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August 30, 2021
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 768

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

**JOINT REPLY OF
THE AMERICAN CHEMISTRY COUNCIL,
THE FERTILIZER INSTITUTE, AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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On behalf of:
American Chemistry Council
The Fertilizer Institute
The National Industrial Transportation
League

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The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League (“ACC/TFI/NITL”) hereby reply to the Joint Petition For Rulemaking filed by the North America Freight Car Association, The Chlorine Institute, and The National Oilseed Processors Association (“Petitioners”) in the above-captioned docket on July 26, 2021 (the “Petition”). Petitioners have petitioned the Surface Transportation Board (“STB” or “Board”), pursuant to 5 U.S.C. § 553, to adopt rules that would govern the railroads’ use of private railcars by making a railroad accountable to car owners for the railroad’s inefficient use of private cars in much the same way that shippers are held accountable to railroads for the shippers’ inefficient use of railroad-owned cars and storage track. ACC/TFI/NITL support the concept of “reciprocity” that underlies the Petition and the general approach contained in the proposed rules that would establish a “delay charge” if a railroad exceeded an allowable transit idle time for a private rail car, with the caveat that this approach only begins to address this critical issue. Therefore, ACC/TFI/NITL urge the Board to grant this Petition both to consider

the Petitioners' proposal and additional forms of reciprocity that hold railroads to equivalent standards as shippers on the first-mile/last-mile of service, which is where most inefficiencies occur.

I. STATEMENTS OF INTEREST.

ACC represents the leading companies in the business of chemistry. ACC members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. As an \$565 billion enterprise, the business of chemistry is a key element in the nation's economy, one of the largest exporting sectors, and one of the largest customers of the U.S. freight rail system. Moreover, and as pertinent to this proceeding, ACC members own or lease virtually all of the railcars that railroads use to transport their raw materials and finished products are transported. This includes covered hoppers to transport plastic polymers and tank cars to transport many types of liquids and compressed gases.

TFI is the national trade association of the fertilizer industry. TFI members include fertilizer producers, wholesaler, retailers, and trading firms. TFI serves its members through legislative, educational, technical, and economic information and public communications. TFI members depend heavily on railroads to transport their fertilizers to the farming regions where they are consumed. In nearly all instances, TFI members own or lease the railcars that railroads use to transport their products.

NITL represents a broad cross-section of American business, united in their need for reliable, efficient and competitive transportation services across all modes of transportation, including rail. Its rail members ship chemicals, petroleum, agricultural products, paper and forest products, and other commodities, many of which are shipped in private rail cars leased by NITL members. The complex supply chains of NITL members require efficient rail service and fair rules and practices to support their operations and the demands of customers and consumers.

As owners and lessees of large portions of the nation's fleet of private railcars, ACC, TFI, and NITL members have a strong interest in this proceeding. They are among the hundreds of non-railroad entities that have invested tens of billions of dollars to acquire railcars and even more money to maintain them for use by Class I railroads.¹

II. THE PETITION ADDRESSES A SIGNIFICANT NEED FOR "RECIPROCITY" IN RAIL TRANSPORTATION.

Just as the railroads routinely assess demurrage, storage, and various accessorial charges against ACC/TFI/NITL members to incentivize their efficient use of railroad-owned cars and track, ACC/TFI/NITL agree with Petitioners that reciprocity is warranted to incentivize railroads to efficiently use private railcars and also private track. The Petition provides a compelling description of the need to incentivize the efficient use of private railcars and the Board's authority to adopt regulations on this subject. ACC/TFI/NITL will not repeat that discussion here except to add ACC/TFI/NITL member perspectives to the facts that Petitioners have presented. Based upon that perspective, ACC/TFI/NITL believe that the Petition is a good start towards achieving reciprocity but that much more ultimately is needed. Therefore, ACC/TFI/NITL urge the Board, in addition to considering the Petitioners' proposed rules, to solicit comments more broadly on ways to achieve greater reciprocity for the treatment of private railcars and track through rules that apply to first-mile/last-mile rail service.

A. The Petitioners' Proposal Would Foster Greater Efficiency for Private Rail Cars.

The relationship between railroads and their customers who provide private rail cars is extremely one-sided. Railroads require their customers to pay demurrage on railroad-owned equipment that is not loaded or unloaded within 24 hours or pay storage charges on private

¹ See Petition 2.

railcars (loaded or empty) that a customer fails to order-in to its facility within 24 hours of arriving at the local serving yard. To justify these charges, the railroads cite their need to improve network fluidity and equipment utilization. ACC/TFI/NITL support these railroad objectives, but railroad behaviors also have adverse impacts upon their customers' operations for which railroads have refused to be accountable. ACC/TFI/NITL submit that it should be an unreasonable practice for railroads to assess demurrage and storage charges (or any other charges that are designed to influence customer behavior) unless the railroads accept accountability for the adverse impacts of their behaviors upon their customers. In other words, "reciprocity" should be a precondition to assessing such charges.

The Petition addresses one such area where reciprocity is lacking, which is the railroads' inefficient utilization of private railcars. If a customer detains a railroad-owned railcar too long, it must pay demurrage charges; similarly, if the customer's private car sits too long in a railroad's local serving yard, the customer must pay storage charges. These charges enable railroads to optimize their rail fleets and track infrastructure through more efficient use.

