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August 30, 2021

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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Office of Proceedings
August 30, 2021
Part of
Public Record

Re: STB Ex Parte No. 768, Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads

Dear Ms. Brown:

The National Association of Chemical Distributors (“NACD”) respectfully submits these comments in support of the joint petition for rulemaking submitted to the Surface Transportation Board (“STB” or the “Board”) on July 26, 2021 by the North America Freight Car Association (“NAFCA”), The National Grain and Feed Association (“NGFA”), The Chlorine Institute (“CI”), and The National Oilseed Processors Association (“NOPA”) (together “Petitioners”) (“Petition”).¹ The Petition requests the STB to establish rules that would incentivize the efficient use of private railcars by requiring Class I railroads that delay the return of such cars beyond a reasonable period to compensate non-railroad suppliers of such cars. The proposed rules would promote the concept of “reciprocity” recognized by the Board in its recent demurrage proceedings by holding railroads accountable for the inefficient use of private railcars just as shippers are held accountable for delays in the return of railroad-owned cars through demurrage charges.² These comments are filed timely.³

NACD is the premier trade association for the U.S. chemical distribution industry, representing nearly 430 chemical distributors and their supply chain partners. NACD members represent more than 85 percent of the chemical distribution capacity in the nation and generate 90 percent of the industry’s gross revenue. NACD members blend, re-package, warehouse, transport, and market chemical products made by large-quantity manufacturers to 750,000 end-users in nearly every industry sector, from cosmetics to automotive and from paints and coatings to food and water treatment. NACD members operate in nearly every U.S. state through more than 3,000 facilities and are responsible for more than 75,000 direct and indirect jobs in the nation. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association’s third-party-verified

¹ Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads, STB Docket No. EP 768 (July 26, 2021) (“Petition”).

² *Policy Statement on Demurrage and Accessorial Rules and Charges*, 85 Fed. Reg. 26866 (May 6, 2020) (“*Demurrage Policy Statement*”).

³ On August 9, the STB granted a request from the Association of American Railroads to extend the time for filing comments to August 30, 2021.

environmental, health, safety, and security program. Through this verification, NACD members demonstrate their commitment to continuous improvement in every phase of chemical storage, handling, transportation, and disposal operations.

A substantial percentage of NACD members receive products via rail cars and greatly depend on reliable and affordable rail service to meet the needs of their customers and remain competitive in the global market. NACD members collectively lease or own thousands of private railcars that are supplied to the Class I railroads to receive rail service.

As the Petition demonstrates, a significant portion of the railcars in service today are owned or leased by non-railroad entities which supply these railcars at little or no cost to the railroads that use them. Private railcars are even more commonly used for the transportation of chemical commodities distributed by NACD members, because they are predominantly shipped in rail tank cars, which are 100% owned by non-railroad entities.⁴

These private railcars have been acquired or leased by shippers, such as NACD members, with significant investments throughout the years. Private railcar owners, similar to railroads, should be permitted to protect their investments through the “private railcar use charge” mechanism set forth in the Petition.

The long-standing principles of demurrage recognize the need to incentivize efficient use of railcars and to compensate rail carriers for the expenses incurred when rail cars are detained beyond a reasonable free time period.⁵ In contrast, where the railcars are primarily owned by non-railroad entities, there is no comparable mechanism for private railcar owners to ensure that railroads use their assets efficiently, and that they are compensated for the costs incurred when railroads detain their cars beyond a reasonable time period. The proposed rules address this issue head-on.

Specifically, the Petition proposes the Board to establish a “private railcar delay charge” that will be assessed by a private railcar provider if a railroad exceeds the “allowable transit idle time” - *i.e.*, “72 consecutive hours of idle time at any point on a railroad’s system ... between the time the private railcar is released for transportation to when it is either constructively placed or actually placed at the private railcar provider’s facility or designated location.”⁶ The Petition also proposes establishing the applicable charge as “the greater of either (i) the applicable demurrage charge that a rail carrier assesses its customers ... for holding on to railroad-owned or leased railcars beyond the free time established by the railroad, or (ii) the applicable storage charge that a rail carrier could assess the Private Railcar provider ... for holding onto or storing the private railcar beyond the free time established by the railroad.”⁷

NACD strongly believes that the proposed rules are reasonable and necessary and fully supports the Petitioners’ proposal.

⁴ *Id.* at 5 (“Petitioners estimate that there are around 1.6 million railcars in service ... and approximately 1.2 million of them are Private Railcars. These include 100% of rail tank cars.”).

⁵ *Demurrage Policy Statement*, 85 Fed. Reg. at 26866 (“Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (*i.e.*, “free time”) for loading and unloading.”).

⁶ Petition at 18.

⁷ *Id.* at 18-19.

As discussed in the Petition, these rules will promote the statutory goal of 49 U.S.C. §11122(a) to “encourage the purchase, acquisition, and efficient use of freight cars” with appropriate incentives for Class I railroads to more efficiently use the private railcars in their possession.⁸

The proposed rules will also establish the long-needed reciprocity with respect to private railcar usage. The Board has explored this idea during the oversight hearing on demurrage and accessorial charges held in May 2019, and asked the interested parties to address the following topic in their written testimonies:

Perspectives on whether demurrage and accessorial tariffs in effect during the past three years have created balanced and appropriate incentives for both customers and railroads, including views on the extent to which reciprocity should be incorporated into demurrage and accessorial charges.⁹

In response to the Board’s solicitation of public views about this issue, Brainerd Chemical Company, Inc., filed comments reflecting its own and other NACD members’ experience and urged the Board to establish reciprocity and “level the playing field for rail customers.”¹⁰ Mr. Brainerd’s comments shed further light on how small businesses, such as NACD members, are being adversely affected by the railroads’ own inefficiencies:

Brainerd leases three of our own rail cars. If these cars are delayed because of railroad inefficiencies, my company is moving less product, which negatively impacts our bottom line. A specific instance occurred at our Danville facility when CSX reneged on a commitment to switch four rail cars with product into our yard. This caused our plant to shut down, our part-time workers to be furloughed, and delays for our customers on their orders.¹¹

Ultimately, the lack of reciprocity causes small businesses to be burdened with millions of dollars in lost profits, additional costs, and lower returns on their investments. Granting the Petition would allow the Board to address this inconsistency and hold railroads accountable for their inefficient use of private railcars just as shippers are responsible when they delay the return of railroad-supplied cars. Accordingly, NACD strongly urges the Board to institute a rulemaking proceeding under 49 C.F.R. §1110.2(b).

Sincerely,

A handwritten signature in dark ink, appearing to read "Eric Byer", is positioned above the typed name.

Eric Byer
President & CEO

cc: All Parties of Record

⁸ *Id.* at 14-17.

⁹ Notice of Public Hearing, STB Docket No. 754 (April 8, 2019).

¹⁰ Written Comments of Matthew A. Brainerd, Brainerd Chemical Company, Inc., STB Docket No. 754 (May 8, 2019).

¹¹ *Id.* at 8.