SERVICE DATE—JUNE 26, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 768

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

Digest:[1] The Board is unable to reach a majority on the petition for rulemaking. The proceeding will remain open.

Decided: June 25, 2025

On July 26, 2021, the North America Freight Car Association, The National Grain and Feed Association (NGFA), The Chlorine Institute, and The National Oilseed Processors Association (collectively, Petitioners) filed a joint petition for rulemaking proposing that the Board adopt regulations allowing private railcar providers[2] to assess a "private railcar delay charge" on a railroad if that railroad delays the movement of private freight cars beyond a specified period of time. (Pet. 18.)

Petitioners assert that the Board may adopt the proposed regulations pursuant to the Board's authority under 49 U.S.C. § 11122(a)(2), which provides that the Board's car-service regulations may include, in addition to the compensation to be paid, "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 using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person." As discussed below, the Board cannot reach a majority on the petition and will keep the proceeding open.

BACKGROUND

Petitioners have asked the Board to adopt regulations that would allow private railcar providers to assess a charge on railroads when a private freight car does not move for more than 72 hours at any point on a railroad's system between the time it is "released for transportation" and the time it is "either constructively placed or actually placed at the private railcar provider's facility or designated location." (Pet. 24.) Petitioners propose that Car Location Message

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Petitioners define a "private railcar provider" as "a shipper, receiver, or other party who owns or leases a private railcar and provides it to a railroad for transportation." (Pet. 23.)

(CLM) Event Sighting Codes published by Railinc[3] could be used to determine whether the allowable transit idle time has been exceeded, and charges would be assessed on railroads when the "CLM location city of CLM sighting code has not changed for more than [72] hours." (Id. at 18.) Petitioners suggest that the amount of the charge would be equivalent to the greater of the railroad's applicable demurrage or storage charge. (Id. at 24.)

Petitioners argue that such regulations are necessary to encourage the efficient use of private freight cars because railroads do not presently have sufficient regulatory or commercial incentives to use private freight cars efficiently. (Id. at 8-10.) Petitioners also argue that the regulations are necessary to compensate private railcar providers for the costs they incur when carriers use private freight cars inefficiently. (Id. at 12-13.)

The Board received replies to the petition.[4] UP and AAR asserted that the Board lacks the statutory authority under § 11122(a)(2) to adopt the proposed regulations. (UP Reply 2-3, Aug. 30, 2021; AAR Reply 3-6, Aug. 30, 2021.) AAR, CSXT, and UP contended that the proposed regulations are unnecessary because carriers have sufficient incentives to move cars efficiently, as delayed cars hinder operations and reduce revenue. (AAR Reply 8-9, Aug. 30, 2021; CSXT Reply 3-4, Aug. 30, 2021; UP Reply 7-8, Aug. 30, 2021.) They also argued that the proposed regulations would have a negative impact on the overall efficiency of the rail network by incentivizing carriers to move private freight cars inefficiently to avoid the charges and by reducing cooperation between carriers during periods of network stress. (AAR Reply 16, Aug. 30, 2021; CSXT Reply 6, Aug. 30, 2021; UP Reply 9, Aug. 30, 2021.) Other respondents contended that the proposed regulations would provide appropriate financial incentives for Class I carriers to use private freight cars more efficiently, (see NCTA Reply 1-2; PRFBA Reply 1; FRCA Reply 1), and offer reciprocity for railroads' demurrage charges, (ISRI Reply 4; NACD Reply 1; AFPM Reply 2; COPA Reply 1-2).[5]

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[3] Railinc, a subsidiary of the Association of American Railroads (AAR), provides rail data and messaging services to the freight rail industry.

[4] Replies were filed by AAR, CSX Transportation, Inc. (CSXT), Union Pacific Railroad Company (UP), the Institute for Scrap Recycling Industries, Inc. (ISRI), a group of shipper associations including the American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Shippers), the National Association of Chemical Distributors (NACD), the National Coal Transportation Association (NCTA), the Private Railcar Food and Beverage Association (PRFBA), American Fuel & Petrochemical Manufacturers (AFPM), the Freight Rail Customer Alliance (FRCA), and the Canadian Oilseed Processors Association (COPA), as well as notices of intent to participate from NGFA and the American Short Line and Regional Railroad Association. AAR, CSXT, and UP oppose the petition, while ISRI, Joint Shippers, NACD, NCTA, PRFBA, AFPM, FRCA, and COPA support it.