When a rail customer provides private rail cars, however, it too has a strong interest in fleet optimization. A rail car fleet that is too large increases the customer's ownership costs, such as leasing, maintenance, and storage of excess railcars. Conversely, a fleet that is too small imposes opportunity costs in lost production and sales. But railroad acts and omissions can throw this careful balance out-of-whack with expensive consequences for rail customers that are not amenable to quick resolution because rail fleets cannot be resized overnight or without substantial costs. Similarly, the measures taken by rail customers cannot be quickly or inexpensively reversed.

Although ACC/TFI/NITL support the concept behind the Petition, they are very interested in how the proposed rules would be implemented if adopted. Specifically, the Board should solicit comment on who is responsible for monitoring rail car delays and invoicing in accordance with the proposed rules, and to whom such invoices would be submitted. Because most of the metrics measured by the proposed rules are generated by the railroads, it appears to be far more efficient to require rail carriers to credit amounts owed under these rules against their demurrage and storage invoices. Shippers then could consider whether they have been properly credited as part of their existing processes for monitoring and auditing demurrage and storage invoices from their rail carriers. Disputes could be resolved via existing processes for disputing demurrage and storage charges more generally.

While storage and demurrage charges both compensate railroads and penalize rail customers for inefficient behaviors, there is no corresponding compensation or penalty for inefficient railroad behaviors when it comes to the handling of private railcars. The Petitioners' proposal with standards for its efficient administration would change that.

B. True “Reciprocity” Requires Consideration of First-Mile/Last-Mile Service Issues.

The Petitioners' proposal is a good start, but it only deals with the tip of the “reciprocity” iceberg. Inefficient railroad behavior in the conduct of first-mile, last-mile service comprises the bulk of this iceberg that is hidden beneath the surface. Missed, incomplete, and delayed switches are the greatest sources of this problem. These are all-too-common occurrences that have become even more frequent with the widespread implementation of Precision Scheduled Railroading (“PSR”). PSR also has reduced the number of customer touch-points, including customer service, which has made resolving these rail service issues more challenging than ever before. Although railroads charge customers for actions that impede, delay, or prevent efficient

switching of the customer's facility and require customers to pre-block rail cars to improve the railroad's efficiency, rail customers are not compensated for missed or incomplete switches that make their operations less efficient.

When a railroad misses or fails to complete a scheduled switch, there are significant consequences for the customer. First, the customer has incurred labor expenses for its personnel to be on-hand to promptly load or unload the railcars to turn them around in service as quickly as possible. This quick turn-around is essential to avoid demurrage on railroad-owned cars and to free up plant track capacity to avoid storage charges on the next delivery of private railcars. Second, when a railroad doubles-up on its next switch to make up for the missed switch, it floods customer plants with double the rail cars which requires extra personnel and overtime to surmount the resulting logjam and restore the customer's operations to equilibrium. Third, missed and incomplete switches congest plant track and have the potential to slowdown or even shutdown production. This problem is exacerbated when a facility lacks sufficient capacity to receive via a single switch the equivalent number of cars usually delivered in two or more switches. To avoid or mitigate these problems, rail customers are spending inordinately more time and money to monitor their loaded and empty railcars in-transit, doing a job that used to be done by the railroads.

In the current rail marketplace, the railroads have no accountability for the consequences their first-mile/last-mile actions have on their customers. As such, when making operating decisions, railroads consider only what is best for them because they have no incentive to consider the consequences for their customers. The Petitioners' proposal provides some incentive for extended delays to private rail cars. But it is first-mile/last-mile service where rail customers feel the greatest impacts upon both their rail car fleets and their facilities.

When a railroad repeatedly misses or fails to complete switches at a customer facility, it should be required to explain the cause(s) and provide a detailed plan to resolve the problem within a clearly defined time frame. If the railroad fails to do so, it should be financially accountable to the customer for transportation by alternative modes that are necessary for the customer to meet commitments to its customers, to maintain fluidity in the customer's plant, and/or to prevent a plant from plugging up and ultimately shutting down. If the railroad has advance notice of a likely plant shutdown, it should be accountable when a missed or incomplete switch in fact does shut down a customer facility. For industries that a railroad only switches once or twice per week, the railroad should be required to provide a make-up switch, without charge to the customer, instead of waiting for the next scheduled switch. The typical railroad platitude is "we are working on it" and the customer has no choice but to wait and see if there is any improvement. Reciprocity in the form of these simple requirements can provide railroads with proper incentives to not just "work on it," but to expeditiously "resolve it."

The rail industry may respond that, even if the Board adopted such requirements, they would not apply to the vast amount of traffic that is governed by contracts. But such a response ignores the fact that the railroads routinely incorporate their demurrage and storage tariffs into their contracts, along with all other tariffs, to the extent they do not conflict with a contract. Furthermore, common carrier tariff terms typically provide the *de facto* baseline terms for contract negotiations. Therefore, if the Board adopts any of the "reciprocal" terms sought in this docket for common carriage, those terms are likely to make their way into contracts too.

Therefore, ACC/TFI/NITL urge the Board to consider "reciprocity" more broadly than just the specific proposal in the NAFCA Petition by also considering "reciprocity" in the context of first-mile/last-mile service. Railroads routinely impose charges, beyond just demurrage and

storage, upon their customers who create inefficiencies for the railroads in their provision of first-mile/last-mile services. Reciprocity mandates that the railroads be accountable to their customers when railroad actions create inefficiencies for those customers.

III. **Conclusion.**

For the foregoing reasons, ACC/TFI/NITL support the Petition and ask the Board to give broader consideration to reciprocity in the context of first-mile/last mile service.

Respectfully submitted,



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