

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. EP 768

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

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COMMENTS OF  
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES

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The Institute of Scrap Recycling Industries (“ISRI”) hereby submits its Opening Comments in response to the April 1, 2022 notice of the Surface Transportation Board (“STB” or the “Board”) seeking public comments on a July 26, 2021 petition for rulemaking proposing that the Board adopt regulations allowing private railcar providers to assess a “delay charge” if railroads delay private freight cars beyond a specified period of time (“Petition”) filed by the North America Freight Car Association, The National Grain and Feed Association, The Chlorine Institute, and The National Oilseed Processors Association (collectively, “Petitioners”).<sup>1</sup>

ISRI strongly supports adoption of rules that would hold railroads accountable when they delay the movement of private cars beyond a reasonable period, just as demurrage is used to incentivize the efficient use of railroad supplied cars by rail customers. Developing rules for this purpose would properly recognize the need for reciprocal incentives that would promote a fluid rail network and provide for reciprocal benefits to private railcar owners and lessors that

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<sup>1</sup> Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads, STB Docket No. EP 768 (April 1, 2022) (“Notice”).

demurrage provides to railroads. This is especially appropriate and necessary given that the majority of cars moving across the national network are private cars.<sup>2</sup>

## **I. STATEMENT OF INTEREST**

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated \$117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating \$13.2 billion in federal, state, and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over \$16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

Rail transportation is a critical mode for shipments of the U.S. scrap recycling industry, especially for ferrous and non-ferrous scrap metal shipments. Many of ISRI members are captive customers who are served by only one Class I rail carrier. Due to the unique nature of shipping bulk scrap metal, there are many situations where rail is the only mode shipping this material. ISRI's rail shippers are subject to the railroads' demurrage and accessorial tariffs and

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<sup>2</sup> Petition at 5 (“Petitioners estimate that there are around 1.6 million railcars in service in the Nation’s railcar fleet and approximately 1.2 million of them are Private Railcars.”).

have actively participated in the Board's proceedings to express their concerns over the reasonableness of existing demurrage and accessorial rules and charges. ISRI members also collectively own or lease thousands of private cars that are supplied to the Class-I railroads to receive rail service. ISRI has also previously filed reply comments supporting the Petition in this proceeding.<sup>3</sup>

## **II. INEFFICIENT USE OF PRIVATE CARS BY CLASS I RAILROADS SUPPORTS THE BOARD'S ESTABLISHMENT OF RECIPROCAL INCENTIVES TO PROMOTE A FLUID RAIL NETWORK**

ISRI believes that there is a strong need to establish appropriate incentives for private railcar use by railroads. 49 U.S.C. §11122(a) requires the Board to “encourage the purchase, acquisition, and efficient use of freight cars.” Thus, developing rules that incentivize the efficient use of private railcar by railroads comports with the Board’s statutory goal, and is reasonable and necessary. Without such incentives, substantial costs and inefficiencies are unfairly borne by rail customers who have invested significant resources to acquire and maintain private cars. Establishing mutual incentives for both rail customers and the railroads to promote an efficient car supply and reduce delays and congestion across the network thereby promoting the National Transportation Policy “to encourage honest and efficient management of railroads.”<sup>4</sup> Also, as the Board recognized previously, “providing such reciprocity [will] promote more efficient car supply” given the predominant use of private railcars in the industry today.<sup>5</sup>

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<sup>3</sup> Reply of ISRI, STB Docket No. EP 768 (August 30, 2021).

<sup>4</sup> 49 U.S.C. § 10101(9).

<sup>5</sup> STB EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*, 85 Fed. Reg. 26866, 26872 (May 6, 2020) (“*Demurrage Policy Statement*”); *see also* Petition at 5 (“Petitioners estimate that there are around 1.6 million railcars in service in the Nation’s railcar fleet and approximately 1.2 million of them are Private Railcars.”).

