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Ex Parte No. 768

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

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**ASSOCIATION OF AMERICAN RAILROADS’  
RESPONSE TO REQUEST FOR COMMENTS**

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## **ASSOCIATION OF AMERICAN RAILROADS' RESPONSE TO REQUEST FOR COMMENTS**

The Association of American Railroads (“AAR”) submits this Response to the Board’s Request for Comments in its Decision served April 1, 2022 (the “April 1 Decision”). AAR organizes its Comments to correspond with the questions set forth in the April 1 Decision, but we begin with an overview of the principal reasons why the Board should reject the relief sought by Petitioners and terminate this proceeding.

The new regulatory regime applicable to privately-owned railcars that Petitioners seek is fundamentally misguided. It reaches far outside the Board’s regulatory purview to regulate the internal functioning of America’s private-enterprise rail networks, and the new regulatory scheme it would erect likely would exacerbate rather than ameliorate the “service” concerns that appear to be at the heart of Petitioners’ motivation. We briefly address the Board’s lack of authority to impose the proposed regime in Section I below. Section II summarizes the ways in which the proposed new regulatory scheme would undermine rail network efficiency and do harm. And Section III demonstrates that there is no compelling justification for creating a new compensation scheme for privately-owned railcars. Finally, AAR provides responses, where appropriate, to the questions the Board posed.

### **AAR’S GENERAL COMMENTS ON THE PROPOSED RULEMAKING**

As set forth in the sections below that respond directly to the issues posed in the April 1 Decision, AAR believes that the proposed new regulatory regime is fundamentally misguided. The key points for the Board to consider as it evaluates whether to proceed down this new regulatory path are the following:

## **I. THE PROPOSED REGULATIONS ARE OUTSIDE THE BOARD’S STATUTORY AUTHORITY**

As set forth in detail in AAR’s 2021 Reply to NAFCA’s Petition, the new regulatory regime private car owners seek is one that would regulate railroad transportation, not “car service.” As such, the proposal is not within the Board’s statutory authority.

First and foremost, there is no bona fide car supply concern at issue here. No evidence has been put forward suggesting that railroads have failed to discharge their obligation to supply railcars, that there is any car shortage, or that there are inadequate incentives for investment in railcars by the many entities – railroads, private lessors, and shippers alike – that participate in the railcar ecosystem.

Instead, the concern is the quality of railroad service provided to shippers who have chosen to supply the railcars used to handle their shipments. The underlying grievance here – from a shipper perspective – concerns how promptly railroads deliver empty cars, how quickly they pull loaded cars, and how long (or how reliably) those cars take to reach their destinations. Petitioners are indeed transparent about their desire to impose through this rulemaking incentives that substitute for their claimed inability to negotiate “rail contract service-standard provisions.” NAFCA Petition at 10. These are not car service issues. They are transportation service issues going to the heart of how railroads operate their networks. AAR incorporates by reference herein its discussion of the statutory framework and governing precedent discussed at length in its 2021 submissions.<sup>1</sup>

At bottom, “car service” applies only to “the use to which the vehicles of transportation are put; not the *transportation service rendered by means of them.*” *Peoria & Pekin Union Ry.*

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<sup>1</sup> See AAR Reply to Petition for Rulemaking (filed Aug. 30, 2021) at 3-6, 11-15; AAR Reply to Motion for Leave to File (filed Sept. 23, 2021) at 1-3.

*v. United States*, 263 U.S. 528, 533 (1924) (emphasis added). The courts have long held that a quest for service standards and cycle-time guarantees are outside the Board’s authority. Matters “directly related to transportation services[]do not fall within the definition of ‘car service.’” *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 607 F.2d 1199, 1205 (7th Cir. 1979).

It is perhaps easiest to appreciate why “car service” cannot be contorted to encompass Petitioners’ proposal by asking, “What is the limiting principle?” If the Board had the authority to regulate the details of how railroads handle privately-owned railcars en route between their origin and destination on the theory that the “efficient utilization” of railcars is subject to car service regulation, there would literally be no aspect of the day-to-day workings of a railroad that was not subject to the Board’s regulatory oversight. Everything a railroad does affects, in one way or another, whether railcars are moved efficiently across the network – for that is the sum and substance of what railroads do.

Such a reading of the Board’s statutory authority would do violence to the text of the statute (“car service” meaning what it says and not “transportation service”) and would read out of the broader statutory framework all of the limitations on the Board’s regulatory authority that Congress so carefully and intentionally engrafted, most notably the goal to “minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2). Such a reading of car service authority would instead insert the Board as all-purpose overseer of rail operations, when it is instead very clear that the Board’s statutory authority is cabined to its role in addressing – via rule or adjudication as appropriate – a specific and delimited set of regulatory functions. Congress intended for the level of service shippers receive to be disciplined by the market, not regulatory fiat. Were the regulation of car service to be used as a back door to override that limitation, it would contravene the will of Congress.

We address this issue further in response to the Board’s Question No. 3.

## **II. THE PROPOSED REGULATIONS WOULD INTERFERE WITH EFFECTIVE AND EFFICIENT RAIL SERVICE FOR NO GOOD REASON**

The central practical problem with Petitioners’ proposed regulatory scheme is its inevitable adverse impact on the operation of the U.S. rail network. No matter how the details are worked out, the scheme is both designed and preordained to compel railroads to operate their networks differently: to *replace* the incentives railroads have today to optimize network operations for the benefit of all shippers and the overall fluidity and throughput of the network *with a set of preferences* favoring the movement of privately-owned railcars. By definition, the “delay-free” movements these private car owners want for their equipment – which in reality would really be an artificial “anti-pause” regime having little nexus to improvements in transit times – would force a change in railroad operational decision-making away from that which would optimize the network for all users.

### **A. The Proposed Regulations Would Create Railroad Network Inefficiencies**

#### **1. Railroads Already Have Strong Incentives to Handle Privately-Owned Railcars Efficiently**

Petitioners’ case for their proposed regulatory scheme is built on the false premise that railroads lack sufficient incentives to handle privately-owned railcars efficiently. Nothing could be further from the truth. Railroads already have strong incentives to operate privately-owned railcars efficiently.

We address this point in part in response to the Board’s Question No. 1, which focuses on the narrow question whether the “Board’s current regulations and policies ... create sufficient incentives for Class I carriers to use private freight cars efficiently.”<sup>2</sup> As we demonstrate, the

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<sup>2</sup> April 1 Decision at 5.

Board’s “regulations and policies” do play a role in this area – particularly as regards the manner in which the economic relationships between railroads and shippers reflect the use of private equipment (as we discuss in Section III.A. below). But the dominant source of incentives to use private freight cars efficiently has nothing to do with Board regulation or policy: it stems from the operation of transportation markets and the practical realities of rail network operations.

First, from a commercial perspective, railroads are in business to earn revenue from the provision of transportation services. Idle – or inefficiently used – railcars reflect a lost opportunity to earn revenue whether the cars are railroad-owned or privately-owned. A loaded tank car or covered hopper parked on a siding somewhere while in transit does nothing to deliver revenue to the railroad’s bottom line, whereas improved cycle times for that equipment mean more revenue movements and more profit. Likewise, idling empty railcars would delay their availability for the next loaded cycle, forgoing railroad revenue opportunities. This incentive is the exact counterpart to that touted by Petitioners when they point out that “a railcar fleet that is too small (or if too few railcars are available because a portion of the fleet is too long in the possession and control of railroads) can result in missed sales opportunities.” NAFLA Petition at 12. Railroads likewise have strong incentives to avoid missing opportunities to earn revenue hauling freight because cars are unavailable.

