

ENTERED
Office of Proceedings
June 27, 2022
Part of
Public Record

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

)
)
In the Matter of:)
)

Petition for Rulemaking)
To Adopt Rules Governing Private)
Railcar Use by Railroads)
)
_____)

Docket No. EP768

COMMENTS OF JAMES CALLAHAN

STUDENT, BOSTON COLLEGE LAW SCHOOL

I am pleased to submit comments to the Surface Transportation Board (STB) regarding the petition for rulemaking governing Class I railroad treatment of private railcars. My interest in this rulemaking is two-fold. First, as a consumer, I have an interest in an efficient, competitive, and economically viable American rail system. Second, as an Amtrak user, I have an interest in reducing passenger rail delays caused by freight train interference. My comments highlight several weaknesses with the proposed rulemaking. By highlighting these weaknesses, I hope to help the STB find the right solution to this complex problem.

Introduction

On April 7, 2022, the STB asked for comments on a petition by the North America Freight Car Association, The National Grain and Feed Association, The Chlorine Institute, and The National Oilseed Processors Association to adopt regulations governing Class I carrier use

of private freight cars.¹ Under this rule, the STB would be able to assess a Private Railcar Delay Charge if a private freight car does not move for more than 72 hours at any point 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.” The charge paid by Class I carriers would be equivalent to the greater of the applicable demurrage or storage charge.

Petitioners believe this rulemaking is necessary to encourage the efficient use of private freight cars. They claim that railroads do not currently have sufficient incentives to use private cars efficiently. In support of this claim, Petitioners cite several instances where Class I carriers have caused egregious delays to private cars.

Although I strongly support incentivizing the swift movement of private cars, I am concerned about several weaknesses of the current proposed rulemaking. In this spirit, I offer the following comments to strengthen the proposed rule:

- I. The STB should require Class I carriers to disclose additional performance metrics before adopting a Private Railcar Delay Charge.
- II. The STB should consider whether a timeframe based on pure running time would be better than one based on a fixed number of hours.
- III. The STB should consider whether alternative rules, currently under consideration by the Board, would better address the problem of private car delays.
- IV. The STB should consider whether this rule will adversely affect passenger rail.

¹ Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads, 87 Fed. Reg. 67 (Proposed April 7, 2022).

Comments

I. The STB should require Class I carriers to disclose additional performance metrics before adopting a Private Railcar Delay Charge.

First, the STB should require Class I carriers to disclose additional performance metrics before adopting a Private Railcar Delay Charge. Currently, the STB does not have enough information. The Board has no evidence of how often Class I carriers hold private railcars longer than 72 hours. It also has no proof that Class I carriers treat private cars any differently than railroad-owned cars. The STB lacks this information because it does not require Class I carriers to report detailed statistics about private cars. By requiring additional disclosures, the STB would be able to use more evidence to create a better rule.

There is ample precedent for STB-required disclosures. In 2016, the Board adopted a rule requiring all Class I carriers to report certain performance metrics on a weekly, semiannual, and occasional basis.² These metrics require Class I carriers to disclose things like average train speeds, average terminal dwell times, and weekly average number of trains holding per day. Each of these categories is further broken down according to the kind of car: grain, coal, automotive, crude, or ethanol. These disclosures have given the STB standardized and consistent data on which to base its decisions.

Since Class I carriers already disclose extensive performance metrics, it should not be too burdensome for them to disclose additional metrics about private car delays. This would be helpful for the STB because Petitioners provided only five anecdotal occasions when Class I carriers delayed private cars. As the Association of American Railroads notes, “[t]his handful of anecdotes—with no specifics, no evidence of any generalized patterns, and no data or other

² 49 C.F.R. pt. 1250 (2016).

reason to believe that private cars experience any different treatment from railroad-owned cars—is not a basis for industry-wide rulemaking.”³

Finally, more data will help solve two needs of the STB. First, the Board needs more information to see how often private cars are delayed. Especially given the unique nature of the Covid-19 pandemic, it is unclear if private car delays are still a problem in 2022. Second, the STB needs to know if Class I carriers are treating private cars differently than railroad-owned cars. If railroad-owned cars are suffering from the same delays as private cars, then perhaps this rule should apply to both private and railroad-owned cars. After all, delays harm *all* shippers—not just those who rely on private cars. For these reasons, the STB should require Class I railroads to disclose additional performance metrics.