[5] On September 10, 2021, Petitioners submitted a motion for leave to file a surreply, along with an accompanying surreply, and on September 23, 2021, AAR and UP submitted replies to that filing. The Board granted Petitioners' motion for leave in its November 23, 2021 decision. Pet. for Rulemaking to Adopt Rules Governing Private Railcar Use by R.R.s, EP 768, slip op. at 2 n.5, 3 (STB served Nov. 23, 2021).

The Board opened a proceeding on November 23, 2021, and established procedures for further public comment in a decision served on April 1, 2022. The Board invited interested persons to further comment on the issues raised in the petition and posed specific questions to which commenters could respond. Pet. for Rulemaking to Adopt Rules Governing Private Railcar Use by R.R.s, EP 768, slip op. at 5-8 (STB served Apr. 1, 2022). The Board's questions covered, among other things, the Board's authority under § 11122, the adequacy of shippers' car supply, and various facets of Petitioners' proposal. Id.

In its response to the April 1, 2022 decision, AAR argues that the Board cannot adopt the regulations under § 11122 and that, even if it could, the regulations are unnecessary and would undermine rail efficiency. (AAR Comment 3, June 30, 2022.)[6] To the first point, AAR asserts the proposal is not within the Board's statutory authority. (AAR Comment 4, June 30, 2022.) AAR argues that Petitioners' concern is with the quality of railroad service provided to shippers who have chosen to supply the railcars but that the Supreme Court made clear in Peoria & Pekin Union Railway v. United States, 263 U.S. 528 (1924), that "car service" only applies to the use of the car rather than the transportation the railroad provides with the car. (AAR Comment 4-5, June 30, 2022.) AAR asserts that Peoria limits the Board's § 11122 authority to "matters that bear on the supply of railcars," (AAR Comment 28, June 30, 2022), and that there is no indication of a car shortage or evidence suggesting that railroads have failed to discharge their obligation to supply railcars, (id. at 4). AAR reiterates that, even if the Board's authority were properly invoked, Petitioners' proposed regulations would not be necessary because railroads already have adequate incentives to move rail cars efficiently. (Id. at 29.) Petitioners and their supporters respond in defense of the proposed rules, explaining why they view them as necessary and arguing that they can be based on § 11122. (See, e.g., Petitioners Comment 3-6, 11-13, June 30, 2022.)

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The Board is unable to reach a majority on the petition for rulemaking. The proceeding will remain open.

It is ordered:

1. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Members Fuchs and Schultz concurred with separate expressions. Board Member Primus, joined by Board Member Hedlund, concurred with a separate expression.

[6] BNSF, CSXT, NSR, and UP join in AAR's comments and highlight individual concerns about the proposed rules.

BOARD MEMBER FUCHS, concurring:

I concur with Vice Chairman Schultz's cogently presented concerns, and I write separately to briefly explain my decision to call for votes despite the absence of a majority. As Chairman, I have pledged accountability, transparency, and collaboration. Here, in a regulatory docket where the Board had not acted in three years, accountability demands an effort to resolve this long-standing proceeding. When the Board is unable to form a majority, transparency calls for Members to have an organized opportunity to explain their positions to the public. Finally, as the public now has a better sense of Members' views, I especially welcome collaborative discussion[7] with interested parties about ways to improve the agency's regulatory framework in support of a sound, efficient, and competitive rail system.