Second, the competitive environment in which railroads operate magnifies these inherent commercial incentives. Operating private railcars inefficiently will degrade the value of the transportation service railroads provide, creating pressure for the railroads’ customers (*i.e.*, shippers and receivers) to look elsewhere to meet their needs – potentially turning to a competing railroad, potentially exploring other transportation modes, potentially looking to other sources of supply or other markets that can be reached via alternative transportation providers (*i.e.*,

geographic or product competition), or potentially losing business to other shippers that have better transportation options. All of these forms of competition are well recognized and impose real incentives on railroads to run their networks in ways that meet customer needs, regardless of who happens to own the railcars used to haul the freight.<sup>3</sup>

Third, railroads' quest for operating efficiency creates strong incentives to operate private cars efficiently. Just like all other railcars, privately-owned railcars moving on the rail network (in other words, those that are not placed in storage at the direction and expense of the car owner) consume scarce railroad resources across multiple network dimensions.

Petitioners do not question that railroads already have strong incentives to move *railroad-owned cars* efficiently. Indeed, the thrust of Petitioners' desire for "reciprocity" is to attempt to bring railroads' incentives as to private cars into line with the incentives that already exist as to railroad-owned equipment. Yet the parity Petitioners seek is effectively already established by the costs railroads would incur in singling private cars out for disparate treatment. Except when operated in unit trains at the direction of the shipper or receiver, privately-owned railcars move in the same trains as railcars owned by railroads (or owned by them indirectly through TTX). Any attempts by railroads to single out private railcars for less efficient treatment would be counterproductive, as doing so would either incur additional costs or drag down the performance of all railcars, contrary to the railroads' acknowledged objective to handle railroad-owned cars efficiently.

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<sup>3</sup> E.g., *Market Dominance Determinations – Product & Geographic Competition*, Ex Parte No. 627 (STTB served Dec. 21, 1998), at 6 ("In applying its revised market dominance guidelines, the ICC in fact found that product or geographic competition provided effective competition for certain traffic in several cases."); see generally *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte No. 704 (Sub-No. 1), Comments of AAR (filed Jan. 29, 2021) (addressing the Board's precedents addressing broad array of competition affecting railroad transportation services).

Private railcars – also like railroad-owned cars – likewise consume scarce network resources (track capacity, crews, locomotives, etc.) even when they are not already bundled into trains along with railroad-owned cars. Any inefficient movement – or inefficient “pause” in movement – for a block of privately-owned cars will consume scarce track capacity, and require locomotives and crews to put them there and move them elsewhere when their “pause” is complete. Nor do railroads have operational incentives to separate these cars out so as to park them on otherwise unused parts of the network. Even if such track capacity existed, the work necessary to move private cars to remote “parking lots” would similarly consume scarce locomotive and crew resources.

Finally, but by no means least importantly, a very large portion of all rail movements using private equipment occur under transportation contracts. AAR is not in a position to speak to the specifics of any of these contracts, but there is no doubt that they reflect an agreed bargain between the railroad and the supplier of the private equipment. The outcome of negotiations over the contracted speed of service, cycle-time commitments, the number of equipment sets, and myriad other matters all reflect an economic tradeoff, with greater degrees of service commitment likely coming at a cost in terms of rate level or other contract terms. Whether or not these contracts provide the service guarantees that shippers might prefer (*see* NAFLA Petition at 10), they do establish a bargained-for degree of contractual incentive for efficient service and railcar utilization that precludes further regulatory intrusion. *See* 49 U.S.C. § 10709(b).

In light of these overriding commercial and operational incentives, it should come as no surprise that railroads operate all of the railcars on their lines as part of a single, integrated network aimed at optimizing the capability of the network without wasted resources. The

imperative is to keep *all* cars (not just a subset of cars) moving efficiently and earn the revenues railroads need to stay viable and support reinvestment.

This is not to say there are no differences in how private railcars are operated. But the differences do not reflect lesser efficiency at the initiative of the railroads. To the contrary, private railcars differ from railroad-owned equipment primarily in the degree of control *the railcar owners* have over the handling of their equipment. This enhanced control is in fact one of the key features giving shippers incentives to invest in their own dedicated fleet of cars. Among the ways that shippers have greater control over the movement of privately-owned railcars include the following:

- The owners (or lessees) of private railcars are responsible for telling the railroads where to send their cars when they are made empty at destination. This very often means that shippers give directions to return their cars empty to the previous origin so they can be loaded with another shipment. By contrast, the disposition of empty railroad-supplied equipment is controlled by the destination railroad, taking into consideration broader network needs.
- The owners (or lessees) of private railcars are able to instruct railroads to move their equipment to storage (including storage-in-transit for loaded railcars) or to repair facilities wherever on the rail network they have made arrangements for those services.<sup>4</sup>

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<sup>4</sup>

As the Board has previously observed:

“[P]rivate car owners have control over their equipment and can demand that it be returned immediately after it is unloaded. This control gives shippers who own or lease their own cars a number of transportation and marketing advantages. They can direct that their cars be used for temporary or long-term storage. The shippers can use these cars to store their product near their customers, and consignees can hold

- The owners (or lessees) of private railcars often are high-volume shippers or receivers, whose control over loading (*e.g.*, at coal mines or grain elevators) or at destination (*e.g.*, at coal-fired utilities or grain export terminals) can involve staging of equipment as an inherent part of the overall transportation.

All of these features, and undoubtedly many more, may lead to somewhat different “performance” for private railcars relative to railroad-owned equipment.<sup>5</sup> But none of these differences reflect any lack of incentives for railroads to handle such equipment inefficiently.

## **2. Pauses in the Movement of Railcars, Loaded or Unloaded, Are a Natural and Efficient Part of Planned Railroad Operations**

Because railroads have compelling incentives to make efficient use of all of the railcars on their networks, it would be a mistake to view observed operational patterns as “inefficient” without compelling evidence that – despite railroads’ incentives to the contrary – those patterns are in fact inconsistent with efficient network operations. Petitioners provide no support for the claim that perceived “pauses” in the movement of freight cars that their regulatory regime would penalize are inconsistent with efficient network operations, nor do they even attempt to demonstrate how the Board would make such a determination.

There are two key fallacies. The first is that a perceived pause – such as the lack of an updated CLM message some time after a previous one – may not mean that the railcar was

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cars at destination when they cannot unload them promptly without paying the demurrage that would accrue on rail-owned cars.”

*Shippers Committee, OT-5 v. The Ann Arbor R.R.*, 5 I.C.C.2d 856, 858-59 (1989) (“SCOT-5”), *aff’d sub nom, Shippers Committee, OT-5 v. I.C.C.*, 968 F.2d 75 (D.C. Cir. 1992).

<sup>5</sup> The ICC had previously considered it well established that “cars under carrier control have been shown to be more efficient than private cars.” Thus, “[i]f shippers rather than carriers have control over what cars are used and how they are moved within the rail system, the overall efficiency of the railroads could be hampered, ultimately resulting in reduced carrying capacity and higher freight rates for all shippers, not just those that own cars.” *SCOT-5*, 5 I.C.C.2d at 865.

standing still. The car might just not yet have passed the next reporting point, as we explain in response to the Board’s Question No. 9.

Second, even if there is a real “pause” of some duration in a car’s onward movement, that does not mean that forward progress has stopped, or that anything inefficient has taken place. There is no factual basis for assuming that pauses in the movement of railcars – whether railroad-owned or privately-owned – constitute unplanned, undesirable, or inefficient events. To the contrary, such pauses – of brief or longer duration – are a natural part of railroad network operations. Some comments of individual railroads speak to this issue in more detail, but some basic principles are straightforward.

Much like any network, the rail freight network inherently involves a host of separate operations that combine to facilitate the movement of a thing – here, a railcar – across a series of network nodes from origin to destination. These separate steps – ranging from delivering an empty car to a shipper for loading, picking up a loaded car at origin, moving the loaded car to a local serving yard, placing the car into a block for movement by a through train to an intermediate processing yard, classification of that car into another block for further movement towards its destination, and so on, all involve orchestrated connections between separate activities.