II. The STB should consider whether a timeframe based on pure running time would be better than one based on a fixed number of hours

Second, the STB should consider whether a timeframe based on pure running time would be better than one based on a fixed number of hours. The 72 hour timeframe could have the adverse effect of encouraging inefficient car movements. Under the proposed rule, Class I railroads will pay a fine *only if* they do not move a private car within 72 hours. As a result, railroads could avoid fines simply by moving private cars just enough to change the CLM location city. As Union Pacific notes, “a railroad may use resources to move private freight cars a short distance just to ‘reset’ the 72-hour clock.”⁴ Such movements would be inefficient and only worsen the problem of private car delays.

³ Ass’n of Am. R.R., Reply to Petition for Rulemaking on Private Railcar Use by Railroads (Aug. 30, 2021).

⁴ Union Pacific, Reply to Petition for Rulemaking on Private Railcar Use by Railroads (Aug. 30, 2021).

Given this, it might be preferable to base this rule on pure running time instead of a fixed timeframe such as 72 hours (PRT). PRT is the minimum amount of time required to operate a train between two locations via normal routing. PRT of a route is calculated by summing PRTs of location-to-location segments on a route. Therefore, a PRT-based rule would fine Class I carriers if the travel time for a private car *exceeded* the PRT of a given route by a certain amount. Such a rule would incentivize the swift movement of private cars across the *entire rail system*—not just movements that change a car’s CLM location city.

That being said, regulation based on PRT would also be a significant expansion of rulemaking authority for the STB. Because of this, the Board should tread cautiously. Railroads should only be penalized if they exceed the PRT of a given route by an *order of magnitude* greater than the PRT of that route. This would ensure that railroads are not penalized for routine delays. The Board should not micromanage train movements but, rather, provide an incentive for railroads to treat private railcars fairly.

III. The STB should consider whether alternative rules, currently under consideration by the Board, would better address the problem of private car delays.

Third, the STB should consider whether alternative rules, currently under consideration by the Board, would better address the problem of private car delays. The STB is already considering proposals to (1) update emergency service rules and (2) mandate reciprocal switching. Both proposals may provide sufficient incentives to Class I carriers to stop delaying private railcars. As a result, a Private Railcar Delay Charge may be duplicative and unnecessary.

A. The STB should determine whether updating emergency service rules will eliminate the need for a Private Railcar Delay Charge.

To start, the STB should determine whether updating emergency service rules will eliminate the need for a Private Railcar Delay Charge. On April 22, 2022, the STB voted unanimously to propose an update of its emergency service rules.⁵ These rules would permit the STB to compel railroads to respond when shippers are not receiving sufficient and timely service. While the STB has long had this power, it has seldom been invoked because “the current process takes too long and places burdens on petitioners that are difficult to meet, even when the emergency is acute.”⁶ The proposed update solves this problem. It also could solve the problems alleged by Petitioners who support the Private Railcar Delay Charge.

Under the updated rules, the STB could compel movement if it determines that, “over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.”⁷ Beyond this, shippers can also seek “accelerated temporary interim relief for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier that presents potential imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public”—including “potential plant shutdowns.”⁸

The conduct alleged by Petitioners could likely be solved by invoking these updated emergency service rules. For example, according to Petitioners, a Class I carrier’s failure to “return cars to interchange points for up to two weeks” forced a company to shut down a

⁵ SURFACE TRANSPORTATION BD., REVISIONS TO REGUL.S FOR EXPEDITED RELIEF FOR SERV. EMERGENCIES (2022).

⁶ Id.

⁷ Id.

⁸ Id.

production line at one of its plants.⁹ This disruption would fall under the accelerated temporary relief provision. Next, on “numerous” other occasions, Class I railroads held Private Railcars “for between eight and 61 *days*, including two instances where the railroads simply ‘lost’ the Private Railcar.”¹⁰ These delays are a clear deterioration in service and would, presumably, also fall under the updated rules. Therefore, since the updated rules could solve the problems alleged by Petitioners, the STB should reassess whether the Private Railcar Delay Charge is necessary.

