a railroad has a common carrier obligation to provide service on reasonable request,[31] and a shipper can recover damages it sustains if a railroad violates its common carrier obligation.[32] Adopting new a rule and penalties would be inconsistent with the national policy of minimizing regulatory control over the rail transportation system[33] because shippers already have the means to obtain relief.[34]

The proposed rule is not only unnecessary, it would be inconsistent with the common carrier obligation. Petitioners claim shippers have been deterred from seeking relief for service failures because the common carrier obligation "has never been clearly defined."[35] In Union Pacific's experience, shippers seek relief when they believe a railroad has violated its common

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[29] *See* Petition at 10–11.

[30] In any event, a shipper complaining about service provided under a rail transportation contract must pursue relief in court, and the Board cannot add to a railroad's duties specified by the terms of a contract. *See* 49 U.S.C. § 10709(b) & (c).

[31] *See* Petition at 11 (citing 49 U.S.C. § 11101(a)).

[32] *See id*. (citing 49 U.S.C. § 11704(b) & (c)).

[33] *See* 49 U.S.C. § 10101(2) (rail transportation policy "to minimize the need for Federal regulatory control over the rail transportation system").

[34] *Cf. Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 2 (STB served June 26, 2009) (shipper should have pursued relief under "a more specific [statutory] provision that governs the behavior at issue and its effects").

Notably, Petitioners are unwilling to trade their existing remedies for the new remedy—they want multiple remedies. *See* Petition at 23 (discussing proposed 49 C.F.R. § 1334.1(e)).

[35] Petition at 11.

carrier obligations.[36] In any event, the absence of fixed rules is a critical feature of the common carrier obligation. Day-to-day railroad operating decisions reflect the interplay of a wide variety of complex factors. Therefore, when a shipper claims that a railroad failed to provide reasonable service, the Board has "broad discretion to conduct case-by-case fact-specific inquiries."[37] An inflexible rule requiring railroads to move private freight cars once every 72 hours would be inconsistent with the statutory scheme, which recognizes the Board must assess allegations of unreasonable service based on "all the relevant facts and circumstances."[38]

In addition, because the proposed rule would create a new, fixed service obligation, railroads would likely incur additional costs to comply with that obligation—costs they would necessarily have to pass along to shippers who use or lease private freight cars. As a result, shippers using private freight cars may see their rates increase, even if they are satisfied with the protections already provided by the common carrier obligation. In other words, the proposed rule may impose higher costs on all shippers using private freight cars to benefit those shippers who perceive some added value in the proposed 72-hour rule. The Board should not adopt rules making railroad transportation more costly absent a compelling showing that new rules are needed. Petitioners have not shown any need for the proposed 72-hour rule.

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[36] *See, e.g.*, Verified Complaint, *Sanimax USA LLC v. Union Pac. R.R.*, NOR 42171 (filed Nov. 6, 2020); Ex Parte Application for Section 11123(a) Service Order and Section 11701 Investigation, *Hasa, Inc. v. Union Pac. R.R.*, NOR 42165 (filed Aug. 20, 2019).

[37] *Sherwin Alumina Co., LLC v. Union Pac. R.R.*, NOR 42143, slip op. at 6 (STB served Sept. 29, 2015).

[38] *Mont. v. BNSF Ry.*, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013).

IV. The proposed rule would encourage over-investment in private freight cars and would impose new costs and burdens on railroads, shippers, and the Board.

Petitioners' "proposed regulatory solution"[39] to a problem that does not exist would likely impose significant costs and other burdens on railroads, shippers, and the Board. As discussed in Part III, the proposed rule would incentivize railroads to (i) favor shippers using private freight cars over other shippers, and (ii) recover the costs of compliance from all shippers using private freight cars, including shippers who negotiate contractual service commitments or are satisfied with the protection provided by the common carrier obligation. As also discussed above, these marketplace disruptions may not reduce service delays, even for shippers using private freight cars, because the proposed rule merely requires railroads to move private freight cars at least once every 72 hours—it would not regulate transit time. This Part discusses two additional, harmful consequences of the proposed rule: (i) the incentive the rule would give shippers to overload railroad networks with private freight cars, and (ii) the regulatory burdens the rule would impose on the Board.