In this setting, a pause in the forward movement of a particular railcar – or more precisely, the failure to move a railcar past two sequential readers in less than 72 hours – might well be entirely compatible with the most efficient movement of that railcar across the network. For example, network operations may be designed optimally to collect railcars at a particular origin on a daily basis, but movements of a subset of those cars in a particular direction on the network could be optimized to occur only three times a week (*e.g.*, when sufficient density

supports a full block that bypasses intermediate terminals and thus expedites ultimate delivery). In a scenario such as this, it would be routine for cars to pause for a few days as part of the planned network operational design.<sup>6</sup> The alternative of immediately moving every car to an intermediate terminal closer to destination for re-processing could easily add more time to the overall origin-to-destination transit despite avoiding a the sort of “pause” that Petitioners view as unacceptable.

The concept of pauses to facilitate efficient network operations should be familiar to anyone who has traveled by airplane in recent years. The major airlines’ hub-and-spoke networks can be very efficient at providing transportation options between city pairs that lack the density to support direct nonstop service, but as any traveler knows traveling on connecting service (even on a single airline) requires downtime – sometimes a lot of downtime – at intermediate hub airports. And sometimes the length of time spent between airplanes is influenced by the airline’s need to use scarce assets – gates, landing slots, flight crews, and airplanes, among others – to support other vital network activities and thereby optimize the overall network for all users.

We address this issue further below in response to the Board’s Question Nos. 5(a)-(c) and 7.

### **3. Regulatory Strictures Aimed at Altering the Handling of Privately-Owned Railcars Will Create Inefficiencies**

Given that the proposed rules would penalize activity that occurs in today’s complex rail networks, it is certain that such regulations would create incentives for railroads to move private railcars in ways that diverge from sound network operation. It may be difficult to predict exactly

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<sup>6</sup> For example, a car picked up on a Monday could have to wait until Thursday for placement into a long-distance block that moves only three days per week.

how individual railroads would respond to the penalties/incentives that Petitioners seek, but if those rules would have *any practical effect at all* there can be no doubt that the effect will be to move operations away from the goal of optimization for the benefit of all users and all railcars.

It would be unreasonable to expect that railroads would ignore regulations like the ones Petitioners propose if they were put into effect. As a result, the rules would prompt railroads to take extra steps to ensure that private railcars do not “pause” for more than the 72-hours (or other period) prescribed in the new regime. Doing so would necessarily consume resources – locomotives, crews, etc. – that would otherwise have been deployed differently, imposing costs or depriving other parts of the network of those resources. Network operations that were re-optimized with the goal of minimizing “pauses” to private railcars could end up adding delays to other shipments, or even prolonging shipments in private railcars when viewed from the perspective of the overall origin-to-destination movement (and thereby lengthening cycle times when empty returns are factored in).

Any degradation in network efficiency, or any increase in the resources needed to maintain the current level of network efficiency, would further put at risk the Nation’s already-stressed supply chains.

We address this issue further below in response to the Board’s Question Nos. 5 and 6.

**B. The Proposed Regulations Would Embroil the Board in Operational Micromanagement for Which It Is Ill-Equipped and Lacks Authority**

Because operational complexity is a natural part of railroading, establishing a new regulatory regime to penalize certain categories of internal rail network operational events – such as pauses of a certain duration – would force the Board to do the impossible. It would either have to divine a set of bright-line principles that separate in advance – by reducing to clear regulatory language – those pauses that are deemed inefficient from those that are not, or it

would have to create an entirely new regime of adjudication under which private car owners could seek a trial to determine whether, under all the applicable factual circumstances, a particular railcar was operated as efficiently as possible.<sup>7</sup> Neither such approach is remotely feasible or remotely within the Board’s authority.

The Board is simply not equipped, and lacks the authority, to superintend rail network operations. Yet to attempt to assess where the lines should be drawn – whether up-front in regulatory language or post hoc in fact-bound adjudication –the Board would need to dive deeply into the conditions surrounding highly circumstance-specific operational planning, dispatching, and other day-to-day, on-the-ground operational decision-making. To even consider the issues these determinations would raise should serve to underscore that the proposed regulatory regime amounts to regulation of transportation service outside the Board’s expertise, and not a matter concerning the adequacy of railroad car supply.

We address this issue in detail in response to Question Nos. 5(a)-(c) and 7.

**C. The Proposed Regulations Likely Would Further Disrupt the Rail Network By Creating Artificial Incentives to Overinvest in Railcars**

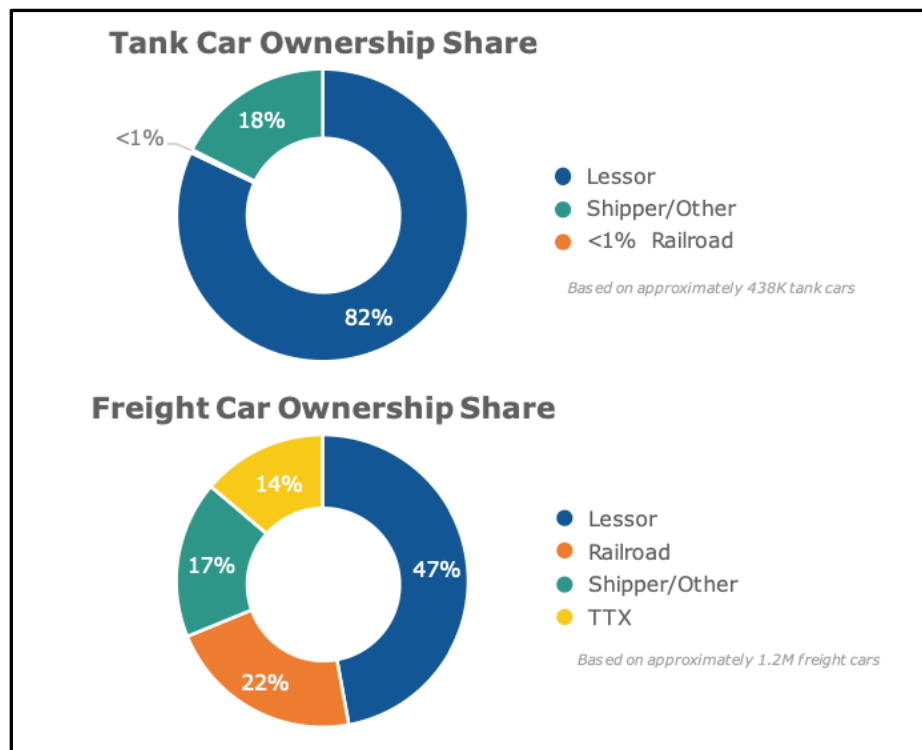
The proposed regulatory regime could have even more pernicious longer-term consequences for the rail network. By creating a new income stream for the owners of private railcars (which will be inevitable unless railroads contort their operations to fully avoid the impact of any new regulation), the scheme will artificially incentivize overinvestment in private railcars.

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<sup>7</sup> In the demurrage context, the Board has sensibly concluded that adjudication of issues relating to the “bunching” of railcars “should be addressed on a case-by-case basis in order to permit the Board to properly consider all relevant circumstances pertaining to an assessment of demurrage.” *Policy Statement on Demurrage and Accessorial Rules and Charges*, Ex Parte No. 757 (STB served Apr. 30, 2020) at 12. Adjudication of the merits of operational decisions that lead to “pauses” in the movement of individual railcars would even more clearly demand case-by-case adjudication.