The Board's current regulations fail to recognize or adequately protect the investments made by non-railroad entities in railcars. In stark contrast to the rail industry in 1980s, a significant majority of railcars in service today are owned by non-railroad entities.<sup>6</sup> For scrap metal shippers, this shift occurred due to railroads' failure to invest in and supply sufficient railcars needed to satisfy the demand for service in recent years. This was explained in shipper testimonies on the record of STB Docket No. EP 754. For example, Mr. Ben Abrams of Consolidated Scrap Resources, Inc. ("CSR"), an ISRI member, reported that, starting about 2012, railroads reduced the number of railcars available to scrap metal shippers to allocate their resources to "more profitable products."<sup>7</sup> Yet, while the current Board regulations recognize the need to protect railroad investments in assets, such as railcars, through demurrage charges to both compensate the railroad for use and incentivize the efficient utilization of their assets, they fail to create reciprocal incentives for the railroads' use of private railcars.

In fact, ISRI members frequently experience the inefficient use of private railcars by railroads, which cause delays for more than 72 consecutive hours, especially with respect to first mile-last mile service. One ISRI member reported that, as recently as June 21, one of the eastern Class I railroads had accumulated 32 empty private cars in the local hump yard near its scrap processing facility. After failing to deliver any cars for a longer period than is typical, the member began calling the railroad requesting service. Eventually the railroad spotted 12 cars which exceeded the scrap yard track capacity which can accommodate up to nine cars. The member loaded nine cars within 24 hours and left three cars to be loaded in the next 24-36 hours to fill customer orders. However, on the following morning the railroad moved the remaining

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<sup>6</sup> See Petition at 5.

<sup>7</sup> Testimony of Ben Abrams before the Surface Transportation Board, STB Docket No. EP 754 (May 8, 2019) at 2-3.

three cars back to its hump yard. ISRI's member notified the railroad immediately that more cars were needed to fill customer orders. Eight days later, after sending multiple communications to the railroad to re-deliver the empty cars, the railroad has still failed to deliver any cars to this member's scrap yard.

While the railroads are in the best position to address why they hold private cars for more than 72 consecutive hours, ISRI believes that, among other things, bunching, crew shortages, or lack of access to main lines are the primary reasons for these delays. As to the specific locations of these delays, ISRI members believe that it is difficult to single out certain locations, and that the delays occur throughout the network on multiple carriers, in many regions, and at different frequencies. Of course, ISRI members' operations, facilities, production, and/or finances are significantly impacted by these delays. For example, when railroads operations cause unreasonable delays in the use of private cars, ISRI members cannot get the railcar turns they need to satisfy their customers' orders, which causes lost sales and increases to their inventory carrying costs. Similarly, ISRI members are forced to lease more cars than would otherwise be needed when railroads fail to provide efficient and reliable service. This results in increased leasehold costs for ISRI members. Further, the implementation of Precision Scheduled Railroading ("PSR") by Class-I carriers resulted in, among other things, inadequate labor and increases in congestion at railyards, which exacerbated service problems and increased the frequency and severity of the inefficient use of private cars by railroads.

Further, contrary to railroad claims, ISRI members do not have any capability to pursue relief through contractual service commitments or other avenues. In fact, ISRI members generally do not have sufficient bargaining power to obtain contractual service commitments from the railroads. Railroads have adopted business models that shift their costs to their

customers, including the obligation to furnish railcars, and contracts fail to provide reasonable opportunities to incentivize the efficient use of private cars. Even if a shipper could obtain such a commitment, it would only apply to the largest shippers that may have multiple facilities and more competition and leverage, leaving the majority of shippers without a clear standard or ability to incentivize the efficient use of private cars through commercial means.

### **III. ISRI SUPPORTS ADOPTION OF THE PROPOSED DELAY CHARGE REGULATIONS WITH SUGGESTED MODIFICATIONS**

ISRI reiterates its previous comments that permitting a Private Railcar Delay Charge, as requested in the Petition, is reasonable and necessary to establish appropriate incentives and reciprocity that is warranted by the dramatic shift in the railcar ownership in today's market realities.