BOARD MEMBER PRIMUS, with whom BOARD MEMBER HEDLUND joins, concurring:

Car supply issues have been a long-standing and frequent concern in the rail industry. For at least the last hundred years, certain industry stakeholders have proposed that the agency adopt a system of reciprocal demurrage to help alleviate such issues. See, e.g., In the Matter of Car Shortage & Other Insufficient Transp. Facilities, 12 I.C.C. 561, 574 (1907); see also Investigation of R.R. Freight Serv., 345 I.C.C. 2941, 2962 (1978) (stating that the ICC would "take all necessary steps to improve service, including further consideration of implementing a reciprocal demurrage plan.") For much of that time the country was plagued with chronic shortages of railcars. At a time when the railroads themselves provided the majority of railcars, it was common practice for railroads to hold onto unloaded cars owned by other railroads, which could then in turn contribute to a railroad's inability to furnish an adequate number of cars demanded by a shipper. See, e.g., S. Rep. No. 65-43, at 3 (1917) (Senator Pomerene stating, in a report calling for adoption of the Esch Car Service Act, that "[i]nexcusable delays have been permitted in returning cars from points of destination . . . Because of this condition producers of food, fuel, and merchandise have not been able to transport their products to the consumers, and the public has been made to suffer unnecessarily.") A system of reciprocal demurrage, according to the agency, would have penalized a railroad for a failure to furnish cars. In the Matter of Car Shortage, 12 I.C.C. at 574. The "reciprocal" part of the phrase was tied the railroads' practice of charging demurrage, a per diem penalty on a shipper when a car is held for unloading beyond a certain fixed number of days. Id. While acknowledging that the real cause of car shortages could be related to railroad managers' decisions not to invest in enough equipment, infrastructure, and employees, the agency stated that the theory of reciprocal demurrage was that it could stimulate and energize railroads to render the service they were created to render. Id. at 575.

In recent decades there has been a pronounced shift in the rail industry away from the use of railroad-supplied railcars in favor of private railcars, to the point that today private railcars

[7] The Board's ex parte regulations permit "[a]ny communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking." 49 C.F.R. § 1102.2(b)(2).

account for 73% of all railcars in service in North America. (Pet. for Rulemaking 1.) Certain types of railcars, such as tank cars, are all private railcars. (Id. at 5.) Private railcar providers, including some of petitioners here, have argued before the Board in recent years that the industry shift away from railroad-supplied railcars raised issues from their perspective and argued that "reciprocity" with railroad demurrage practices could promote more efficient car supply. Pol'y Statement on Demurrage & Accessorial Rules & Charges, EP 757, slip op. at 18 n.58 (STB served Apr. 30, 2020). The Board indicated that it would be open to argument and evidence in future cases where such issues were raised. Id.

Petitioners' proposal that the Board adopt, pursuant to its car service authority, a private railcar delay charge tied to railroad demurrage practices would function as a system as reciprocal demurrage. According to petitioners, because of systemic inefficiencies in railroad operations, railroads have created an artificially high demand for private railcars. (Petitioners Comment 14, June 30, 2022.) However, petitioners note that the supply of private railcars may still be inadequate for individual shippers because of poor rail service, forcing them to invest in additional railcars to ensure there are sufficient cars available to meet their transportation needs. (Id.) Petitioners contend that the private railcar delay charge would promote more efficient car supply and allow them to right-size their railcar fleets. (Id.)

Petitioners argue that the shift to the use of private railcars has occurred largely at the behest of railroads, who long ago shifted to shippers responsibility for providing railcars needed for their service. (Pet. for Rulemaking 6.) Petitioners contend that a shipper's investment in private railcars is often a condition for receiving rail service at particular rates and other terms. (Id.) Petitioners also explain that shippers often invest in their own private railcars to ensure that an adequate number of cars are available to meet production goals and other business requirements rather than rely on a railroad to provide the cars. (Id.)

The railroads counter that private railcar ownership is widely incentivized and popular among shippers, who enjoy greater control over how private railcars are used, which gives them transportation and marketing advantages, including the ability to avoid demurrage fees and other financial incentives. (NS Comment 7, June 30, 2022; see also AAR Comment 10-11, 22, June 30, 2022.) For instance, the railroads indicate that private railcar providers can, among other things, demand that their cars be returned immediately after unloading or they can direct that their cars be used for temporary or long-term storage. (AAR Comment 10-11, 22, June 30, 2022.)