Although Petitioners come before the Board under the guise of shippers who use private railcars, for the most part those cars are owned not by shippers but by railcar leasing companies, which are car builders and large financial institutions like Wells Fargo Rail, Sumitomo Mitsui Bank Corp. (“SMBC”), CIT Group, and others. A breakdown of railcar ownership presented by GATX in its 2022 “Company Overview” is illustrative (Figure 1 below), showing that “lessors” – not shippers – account for the vast majority of cars not owned by railroads (directly or through TTX):

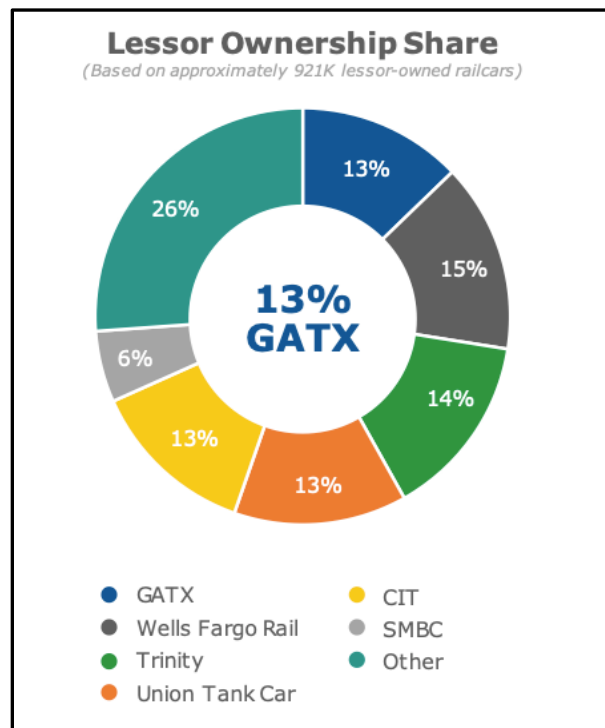
**FIGURE 1<sup>8</sup>**  
**BREAKDOWN OF TANK CAR AND OTHER FREIGHT CAR OWNERSHIP IN NORTH AMERICA**



<sup>8</sup> Source: GATX 2022 Company Overview at Slide 24, available at [https://s28.q4cdn.com/292281939/files/doc\\_presentation/2022/2022-Company-Overview\\_FINAL-4.8.22.pdf](https://s28.q4cdn.com/292281939/files/doc_presentation/2022/2022-Company-Overview_FINAL-4.8.22.pdf).

Figure 2 below shows GATX’s breakdown of the lessor category, showing that these cars are owned by car builders (like Trinity) and large financial institutions (like Wells Fargo, SMBC, and CIT).

**FIGURE 2<sup>9</sup>**  
**BREAKDOWN OF LESSOR OWNERSHIP OF NORTH AMERICAN FREIGHT CARS**



The interests of these “lessor” car owners are not fully aligned with the efficiency of the rail network in serving shipper needs. They benefit when demand for railcars is greater, and an increased demand for railcars can arise – perversely – when more cars are needed owing to rail network inefficiencies. As shippers are well aware, *fewer railcars are needed* when the rail network is fluid and cycle times are shorter.

The investment incentives of these lessors can be distinguished from those of railroads (and to a meaningful extent shippers). Railroads invest when there is a true transportation need –

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<sup>9</sup> Source: *Id.* at Slide 26.

a demand for carloadings not efficiently met by the available fleet of cars, taking into account the impact of added cars on the fluidity of the network as a whole. To a railroad (and to a shipper assembling a fleet of cars for its own use), more cars is not always better. A right-sized fleet operated efficiently is the goal because having railcars is subordinate to railroads' primary interest in generating returns from a freight transportation service that meets customer needs. To lessors, on the other hand, anything that increases the size of the active freight car fleet means a larger revenue stream for them, which may not align with efficient fleet sizing or efficient utilization of cars on the rail network.

The new income stream created by the proposed “no-pause” penalty regime would exacerbate the potential for overinvestment by these financial investors. For such investors, the artificial incentive to acquire more railcars would be magnified by the perceived need *for more railcars* occasioned by the adverse impact of the new regime on network efficiency. The net result would be a boon to railcar lessors and manufacturers, but harm to shippers and the public as the overinvestment in railcars would lead to degraded network inefficiency, and a potentially more serious, longer-run disincentive for rational levels of investment in railcars by railroads and shippers alike.

The history of railcar supply imbalances teaches that artificial incentives to invest – as with the “incentive per diem” regime applicable to boxcars in the 1970s– can lead to operating inefficiencies and long-term disinvestment.<sup>10</sup> The Board’s 1990s deprescription of car hire was

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<sup>10</sup> The perverse incentives for overinvestment in boxcars in the 1970s – particularly by non-railroad investors – created by misguided regulatory policies were much noted in the ICC’s car hire decisions of the 1980s. See, e.g., *Boxcar Car Hire And Car Service*, 3 I.C.C.2d 1, 18 (1986) (Commissioner Andre, dissenting) (“What is actually happening here is that a small number of car leasing companies have recently found themselves with more boxcars than the railroad industry needs for transportation. The boxcars were financed by astute investors who were able to benefit handsomely from tax breaks, the high car rental rates in the 1970s, and the boxcar shortage prior to the Staggers Act. By leasing their cars to small railroads, the owners of the boxcars are able to utilize the mandatory car interchange of the

driven by a sound impulse to return these incentives to the marketplace where they belong to avoid precisely these kinds of overinvestments.<sup>11</sup>

To avoid harm to all users of the rail network, the Board should decline the invitation to create a set of artificial new incentives to inject railcars into a network that functions more smoothly, and more efficiently, with fewer cars moving faster rather than more cars moving slower. We address this issue further below in response to the Board's Question No. 5(d)

#### **D. The Proposed New Regulatory Regime Would Not Be Self Correcting**

The Board should recognize the high risk that any new regulatory regime, no matter how well intentioned or how well designed at the outset, would lead to incentives for inefficient behavior that will not be self-correcting. Once launched, the regime will not adjust organically to market conditions; it will be rigidly frozen in place, requiring burdensome and time-consuming future regulatory proceedings to adjust.

Structuring any proposed regulation in this arena will require choices about such matters as the number of "pause hours" that trigger a potential financial payment, the method used to determine whether a railcar has moved, the size of the payment, and what circumstances, if any, excuse a railroad from making the payment. Petitioners are in effect asking the Board to develop from scratch a complex compensation regime akin to the system of demurrage applicable to

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Interstate Commerce Act to force the larger carriers to accept these unneeded cars in interchange and to pay prescribed car hire rates.").

<sup>11</sup> As described in *LO Shippers Action Committee v. Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1, 11 (1987) ("LOSAC"), *aff'd sub nom. LO Shippers Action Committee v. I.C.C.*, 857 F.2d 802 (D.C. Cir. 1988), the reform of the car hire regime and other policy relating to railcar supply was driven by Congress's stated intention that "marketplace decisions govern the railroad industry and its relationship with shippers." This initiative led to the ICC's deprescription of car hire in 1992. *See Joint Petition for Rulemaking on Railroad Car Hire Compensation*, Ex Parte No. 334 (Sub-No. 8), 9 I.C.C.2d 80 (1992); *Joint Petition for Rulemaking on Railroad Car Hire Compensation*, Ex Parte No. 334 (Sub-No. 8), 9 I.C.C.2d 1090 (1993). Deprescription removed all "cars bought in the future" from the regime of prescribed car hire rates, and thus subjected "future equipment acquisition decisions" to "market rates." 9 I.C.C.2d at 1096.

railroad-owned freight cars that has evolved over more than a century. They are in fact quite up front about this, as they liken the proposed regulations to “reciprocal” demurrage.<sup>12</sup>

Wholly apart from all of the other problems with this demurrage analogy, which we discuss in greater depth in the next section, the demurrage regime has the crucial advantage, and key difference, of being a market-based regime. Individual railroads establish their own demurrage tariffs, making choices about such matters as the amount of free time, the level of charges per day of detention, and the like. These choices are dynamic and made by railroads (and continually revisited and adjusted by them) against a market backdrop,<sup>13</sup> considering such questions as what terms successfully drive efficient handling of railcars by shippers, what terms are out of line with competitive conditions and inadvertently drive traffic away, and many others. And those choices vary by railroad, by geography, by car type, and in many other dimensions. If demurrage terms are not working as intended, they can be adjusted with a simple tariff change. The Board’s regulatory oversight of the reasonableness of the terms established by railroads provides a backstop,<sup>14</sup> but does not prescribe a rigid set of unchangeable tariff provisions.