A. The proposed rule would give shippers an incentive to deploy inefficiently large fleets of private freight cars, contributing to network congestion.

Petitioners imply the proposed rule would lead shippers to acquire fewer private freight cars,[40] but it would actually incentivize shippers to deploy inefficiently large fleets. In general, when railroads experience service disruptions, shippers have an incentive to deploy more freight cars to offset slower cycle times. Currently, that incentive is tempered by the knowledge that any additional cars may well end up sitting in congested rail yards, rather than generating revenue. The proposed rule would change shippers' cost-benefit calculations. Shippers would

[39] Petition at 18.

[40] *See* note 16, *supra*.

expect compensation from the railroad even if their additional cars remain idle. The proposed rule would thus incentivize shippers to acquire additional freight cars and deploy them during service disruptions, despite their potential to contribute to congestion problems.

Additionally, although Petitioners' proposal is unclear, Petitioners may contemplate that shippers could use the proposed rule to profit from railroad service disruptions. At some points, Petitioners seem to propose the 72-hour clock would not start until a railroad picks up a private freight car from a shipper's facility.[41] At other points, Petitioners seem to say the clock would start as soon as a shipper releases a private freight car for transportation, even if the car remains at the shipper's facility.[42] If the clock would start when a shipper releases a car, the rule would encourage gamesmanship: shippers could continue loading freight cars despite their knowledge of railroad service disruptions, transforming the rule into a rent-seeking, revenue-generating mechanism.

B. The proposed rule would create new administrative burdens for the Board.

Petitioners recognize the proposed rule would inevitably lead to disputes between railroads and shippers that would require resolution by the Board.[43] In particular, the proposed rule would generate disputes about whether penalties were appropriate under the specific circumstances. Petitioners incorrectly analogize their proposal to demurrage, but under their analogy, penalties should not be imposed if the shipper is at fault or delays are beyond the

[41] *See* Petition at 24 (discussing proposed 49 C.F.R. § 1334.1(g), which defines "allowable transit idle time" as "seventy-two (72) consecutive hours of idle time *at any point on a railroad's system*" (emphasis added)).

[42] *See id.* at 21 (discussing private freight cars 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").

[43] *See id.* at 19.

railroad's "reasonable control."[44] The Board could spend years developing case law sufficient to clarify when events are beyond a railroad's reasonable control and when a shipper's car supply decisions contribute to delays of its shipments. Disputes over the application of the "fault" and "reasonable control" standards could multiply if the rule allowed shippers to start the 72-hour clock unilaterally by releasing freight cars for transportation, especially where shippers lack sufficient volumes to justify daily service.

Ultimately, the Board's expenditure of resources to implement the proposed rule would not result in beneficial changes to rail service. Railroads would likely prevail in contesting the application of penalties—if freight cars are not moving for an extended period of time, there is almost always a good reason. Shippers who use private freight cars would likely be disappointed once they recognize that a requirement to move cars at least once every 72 hours raises their costs without guaranteeing faster overall cycle times. And, to the extent the rule changed railroad behavior to benefit shippers who use private freight cars, the benefit would be offset by the costs imposed on shippers using railroad-owned freight cars.

V. Conclusion

The Board should not institute a rulemaking to consider the proposed rule. The Board lacks statutory authority to adopt the rule. Even if the Board could adopt such a rule, Petitioners have not shown a new rule is needed to improve freight car supply or efficient use of freight cars, and they have not explained how requiring railroads to move private freight cars every 72 hours would improve car supply or efficient use of cars. The Board should firmly reject the idea of taking day-to-day car movement decisions out of the hands of railroad managers and placing them under control of railroad regulators.

[44] *Policy Statement on Demurrage and Accessorial Rules and Charges*, slip op. at 21.

Respectfully submitted,

/s/ Michael L. Rosenthal

CRAIG V. RICHARDSON
JAMES B. BOLES
TONYA W. CONLEY
JEREMEY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-5543

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
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