Moreover, the railroads also argue vociferously against petitioners' contention that the railroads currently lack incentives to handle private railcars efficiently. The railroads say they are in business to earn revenue from providing a transportation service and therefore are incentivized to operate all railcars efficiently, whether their own or private railcars, because inefficiently used railcars represent the lost opportunity for additional revenue. (Id. at 7.) These commercial incentives, the railroads argue, are magnified in the competitive environment in which they operate. (Id.) Inefficient operation of railcars, the railroads claim, will degrade the value of the transportation service they provide, which will then push customers to turn to another railroad, or even another mode, to meet their transportation needs. (Id.)

Given the changes in the railroad industry documented in this proceeding, I am concerned about a potential imbalance in the relationship between private railcar providers and railroads, which petitioners argue the private railcar delay charge could begin to correct. (Petitioners Comment 20-21, June 30, 2022.) For instance, it is unclear to me whether the transportation marketplace is always sufficiently competitive to provide the incentives the railroads claim exist. Post-Staggers, there has been considerable consolidation in the rail industry, and only six Class I railroads remain today. In this environment, many shippers are captive to a single railroad, meaning there is no competitive pressure from a competing railroad. Other shippers may not have the option to ship by other modes because of restrictions in place on the movement of their products, as in the case of certain TIH/PIH materials.

Furthermore, I perceive a disconnect between the railroads' argument that private railcar providers exert considerable control over the railroads' use of private railcars and petitioners' representations that many shippers must maintain larger-than-necessary railcar fleets to meet their shipping needs. According to petitioners, some private railcar providers must incorporate costly buffers into their operations—in the form of additional railcars, infrastructure, and employees—to account for the inefficient and unpredictable rail service they receive. (Petitioners Comment 3-4, June 30, 2022.)[1] It appears that for some private railcar providers the ability to demand the immediate return of their private railcars does not necessarily mean those cars will be returned in time to be available when needed.[2]

As I stated previously, reciprocal demurrage is a solution that has been proposed for agency consideration to help alleviate car supply issues. I do not believe in regulation for the sake of regulation, and any system of reciprocal demurrage must be in accord with the Board's statutory authority. I am mindful that the railroads here contend that the Board lacks the authority to adopt the private railcar delay charge, arguing that the Board's authority to regulate "car service" is limited to the use to which the vehicles of transportation are put not the transportation service rendered by means of them. (AAR Comment 4-5, June 30, 2022 (citing Peoria & Pekin Union Ry. v. United States, 263 U.S. 528 (1924) & Atchison, Topeka & Santa Fe Ry. v. ICC, 607 F.2d 1199 (7th Cir. 1979)).). The distinction between "car service" and "transportation service" is easy to state but appears more complicated to apply in practice

[1] Petitioners provide some concrete examples of individual shippers who incurred these additional costs, (see Petitioners Comment 9-10, June 30, 2022), but state that they could not provide more examples because of the reluctance of many shippers to complain publicly about their service in a way that named specific railroads, (id.). The implication is that petitioners feared retaliation from the railroads. Retaliation is of great concern to me and, and I continue to believe that the Board must more forcefully address retaliation. For purposes of this case, fears of railroad retaliation, if true, could further indicate the railroads' considerable market power.

[2] Additionally, since petitioners filed their petition, I note that the current Administration has announced plans to increase domestic manufacturing and energy production. While I anticipate that rail transportation will play a vital role in supporting these efforts, I worry that the network currently lacks sufficient capacity to handle additional traffic resulting from increased manufacturing and energy production. In the context of this proceeding, moreover, I am concerned with how the Administration's plans will impact the supply of railcars and the movement of railcars through the interstate rail network.

because the supply of railcars and the quality of transportation service are closely linked.[3] Indeed, it is often through service disruptions that the Board has learned about car supply issues. See, e.g., Urgent Issues in Freight Rail Serv., EP 770, slip op. at 2 (STB served Apr. 7, 2022) (noting that the Board has heard from stakeholders about inconsistent and unreliable service, and those challenges include "tight car supply and unfilled car orders, delays in transit for carload and bulk traffic, increased dwell time for released unit trains, missed switches, and ineffective customer assistance."); see also Oversight Hearing Pertaining to Union Pac. R.R. Embargoes, EP 772, slip op. at 4 (STB served Apr. 17, 2024) (discussing UP's use of congestion embargoes and the effect on private railcars).