By contrast, any Board regulations that attempted to create a “reciprocal” demurrage-like regime for private cars would involve an inherently prescriptive, one-size-fits-all approach that would be rigid rather than responsive to evolving market and operational needs. There would be no market check against any new Board regulations driving inefficient outcomes. The only

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<sup>12</sup> NAFCA Petition for Rulemaking (filed July 26, 2021) at 8-10; *see also*, Joint Reply of ACC, TFI and NITL (filed Aug 30, 2021) at 1.

<sup>13</sup> “[T]he railroads are tasked in the first instance with the role of establishing terms related to demurrage. ... [T]he Board has the regulatory authority to ensure that demurrage practices are reasonable.” *Demurrage Liability*, Ex Parte No. 707 (STB served Apr. 11, 2014) at 7.

<sup>14</sup> *Id.*; *See generally Policy Statement on Demurrage and Accessorial Rules and Charges*, Ex Parte No. 757 (STB served Apr. 30, 2020) (discussing principles governing the Board’s oversight of demurrage).

recourse would be yet another round of regulatory proceedings before the Board, in which the interests of some – perhaps many – private car owners would not be aligned with fine tuning the regulations to avoid rail network inefficiencies. When the law of unintended consequences kicks in and the inefficiencies outlined above come to pass, the industry would end up stuck with the new regime with no way to correct the damage inflicted on the network absent intense engagement by the Board to redesign – or jettison – a misguided set of regulatory strictures.

### **III. NO COMPELLING JUSTIFICATION FOR THE PROPOSED RULES WOULD OVERCOME THE POTENTIAL HARM TO NETWORK EFFICIENCY**

There is no compelling need for the proposed new regulatory scheme that could overcome its many significant downsides. As demonstrated above, there is no “problem” with private railcar utilization that warrants this regulation – pauses are a normal part of railroad operation for all railcars. Nor is there any other interest that would be served by compelling railroads to pay financial penalties to private car owners.

Petitioners allude to two potential justifications, neither of which has merit.

#### **A. Private Car Owners (qua Shippers) Benefit from Their Provision of Private Railcars for Railroad Use**

Petitioners imply that railroads are free riders on their substantial investment in privately-owned railcars. This impression is simply false. Shippers receive many benefits from their choices to provide private railcars for use by railroads in handling their shipments. Some of those benefits flow from their economic relationships with the railroads using their cars. Those relationships reflect railroads’ avoidance of the costs associated with providing railroad-controlled cars, which can be reflected in the level of the transportation rate applicable to movements in private cars or allowances paid specifically for private car use.<sup>15</sup> Indeed,

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<sup>15</sup> *E.g., LOSAC*, 1 I.C.C.2d at 17-18.

Petitioners here along with other tank car owners have for years been embroiled in extraordinarily complex litigation before the Board over the compensation they claim is owed them for certain kinds of movements of that type of rolling stock.<sup>16</sup>

In addition, private car owners receive many other forms of value that motivate them to invest in private cars rather than relying on railroads to supply that equipment in discharge of their common carrier obligations. As the ICC explained in *SCOT-5*:

“Large shippers have always bought private freight cars to protect themselves from recurring shortages. ... Shippers apparently have been more willing to invest in covered hopper cars necessary to meet peak demands because of the high grain prices available during times of peak grain demand, and because of other benefits they obtain from car ownership.

“The Commission has long recognized that there are important advantages to shippers in private car ownership in addition to protection against car shortages. ... Private cars do not ordinarily become part of the national car fleet, and individual carriers cannot normally control their movement. Rather, private car owners have control over their equipment and can demand that it be returned immediately after it is unloaded.

“This control gives shippers who own or lease their own cars a number of transportation and marketing advantages. They can direct that their cars be used for temporary or long-term storage. The shippers can use these cars to store their product near their customers, and consignees can hold cars at destination when they cannot unload them promptly without paying the demurrage that would accrue on rail-owned cars.”

5 I.C.C.2d at 858-59.

There is no justification for erecting an entirely new regulatory scheme to supplement the economic benefits private railcar owners already obtain from their car ownership.

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<sup>16</sup> See *North America Freight Car Ass’n, et al. v. Union Pacific R.R.*, Docket No. NOR 42144 (STB served Mar. 22, 2021).

## **B. The Analogy to “Demurrage” Is Inapt**

Reduced to its core, the position of Petitioners boils down to a bald plea for reciprocity: if railroads are allowed to impose demurrage charges on us, Petitioners claim, we should be able to impose “delay charges” on them. This argument for the creation of an entirely new regulatory regime is meritless and ultimately content-free. The posited analogy to demurrage is inaccurate on multiple levels,

First, demurrage has a long history in the railroad industry, arising from the authority – and statutory obligation – railroads have to establish reasonable demurrage tariffs. Under 49 U.S.C. §10746, rail carriers “providing transportation subject to the jurisdiction of the Board under this part *shall compute demurrage charges*, and establish rules related to those charges” (emphasis added). Shippers have no comparable – or “reciprocal” – authority. To be sure, shippers are absolutely free to negotiate with railroads over the terms associated with the use of shipper-owned rail cars, and such negotiations could include “delay charges” and other details relating to how the shipper’s traffic or railcars will be moved, but the statutory framework gives shippers no entitlement to “reciprocal” demurrage.

Second, the system of demurrage generally applies only to railroad-owned railcars. Privately-owned cars are covered only to the extent such cars are “held on railroad property.”<sup>17</sup> Shippers do not pay railroads anything when they hold onto their own railcars for long periods of time at origin or destination or store them (loaded or empty) at an intermediate point, unless that storage occurs on railroad-owned trackage.

The regime that Petitioners propose here is not remotely the “reciprocal” of demurrage applicable to shipper-owned cars. Charges for private cars held on railroad-owned property are

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<sup>17</sup> *Demurrage Liability*, Ex Parte No. 707 (STB served Apr. 11, 2014) at 7.

reasonable because they “compensate the railroad for use of its assets (*i.e.*, the space on its track or at its yards), and they encourage more efficient use of freight cars on its system.”<sup>18</sup> If there were any reciprocal counterpart to this situation, it would entail charges assessed against railroads *for railroad cars held on shipper-owned property*. But that is not what Petitioners seek, likely because they know that railroads have absolutely no interest in having their cars sitting idle at shipper facilities. To the contrary, railroads themselves impose demurrage precisely to avoid this result.

Third, the true thrust of Petitioners’ analogy to “demurrage” appears to be that railroads lack incentives to handle private railcars efficiently and such an incentive must be forced upon them. But that premise is simply false. Railroads do have incentives to operate private railcars efficiently, for the reasons discussed in Section II.A. above.<sup>19</sup> Demurrage, by contrast, provides incentives for the prompt loading and unloading of railroad-owned cars that in many cases would *not otherwise exist at all* when cars are in the hands of shippers. Without demurrage, shippers could benefit by using railroad freight cars as free warehouse space or holding onto them indefinitely until the need for a shipment arises. Were railroads to treat private cars the same way, they would receive no similar benefits (since railroads cannot use private cars except as directed by their owner/lessor), but those railroads would suffer high costs in terms of the consumption of network resources.