The Petition asks for a "Private Railcar Delay Charge" that would be assessed if the "allowable transit idle time" for a private railcar is exceeded.<sup>8</sup> In the Petition, the "allowable transit idle time" is identified as 72 consecutive hours of idle time at any point on a railroad's system while the loaded or empty private car is being transported between the time the private railcar is released for transportation to when it is either constructively or actually placed.<sup>9</sup>

In its Notice, the Board asks whether the 72 consecutive hour timeframe is appropriate.<sup>10</sup> ISRI believes that a time period between 36 and 48 hours would be more appropriate to provide an adequate efficiency incentive and is more closely aligned with tariff free time periods – i.e., 24-48 hours applied by the railroads before they assess demurrage/storage charges.<sup>11</sup>

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<sup>8</sup> Petition at 23-24.

<sup>9</sup> Id. at 24.

<sup>10</sup> Notice at 7.

<sup>11</sup> See e.g., Norfolk Southern Railway Company Freight Tariff NS 6004-D at Item 750 (free time for railroad-owned cars is 24 hours and for private cars is 0 hours).

<http://www.nscorp.com/content/dam/nscorp/ship/shipping-tools/shipping-news-and-alerts/NS-6004-D-Tariff-Revision-eff-11-01-2020.pdf>.

Nonetheless, instead of a “consecutive” hour standard for calculating the “allowable transit idle time,” ISRI would also support a rule that calculates the delays based on the total original trip plan and/or published transit times (but not adjusted trip plans after the car is already picked up). The purpose of establishing appropriate incentives can be achieved by creating a system which provides for an allotted timeline for each railcar movement. If the timeline is 7 days, for example, there would be consequences for a railroad’s failure to deliver a railcar within 48 hours after the expiry of the 7-day period. This system would provide more flexibility for the railroad to schedule its own deliveries – *e.g.*, a railcar may sit for 3 days at a given location for various reasons but the railroad may still be able to deliver the car within 4 days thereby satisfying the applicable delivery window. This system where every car had an allocated delivery schedule would also allow shippers furnishing railcars to better plan their schedules, car turn times, and fleet management. Ultimately, ISRI believes that establishing the “allowable transit idle time” definition based on allotted trip plans, instead of a consecutive hour standard, would provide for a less complicated system that is more administratively manageable for railroads and their customers.

Accordingly, CLM Event Sighting Codes would not be needed to track cars throughout the movement if there is an allotted trip plan for each movement and the delay charge is calculated when a railcar delivery occurs 48 or more hours after the scheduled delivery time. Instead, as noted, if for example the allotted trip plan between Atlanta and Birmingham is 5 days, and if the railroad exceeds the allotted time by 48 hours, the receiver would be given demurrage credits for every day thereafter the car is late, without the need to track the CLM Event Sighting Codes. ISRI also believes that the timeframe for measuring the published delivery window should begin when the car is first pulled for the trip plan movement.

The proposal also contemplates that the delay charge applied would be equal to the involved railroad's demurrage charges published in its tariff. ISRI agrees that this proposal is appropriate, but also believes that permitting railroads to provide demurrage (or storage) credits would be administratively easier. Further, setting the proposed credit charges at the same level as demurrage or storage charges is appropriate, since demurrage and storage charges reflect what railroads believe is an appropriate incentive to encourage efficient use of rail assets.

The Board also asked for comments as to who should be responsible for tracking the delays and providing credits in accordance with the proposed regulations. ISRI strongly believes that railroads should be responsible for tracking delays and providing credits. Railroads have direct access to railcar delay information and are best positioned to accurately track this information. Further, railroads already track storage charges that may apply to a movement involving a private car and, thus, placing railroads in charge of providing credits simplifies the credit reconciliation process. Similarly, requiring railroads to track delays and provide credits would allow the railroads to track trends and collect statistics that could help them address service challenges and network congestion that have resulted in delay charges or credits. Finally, there may be situations where the private railcar credits exceed the outstanding demurrage/storage charges in a given month. In that case, ISRI believes that the railroads should be required to make payments directly to private railcar providers for the excess credits at the end of such month.

#### **IV. CONCLUSION**

For the foregoing reasons, ISRI respectfully requests the Board to promulgate private railcar use regulations consistent with its comments and suggested modifications herein.

Respectfully submitted,

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*On Behalf of:*

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