

BEFORE THE SURFACE TRANSPORTATION BOARD

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Docket No. FD 36369

**ASSOCIATION OF AMERICAN RAILROADS
– PETITION FOR DECLARATORY ORDER**

**COMMENTS OF
THE NORTH AMERICA FREIGHT CAR ASSOCIATION**

Pursuant to the Decision served in this proceeding February 19, 2020, the North America Freight Car Association (“NAFCA”) provides comments on the Petition for Declaratory Order filed by the Association of American Railroads (“AAR”) requesting that the Surface Transportation Board (“Board” or “STB”) find either that 49 U.S.C. §10501(b) preempts the Clean Water Act’s (“CWA”) discharge prohibition and National Pollutant Discharge Elimination System (“NPDES”) permitting regime as applied to discharges incidental to the normal operation of rail cars in transit, or institute a proceeding to consider the issue. For the reasons set forth below, NAFCA supports the ruling requested by the AAR.

I. Identity and Interest of NAFCA

NAFCA is an organization made up of private (non-railroad owned) rail car manufacturers owner/lessors, lessees, rail shippers, and other entities that support the rail car industry. Combined, NAFCA’s members own and/or lease in excess of 700,000 of the estimated 1.33 million railcars in service today nationwide. Its members include some of the largest railcar manufacturers and

lessors in the industry, as well as rail shippers who collectively lease and/or own and maintain hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service.¹ All told, private railcars now comprise approximately 73% of the nation's freight railcar fleet, representing approximately \$105 billion in asset value, not counting the hundreds of millions of dollars expended annually to maintain the railcars for the benefit of the Class I railroads who transport them.

NAFCA is dedicated to promoting the safe, efficient and economical ownership and use of private railcars. To achieve these goals, NAFCA and its members rely on their extensive collective knowledge of the rail car industry to investigate relevant issues and to educate public policy makers, regulators and the media regarding operational, regulatory, economic, and legal matters that affect private railcars. NAFCA also strives to ensure its members and all private car owners and operators are subject to reasonable, equitable and lawful practices and rules affecting the use, repair, and principles of compensation for private railcars. To this end, NAFCA frequently interacts directly with the AAR to seek commercial and technical solutions for railcar issues. However, NAFCA has not hesitated to institute formal proceedings before this Board and its predecessor the Interstate Commerce Commission for the purpose of obtaining policy guidance and precedent that maximizes the safe, efficient, and commercially fair use of private railcars by the Class I railroads.

II. Comments on AAR Petition

NAFCA concurs with the AAR that a declaration from the Board that §10501(b) preempts the CWA's discharge prohibitions and the state-run NPDES permitting system is appropriate and necessary at this time, as opposed to waiting for another case that seeks to cite the Washington

¹ <http://www.nafcahq.com/company-profiles>.

federal district court's 2016 ruling as authority.² The potential of such a ruling being applied to future movements of railcars containing not only coal, but many other commodities, has created unnecessary uncertainty for railcar manufacturers, railcar lessors, and rail shippers who both own and lease fleets of railcars. NAFCA agrees with AAR that STB preemption is necessary for both the federal discharge prohibition contained under the CWA and the state-run NPDES permitting regime. Petition at 14-15. The latter category is particularly significant, since 47 states and one territory are authorized to implement their own, individualized permitting programs, thereby creating the real potential for a patchwork of regulatory requirements that would potentially apply to hundreds of thousands of railcars that are currently operating in the majority of states as well as Mexico and Canada.

NAFCA also concurs with the Petition's summary of the applicable legal principles, which clearly establish the STB's statutory authority to issue the requested ruling, and the Petition's review of the supporting agency precedent and public policy reasons. In these comments, NAFCA wishes to expand on one potential effect of the court's ruling that is touched on in the Petition, which is the huge impact that broader application of the ruling would have on railcar manufacturers, railcar owners who lease cars to shippers, and shippers who both own and lease railcars.