Finally, as noted above, unlike any rule that the Board might adopt governing “reciprocal demurrage,” railroad-imposed demurrage incentives are subject to market discipline against

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<sup>18</sup> *Id.* (quoting *NAFCA v. BNSF Ry.*, Docket No. NOR 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 9, *aff’d*, 529 F.3d 1166 (D.C. Cir. 2008)).

<sup>19</sup> For example, when in the hands of railroads (*i.e.*, not stored on shipper owned or leased track or at industries), those cars consume network resources (track capacity, locomotive and crew resources, etc.), giving railroads compelling incentives to move them.

overreach. Demurrage rules that set too high a daily charge, provide too little free time, or otherwise lead to inefficiencies would tend to drive traffic to other railroads or other modes. Any Board-imposed rules regarding the utilization of private railcars would not be subject to that kind of discipline, as they would be uniform, unbending, and only changeable through costly and time-consuming further regulatory proceedings.

We address these issues further below in response to the Board's Question No. 8.

## **AAR'S RESPONSES TO THE BOARD'S QUESTIONS**

### **QUESTION 1**

- “1. Petitioners assert that the Board’s current regulations and policies do not create sufficient incentives for Class I carriers to use private freight cars efficiently. (Pet. 2.) The Board invites commenters to provide detailed, concrete examples of carriers’ inefficient use of private freight cars (i.e., the carriers and car owners involved, relevant dates and times, etc.). They may also wish to provide context for their comments by including information about the quantity of private freight cars owned or leased, volume of traffic shipped, storage capacity, and seasonality of shipments (if any). If requested, a protective order may be issued that would allow sensitive information to be filed under seal. In particular, the Board asks commenters to address the following:
- “a. How frequently do carriers hold private freight cars for more than 72 consecutive hours? The Board requests that commenters provide supporting data on the frequency of this occurrence, where available.
  - “b. To the extent known by the commenter, why do carriers hold private freight cars for more than 72 consecutive hours?
  - “c. To the extent known by the commenter, at which location(s) on the rail system are private freight cars held for more than 72 consecutive hours?
  - “d. How are rail users’ operations, facilities, production, and/or finances affected?
  - “e. Has the frequency and severity of the issue changed with the implementation of operating changes by Class I railroads?”

### **AAR RESPONSE**

AAR makes several general observations.

First, there already are strong incentives for railroads to handle private cars efficiently, as discussed in Section II.A.1. above. Railroads, like shippers, have compelling incentives not to forgo additional sales (freight revenues in the case of railroads) as a result of railcars (whether privately- or railroad-owned) being unavailable or poorly utilized. In addition, except when private cars are moving in dedicated unit train service – which can facilitate more rapid cycles and efficient asset utilization – they move in the same trains (both local and through) along with railroad-owned equipment. Singling private equipment out for special – inferior – treatment would consume resources and create costs for no reason.

Second, the fact that shippers might present examples of railcars being held in one location for periods of time would not necessarily suggest that those cars were handled inappropriately giving consideration to all of the factors that bear on rail network operations, especially when railroad-owned cars are handled in the same manner.

Third, any suggestion that privately-owned railcars are handled less efficiently than railroad-owned cars would require very close scrutiny. As the ICC found in the *SCOT-5* case, privately-owned railcars operated are less efficient on average (in terms of loadings per year) than railroad-owned cars because of the control that the car owners (or lessees) exercise over the disposition of their cars – holding them for loadings at specific facilities, directing them to return empty via reverse-route, etc. See page 11, footnote 5 above. That same control is a big part of why shippers reap benefits from car ownership, as the Board has frequently observed. It would be inappropriate for any regulatory regime to penalize railroads for any such differences between usage patterns of private and railroad-owned equipment.

## **QUESTION 2**

- “2. UP asserts that Petitioners’ proposed regulations are unnecessary because private railcar providers have other avenues to pursue relief, such as through specific service commitments in contracts. (UP Reply 10-11, Aug. 30, 2021.) Do such contract service commitments include similar terms to the regulations proposed by Petitioners?”

### **AAR RESPONSE**

AAR cannot comment on the terms of individual contracts between railroads and shippers.

## **QUESTION 3**

- “3. How, if at all, would Petitioners’ proposal regulate “car service” within the meaning of 49 U.S.C. § 11122(a) by “encourag[ing] the purchase, acquisition, and efficient use of freight cars”?
- “a. The Board invites commenters to address AAR’s argument that Petitioners’ proposal would regulate the “transportation services” that

railroads provide, rather than “car service” within the meaning of § 11122(a). (See AAR Reply 3-6, Aug. 30, 2021.)

- “b. To what extent is a finding of inadequate car supply a prerequisite for the Board to adopt Petitioners’ proposed regulations?
- “c. Do rail users currently lack access to an adequate supply of freight cars or anticipate a future freight car shortage?
  - “i. If so, how would the proposed regulations help solve or mitigate the issue? The Board requests that commenters provide supporting data on any claim of a current or future inadequacy of car supply, where available.
- “d. Petitioners contend that their proposed regulations would “result in the national railcar fleet being of a more rational size to utilize existing rail system capacity and meet demand.” (Pet. 2.)
  - “i. How would the proposed regulations lead to a more rationally sized freight car fleet?
  - “ii. How, if at all, would a more rationally sized freight car fleet ensure an adequate supply of freight cars?

#### **AAR RESPONSE**

As discussed in Section I above, Petitioners’ proposal would not regulate “car service” within the meaning of the statute or Board and court precedent.

AAR does not take the position that the Board’s authority to regulate car service is limited to situations where the Board has made a “finding of inadequate car supply.” However, the Board’s car service authority is limited to matters that bear on *the supply of railcars*, rather than the transportation services that are provided using those cars. That is the gravamen of the *Peoria & Pekin* and *ATSF* cases cited in AAR’s 2021 Reply. See pages 4-5 above.

To the extent the Board concludes that its car service authority is properly invoked here, the lack of any showing of need for such regulations to stimulate an adequate supply of railcars – and the potential for those regulations to create incentives for the overinvestment in railcars – would be reason enough to decline to pursue the proposed new regulatory scheme (even if the Board disregarded the railroad operating inefficiencies and extensive administrative burdens that such a regime would generate).

AAR is eager to see and respond to any evidence Petitioners or others may put forward suggesting that there is a current (or likely future) freight car shortage, or showing how the proposed regulations would contribute to a “more rational” fleet size. AAR believes that there is no shortage, and that there already exist ample incentives for railroads, shippers, and lessors to invest in a “rational” number of railcars. Railroads exist to earn freight revenue, and they cannot not do so if railcars are unavailable for loading. Railroads – both directly and through TTX – have invested more than \$12 billion in new freight cars over the past decade. Every new car that is added to the fleet tends to have greater loading capacity (in cubic or tonnage terms) than the cars that are retired from the fleet, thereby adding net new railcar capacity. In addition, railroads are constantly striving to improve operational productivity of their railcars, enabling the same number of cars to move more shipments (and in the process improving network fluidity).