B. The STB should examine whether the proposal to mandate reciprocal switching will eliminate the need for the Private Railcar Delay Charge.

Next, the STB should examine whether the proposal to mandate reciprocal switching will eliminate the need for the Private Railcar Delay Charge. In March of 2022, the STB reconsidered an old proposal to mandate reciprocal switching. Under the proposal, Class I carriers would be forced to share track access with competitors.¹¹ Where a single railroad has physical access to a shipper facility, that railroad would have to allow private cars to transfer to a junction point with a second railroad. The proposal is strongly supported by shippers because it would empower them to choose a carrier that provides the best combination of rates and service.

The STB should be aware that reciprocal stitching will have a substantial impact on private railcar delays. It would incentivize Class I carriers to compete on not just cost but, also, service quality. As a result, at least some shippers currently suffering from delays could turn to competing carriers with better service. Under the proposal, Class I carriers would lose business

⁹ N. Am. Freight Car Assoc. et. al., Petition for Rulemaking to Adopt Rules Governing Priv. Railcar Use by R.R.s (July 26, 2021).

¹⁰ Id.

¹¹ Surface Transportation Bd., Docket No. EP 711 (Sub-No. 1).

unless they improve on-time performance. Therefore, the STB should reassess whether the Private Railcar Delay Charge is truly necessary. Otherwise, the Board could end up creating duplicative rules and unnecessary red tape.

IV. The STB should consider whether this rule will adversely affect passenger rail.

Fourth, the STB should consider whether this rule will adversely affect passenger rail. As written, this rule imposes new obligations on Class I carriers to move private cars once every 72 hours or pay a fine. By incentivizing additional freight car movements, this rule could have the effect of increasing congestion and increasing passenger rail delays. As an Amtrak passenger, I know the agony of delays all too well: last summer, my train from Charleston, SC to Savannah, GA was delayed by 56 minutes. So, while the goal of reducing freight car delays is a noble one, it should not come at the cost of longer delays for Amtrak passengers.

Today, Amtrak's number one cause of delay is freight train interference. This is "typically caused by a freight railroad requiring an Amtrak passenger train to wait so that its freight trains can operate on the tracks ahead."¹² Because of freight car interference, Amtrak loses more than \$140 million dollars a year and passengers lose valuable time.¹³ In 2018 alone, Norfolk Southern delayed Amtrak trains for 464,342 minutes—the equivalent of 322 days.¹⁴ As a result, Amtrak's on-time performance is egregious, especially on routes outside the Northeast Corridor. For example, only 21% of Sunset Limited passengers, 31% of Auto Train passengers, and 18% of Silver Star passengers arrived on-time in May of 2021.¹⁵ Class I carriers have a legal

¹² NAT'L R.R. PASSENGER CORP, HOST RAILROAD REPORT CARD & FAQ (2018).

¹³ NAT'L R.R. PASSENGER CORP., LETTER TO NORFOLK S. CORP., (March 6, 2019).

¹⁴ *Id.*

¹⁵ *Id.*

obligation to prioritize passenger cars over freight cars.¹⁶ Nonetheless, they have ignored this obligation for decades.

Given this context, the STB should be especially wary of imposing more obligations on Class I carriers. The law is clear: Amtrak gets priority over freight rail. STB policy should be made with this in mind. New rules should not make it any harder for Class I carriers to fulfill their existing legal obligations. Without careful tailoring, this rulemaking could incentivize Class I carriers to move freight cars before passenger cars on highly congested routes. As a general matter, inefficient freight car movements could increase delays for Amtrak passengers. By being aware of this issue, the STB can hopefully structure this rule in a way that does not adversely impact passenger rail.

Conclusion

I fully support the goal of decreasing private car delays. However, as written, this rule suffers from several weaknesses. To remedy these, the STB should require additional performance metric disclosures, reconsider the rule's 72 hour timeframe, examine the larger rulemaking landscape, and mitigate any adverse impacts on passenger rail. It is my hope that these actions will enable the Board to promulgate a stronger rule that benefits all Americans.

Respectfully submitted,

James Callahan
Boston College Law School
885 Centre Street
Newton, MA 02459

June 26, 2022

¹⁶ NAT'L R.R. PASSENGER CORP, HOST RAILROAD REPORT CARD & FAQ (2018).