According to the Petition, in the court proceeding the complainants sought to enjoin BNSF and prohibit BNSF from operating any railcar that allowed coal or pet coke to be discharged into the waters of the United States, and they also asked the court to require BNSF to install mechanical covers on rail cars, to order BNSF to replace each coal car in use with a railcar that met certain design specifications, and to otherwise operate in a manner guaranteed to prevent the alleged

² *Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016).

discharges. Petition at 10. However, as AAR explains in the Petition, while the case and the court’s ruling were tailored to BNSF, and could therefore lead to BNSF and other railroads having to obtain NPDES permits before transporting certain cars, the broad scope of the CWA and NPDES regulatory regimes could easily also mean that “a range of entities, from railroads to loading facilities to railcar owners to shippers might also have to obtain NPDES permits before they can use the rail network.” *Id.* at 17. Moreover, the court ruled that the railcars were the point source, such that coal falling from the railcars was a “discharge” requiring a permit. Consequently, under the applicable regulations, an “operator” required to obtain a NPDES permit covering discharges from a railcar could include a broad range of participants in the transportation chain associated with the railcar, including the railroad, the rail shipper who purchases and/or sells the commodity being shipped, third parties who load the railcar, the railcar owner, or the railcar manufacturer. *Id.* at 25.

In the first place, requiring new railcars to be designed (and presumably, existing railcars to be retrofitted) to eliminate the “discharge” of any “pollutant” pursuant to standards issued by 47 different states would astronomically increase the cost of making and retrofitting railcars, costs that would initially be borne by the railcar manufacturers but ultimately would be borne by the purchasers and lessees of railcars and/or their end use customers. As the AAR correctly points out, because railcars are routinely transported within and across the borders of many states, the court’s ruling would necessarily require railcars to be either designed and constructed to meet the most restrictive permit standard under any permit in any state, or they would be restricted to traveling only in states with less restrictive permit conditions. *Id.* at 20. Such an outcome would significantly interfere with interstate railroad operations and substantially drive up the cost of rail transportation, precisely the outcome that STB preemptive authority is there to prevent.

Second, as stated above, around 73% of all railcars in service nationwide are now owned by private entities. Nearly 78% of grain hopper cars are privately owned, as are nearly 100% of all rail tank cars. In today's rail industry, where a few Class I railroads supply over 90% of the freight rail transportation, privately owned railcars are provided to railroads by rail shippers in order to obtain rail service. The shipper either owns or leases the railcars, or its fleet is made up of both. Either way, the cost of manufacturing and maintaining the railcars is ultimately paid by the shipper through the purchase price or rental payments unless it can pass such ownership or lease costs to its customers. Moreover, most private railcars are provided to the railroad at no cost to it, and the shipper (and/or its customer) ultimately bears all of the costs incurred by the railroad while transporting the railcar through the payment of linehaul rates and accessorial charges. Consequently, to the extent the CWA discharge prohibitions and the NPDES permitting system are allowed to apply to railcars, whether the permit holder is a railroad, the railcar manufacturer, a third party loader, or the rail shipper,³ the huge costs of complying with such a regulatory regime – if it could even be implemented - would be ultimately borne by rail shippers and their customers in the form of higher prices for newly manufactured railcars and associated covers and other means to prevent any “discharges,” higher lease rates for new and retrofitted railcars, increased linehaul rates for rail transportation, higher accessorial charges, and increased maintenance costs. Such additional costs could very well make rail transportation uneconomical compared to other transportation modes.

³ For example, a Class I railroad could seek to condition transportation of a particular commodity in private railcars on the shipper and/or car owner either obtaining a NPDES discharge permit, or assuming all of the railroad's costs and liabilities associated with its NPDES permitting obligations.

III. Conclusion

In conclusion, for the reasons set forth in the Petition and these opening comments, NAFCA strongly supports the Petition's request that the STB issue a declaratory order finding that 49 U.S.C. §10501(b) preempts the application of (1) the CWA's discharge prohibition and (2) the NPDES permitting regime to discharges incidental to the normal operations of railcars in transit.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive, flowing style.

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Certificate of Service

I, Thomas W. Wilcox hereby certify that a true and correct copy of the Comments of the North America Freight Car Association was served on all Parties of Record in Finance Docket No. 36369 by email.



Thomas W. Wilcox