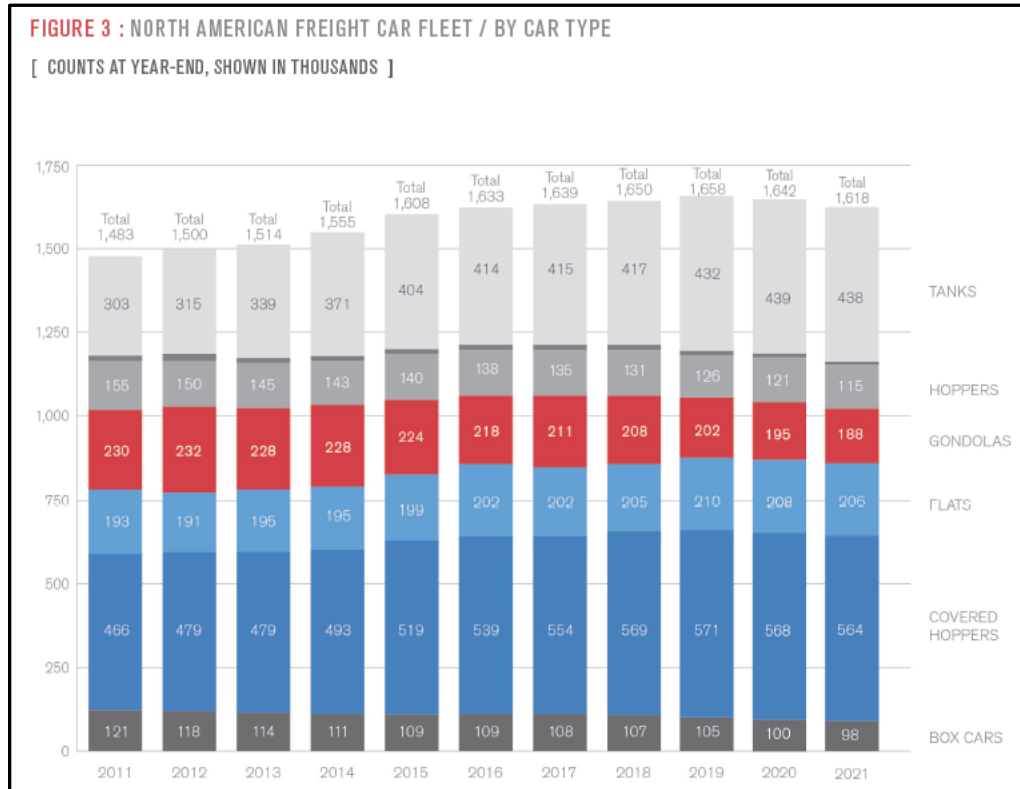
Likewise, there are strong incentives for non-railroads to invest in railcars. As we demonstrate in Section III.A., and as the Board has consistently recognized, shippers are motivated to make such investments for many reasons, not least the control that car ownership gives them over the availability of cars for loading during periods of peak demand.<sup>20</sup> As Petitioners themselves tout, these and other incentives have led non-railroads to invest billions in new railcars over the past decade. *See* NAFC Petition at 6-7.

These ongoing investments have led to consistent growth in the North American railcar fleet over time, even as the productivity of the cars in the fleet has also grown, as shown in Figure 3 below.

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<sup>20</sup> The ICC has acknowledged that it would not be rational, and is not required, for railroads to invest in railcars that would only be needed during peak loading periods, just as churches tend not to be built to accommodate all of the parishioners who choose to attend Easter services. *See LOSAC*, 4 I.C.C.2d at 9.

**FIGURE 3**  
**NORTH AMERICAN RAILCAR FLEET**



In this context it would be particularly inappropriate to establish a new regulatory scheme designed to create artificial incentives to invest in railcars. As explained in Section II.C. above, most private railcars are not actually owned by shippers but by financial institutions (lessors) that would be motivated to add cars to chase any new revenue stream regardless of the impact of those investments in network efficiency and fluidity. Establishing such a regime would be counterproductive even if the Board’s only concern was the adequacy of investment in railroad car supply. The proposed regime, therefore, would not lead to a rationally-sized fleet, but could actually incentivize an irrational, oversized fleet of cars.

#### QUESTION 4

- “4. How would Petitioners’ proposed regulations affect rail users that do not use private freight cars? For example, CSXT, UP, and AAR argue that Petitioners’ proposed regulations would create incentives for carriers to prioritize private freight cars to the disadvantage of rail users that use railroad-owned freight cars.

(CSXT Reply 2; UP Reply 8 n.26, Aug. 30, 2021; AAR Reply 16, Aug. 30, 2021.)”

#### **AAR RESPONSE**

The proposed regulatory scheme would create strong incentives for railroads to afford privately-owned railcars special treatment so as to avoid the financial penalties that would uniquely apply to whatever form of “pause” the regulation proscribed. . Given that railroads do not possess unlimited resources – again, in terms of track capacity, locomotives, crews, or management attention – this would inevitably mean some shift in resources away from the handling of railroad owned cars and the shipments they carry. That reallocation would tend to favor larger shippers of certain commodities typically moved in private cars over the smaller shippers that more often depend on railroad-supplied freight cars. This could lead to a de facto premium service for larger shippers who utilize privately-owned railcars, at the expense of those smaller shippers that do not, in the form of less-efficient service.

#### **QUESTION 5**

- “5. Petitioners propose that charges would be assessed unless “the rail carrier demonstrates that it was not a cause of the [72 hours] being exceeded despite exercising due diligence.” (Pet. 24.)
- “a. In what kinds of circumstances should carriers be able to show that they were not “a cause” of the 72 hours being exceeded?
  - “b. What kind of actions should constitute “due diligence”?
  - “c. How would this standard account for the possibility raised by AAR that carriers may hold private freight cars longer than 72 consecutive hours to improve the overall efficiency of the rail network (i.e., to prevent congestion at terminals during times of peak demand or to recover from network disruptions caused by weather events)? (See AAR Reply 16, Aug. 30, 2021.)
  - “d. How would this standard account for rail users’ own car supply decisions? For example, UP argues that Petitioners’ proposed regulations would “incentivize shippers to acquire additional freight cars and deploy them during service disruptions, despite their potential to contribute to congestion problems.” (UP Reply 13-14, Aug. 30, 2021.)”

## AAR RESPONSE

These questions highlight a key defect in the proposed new regulatory regime. Because efficient network operations necessarily entail pauses in the movement of freight cars for various reasons, any rule that automatically applied to each and every such pause meeting some objective standard would penalize rail operations that were efficient from the perspective of the network as a whole, and thus broadly beneficial for all of its users. The comments of individual railroads discuss scenarios where operational pauses in the onward movement of private railcars is efficient, both from the standpoint of those shippers and the overall network. *See* Section I.A.2 above.

The Board's questions acknowledge that the proposed regime would have to provide a process for separating situations where a pause was justified from those situations – if any – where a pause represented some form of malfeasance by the railroad in possession of the private railcar. AAR believes that the burden of proving that a pause was unjustified would necessarily fall upon the claimant – here, the private car owner – but no matter where that burden was placed, the proposed rules would require the creation of a complex adjudicative process for examining the detailed circumstances surrounding a pause in railcar movement. This would inevitably embroil the Board in the micromanagement of rail network operations, which it has no authority or expertise to undertake.

## QUESTION 6

- “6. How would rail network efficiency be affected by the proposal?
  - “a. The Board requests that commenters provide data, where available, to support claims that the rail network would be more (or less) efficient as a result of Petitioners' proposed rule.
  - “b. Under Petitioners' approach, to what extent would carriers have incentives to make potentially inefficient movements solely to avoid charges? (See CSXT Reply 6; AAR Reply 16, Aug. 30, 2021; UP Reply 9, Aug. 30, 2021.)”

## AAR RESPONSE

For the reasons addressed above, there is no doubt that a new regime of penalties triggered by pauses in the movement of privately-owned railcars would impose costs on operational decisions made to optimize network efficiency and cause an overall degradation in network operations. The only way that network efficiency would be unaffected would presuppose that the new regulatory regime was completely ineffective in changing railroad behavior, in which case adopting such a regime would be futile (or merely serve as a tax on railroads in favor of shippers, which the Board has no authority to impose).

AAR defers to individual railroads regarding the specific ways in which the proposed regime would make their operations less efficient or incentivize inefficient movements of privately-owned railcars.