Although the Board is unable to reach a majority at this time, I look forward to the opportunity for the Board to continue to consider the important and complex issues raised in this proceeding.

BOARD MEMBER SCHULTZ, concurring:

While I acknowledge the concerns raised by Petitioners, I question whether the Board has the legal authority to promulgate the rules proposed in this proceeding under 49 U.S.C. § 11122. Section 11122 allows the Board to issue regulations on "car service" with the goal of encouraging "the purchase, acquisition, and efficient use of freight cars." "Car service" is statutorily defined as "(A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier." 49 U.S.C. § 10102(2).

Although the statutory definition of "car service" is written broadly enough that it could be interpreted to encompass any "movement" of rail cars, see 49 U.S.C. § 10102(2), courts have construed the term "car service" more narrowly, having indicated that the Board's authority to regulate car service under § 11122 does not generally extend to the regulation of the details of day-to-day movements of rail cars. Peoria & Pekin Union Ry. v. United States, 263 U.S. 528, 533-35 (1924); Atchison, Topeka & Santa Fe Ry. v. ICC, 607 F.2d 1199, 1205 (7th Cir. 1979).[1] In Peoria, the Supreme Court held that "car service" means "the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." Peoria, 263 U.S. at 533-35. Applying this distinction, the Court held that the ICC could not use its car-

[3] The agency has discussed the definition of "car service," including in the context of the Transportation Act of 1920, where the definition was amended to include the word "supply," and which still appears in the definition today. In its review of the legislative history, the agency concluded that the addition of "supply" was for the sole purpose of extending to the agency "powers explicitly to include car supply and, quite obviously, the effect of car supply upon the adequacy of freight rail service." Investigation of R.R. Freight Serv., 345 I.C.C. 1223, 1236-37 (1976).

[1] The statutory definition of "car service" at the time Peoria and Atchison were decided was substantially similar to the current one. See Peoria, 263 U.S. at 534; Atchison, 607 F.2d at 1205.

service authority to require a terminal company "to switch, by its own engines and over its own tracks, freight cars tendered to it by, or for," another carrier. Peoria, 263 U.S. at 531. In Atchison, the Seventh Circuit determined that the ICC could not require tariff publication of operating schedules under its car-service authority because tariff operating schedules were "directly related to transportation services [and] do not fall within the definition of 'car service.'" Atchison, 607 F.2d at 1205. These decisions seem to indicate that the Board generally cannot interpret the car-service statute so broadly that it would permit regulation of "the transportation service rendered by means" of the vehicles of transportation.[2]

Considering these judicial interpretations, I question whether the regulations proposed by Petitioners relate to "car service" and not "transportation service," as they would seem to regulate the day-to-day movement of cars after they are released for transportation and before they are placed with a shipper or receiver. It is unclear to me whether there is a practical difference between ordering carriers to move cars more quickly and allowing fines to be assessed if they do not move cars more quickly. Both would appear to be aimed at influencing carriers to correct perceived deficiencies in transportation service.

While this proceeding remains open due to lack of a majority, I question how we could promulgate the rules as proposed, given these limits surrounding the Board's authority under § 11122. With that said, I welcome discussion of any future proposal that could effectively address Petitioners' concerns in a way that is consistent with the Board's statutory authority.

[2] The agency has successfully invoked its car-service authority as a basis for regulation of day-to-day movement when doing so to remedy a specific problem relating to the supply of cars. For example, in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 744-46 (1972), the Supreme Court upheld ICC rules requiring the return of unloaded freight cars in the direction of the owning railroad under the predecessor of § 11122 where the ICC found substantial record support of a national freight car shortage that could be alleviated by mandatory observance of the rules. Allegheny-Ludlum, however, involved the movement of cars after they had reached their destination, not while they were between origin and destination. And, based on the current record, I have doubts about whether there is a nationwide railcar shortage or other systemwide car-supply problem.