## QUESTION 7

- “7. Under Petitioners’ proposed regulations, private railcar providers would be able to assess charges if the ‘CLM location city of CLM Sighting Code’ of a private freight car has not changed for more than 72 consecutive hours. (Pet. 18.)
  - “a. Why is 72 hours an appropriate timeframe and not, for example, 48 hours or 96 hours?
  - “b. Why should charges be based on when cars are idle for more than 72 consecutive hours, as opposed to, for example, overall transit idle times for the entire trip or when the placement of private freight cars exceeds projected transit times?
  - “c. Are CLM Event Sighting Codes a practical way to measure idle time?
    - “i. If not, what metric, if any, would be more useful as the basis for assessing delay charges?
  - “d. At what point should the timeframe begin (i.e., as soon as a rail user releases a private freight car, when the carrier picks up the private freight car, or some other point)?
    - “i. And if the 72-hour timeframe begins when private freight cars are released, how would this timeframe apply to rail users that receive service only once or twice per week?

## **AAR RESPONSE**

A longer timeframe likely would do less violence to the efficiency of the rail network and the market incentives to invest in railcars, but from the standpoint of the legality of the proposed regulations, the choice of threshold is immaterial. Any regulation in this area would exceed the Board's authority.

Even if the Board had some authority to regulate in this arena, the choice of a 72-hour threshold would be entirely arbitrary, as would the choice of a 48-hour or 96-hour threshold. As the Board concluded in the demurrage context, whether any shipper's assertion that demurrage charges should be excused because of "bunching" requires a case-by-case inquiry. The same would be true here. Yet the kind of detailed operational inquiry that would be required to separate appropriate delays (no matter the duration) from inappropriate ones would embroil the Board in detailed, case-by-case administration of railroad operating practices that it is not equipped to handle and lacks the resources to carry out.

Regarding CLM Event Sighting Codes, there are considerable shortcomings with reliance on car location data derived from this source. CLM "sightings" depend on railcars being spotted by wayside equipment capable of reading the "AEI" (or "automatic equipment identification") tag on the sides of railcars. The installation of AEI readers is at the discretion of individual railroads, and there is no standardized distance between them, or any rule that they will be placed on either side of locations where railcars may be paused en route to destination, much less at the destination itself. As a result, railcars can move a great deal without a subsequent CLM sighting confirming that movement, such as between two yards in the same terminal, from a customer facility to a serving yard, or any number of other scenarios. The fact that some (72-hour or other) period of time has elapsed from one sighting to the next is not a reliable basis for concluding that the railcar actually stood still for that length of time. AAR is not aware of any

consistently-available source of data that would reliably indicate whether railcars were parked somewhere on the rail network for reasons unrelated to efficient network operations.

A rule that began the “72-hour clock” (or any other clock) upon the “release” of a railcar by a shipper would create significant opportunity for gamesmanship, for both large shippers and those that receive service less frequently than daily. Shippers could manipulate the time of “release” or the number of cars released at one time to maximize the potential to trigger delay payments given the cadence of railroad service to that shipper and the inherent variability in that service. Railroads are best able to serve customers well when there is a cooperative and collaborative relationship.

#### **QUESTION 8**

- “8. Petitioners’ proposal contemplates that the amount of the “private railcar delay charge” would correspond to the carrier’s applicable demurrage or storage charge unless the carrier could demonstrate that such a charge would be “unreasonable and inappropriate” in a particular situation. (Pet. 24.)
  - “a. Is it appropriate for the Board to equate the amount of the “private railcar delay charge” to a demurrage or storage charge in most cases?
  - “b. To what extent are there practical alternatives to equating Petitioners’ proposed “private railcar delay charge” to a demurrage or storage charge and what are the merits of those alternatives?”

#### **AAR RESPONSE**

There is no legitimate basis for equating the amount of any “private railcar delay charge” to demurrage or storage fees.

As to storage fees, those fees are set in the marketplace and compensate the provider of track space for the value of that space. There is no relationship whatsoever to the posited cost to private car owners of alleged railcar delay, which do not consume any track space owned by shipper car owners.

As to demurrage fees, as discussed in Section III.B.2. above the analogy to demurrage is fundamentally flawed. Focusing here on the level of demurrage fees, tying “delay charges” to demurrage fees would be inappropriate. As the Board has emphasized in its recent decisions addressing demurrage, the level of demurrage charges is driven in large part by the need to provide sufficient incentives to encourage efficient railcar utilization. In the context of private railcars, as discussed above (in Section II.A.), railroads already have ample incentives to handle private railcars efficiently on their networks. As a result, were delay charges set in parity with demurrage charges, those charges would be far too high, overcompensating private railcar owners for delays that railroads already have incentives to avoid.

AAR does not believe that there is any practical regulatory approach to prescribing the level of delay charges. No matter what level of delay charge were chosen, it would (a) skew railroads’ existing incentives to handle all railcars efficiently, as discussed at length above, and (b) arbitrarily provide railcar owners with a windfall that overincentivizes investment in private railcars.

#### **QUESTION 9**

- “9. Commenters should address the following questions about how the regulations proposed by Petitioners would be implemented:
  - “a. Which party would be responsible for tracking the CLM Event Sighting Codes for private freight cars and invoicing in accordance with the proposed regulations?
  - “b. Joint Shippers suggest that the Board could require carriers to credit charges against their demurrage invoices. (Joint Shippers Reply 5.) How would compensation be handled under this proposal for rail users that do not incur demurrage charges or incur fewer charges than would be owed pursuant to the proposed regulations?”

## **AAR RESPONSE**

To the extent the Board established any regime of so-called “reciprocal demurrage,” the administrative burdens associated with that regime should be borne by shippers as the intended beneficiaries of the regime.

Regarding 9(b), there is no justification for creating a linkage between the proposed new regulatory regime applicable to private cars and the existing regime of demurrage. The two sets of potential monetary entitlements would not arise from the same set of transactions: one would involve the shipper’s handling of railroad-owned cars, while the other would relate to entirely separate transactions, raising entirely separate issues, involving the movement of privately-owned cars on the railroad. Allowing shippers to offset their demurrage liability to the railroad based on their asserted entitlement to payments from the railroad would encourage opportunistic, and asymmetrical, self-help. Shippers could resist payment of legitimate demurrage charges by merely asserting an entitlement to “delay penalties” and thereby imposing on railroads the administrative costs of seeking to collect the demurrage, while railroads would have no corresponding right to offset alleged delay penalties.

## **QUESTION 10**

“10. Petitioners suggest that the proposed regulations should apply only to Class I carriers. (Pet. 1-2.) How, if at all, would Class II and Class III carriers be impacted by the proposed regulations, if limited to Class I carriers?”

## **AAR RESPONSE**

There is no justification for limiting the proposed regulations to Class I carriers. To the extent that the Board is persuaded that “pauses” in the movement of private railcars somehow represent a concern warranting the creation of an entirely new regulatory regime, exempting those that occur on Class II and Class II railroads would serve no purpose and would undermine whatever objectives the Board was seeking to accomplish. Imposing the proposed “pause-

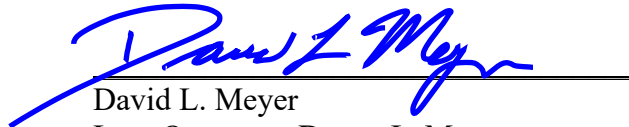
penalty” regime solely on Class I railroads would reveal that the Board’s motivation was to impose a tax on large railroads in favor of shippers rather than to serve any broader public interest in adequate car supply or efficient rail network operations.

### CONCLUSION

The Board should recognize that Petitioners’ proposed new regulatory regime would take the Board down a regulatory path that it does not have authority to pursue, and if enacted would likely harm rail network efficiency in service of the enrichment of a subset of industry participants. The Board should resist calls to regulate in this way and terminate this proceeding.

Dated: June 30, 2022

Respectfully submitted,



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