

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Docket No. EP 768

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

304898

ENTERED
Office of Proceedings
June 30, 2022
Part of
Public Record

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Dated: June 30, 2022

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EXHIBIT 1: Verified Statement of Rodney Moore

INTRODUCTION

Norfolk Southern Railway Company (“NS”) respectfully submits these comments in response to the Board’s April 1, 2022, request for comments on the petition for rulemaking by the North American Freight Car Association, The National Grain and Feed Association, The Chlorine Institute, and The National Oilseed Processors Association (collectively, Petitioners).¹ The Board is now seeking public comment on numerous questions and issues related to the Petition.

There are few new regulatory concepts for an industry that has been regulated at the federal level for over 130 years. The proposal by a coalition of private railcar owner interest groups that would impose on a railroad a “private railcar delay charge” whenever the railroad exceeds an “allowable transit idle time” when transporting a private railcar is neither new nor innovative.² The concept is almost as old as the railroad industry itself. The concept of requiring railroads to pay “reverse” or “reciprocal” demurrage charges was properly rejected by Congress decades ago. Since at least 1917, Congress made it clear that the car service provisions of the statute do not provide the agency with authority to impose reciprocal demurrage charges for private equipment. Decades later, Congress considered and rejected changes to the Interstate Commerce Act that would have granted that authority to the Interstate Commerce Commission.³ In sum, Congress

¹ Decision, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768 (STB served Apr. 1, 2022) (“Decision Seeking Comments”).

² Petition, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 18 (filed July 26, 2021) (“Petition”); Decision, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, slip op. at 1 (STB served Nov. 23, 2021) (“Decision Opening Proceeding”).

³ In 1956, a Senate subcommittee held hearings on a proposed bill (S. 2770) to amend section 1(15) [now 49 U.S.C. § 11123] of the Interstate Commerce Act to

has decided against providing this agency the authority to micromanage railroad operations as contemplated by the Petition. Petitioners' proposal to resurrect a long-discredited regulatory concept should be rejected.

Nonetheless, the Decision Seeking Comments inquires not only about the STB's legal authority to adopt the petition but also the public policy implications from imposing an elaborate reverse demurrage regulatory scheme on the industry. Considering the policy implications reaffirms the wisdom of Congress's prior decision to reject this concept. First, Petitioners failed to establish any actual industry-wide problem with regard to car supply or how railroads use private railcars, but the proposed rulemaking would be the very kind of outdated top-down regulation of railroad service that Congress has rejected. Second, Petitioners' proposed rulemaking is a self-interested proposal designed to advantage their own private investments without regard to other shippers on the network, who would suffer the consequences of decreased service quality and higher rates. Third, the program would create artificial incentives to move cars for the sake of moving cars,

alleviate freight car shortages. *See* Amending interstate commerce act (to alleviate freight car shortage): hearings before a subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-fourth Congress, second session, on S. 2770 (March 29, May 7 and 8, 1956) ("S. 2770 Hearing Record"). The bill was introduced at the request of the ICC because it believed it did not have "authority to direct the assessment of special charges in addition to per diem charges as a means of stimulating prompt action by the carriers in time of [emergency] car shortages or threatened car shortages." S. 2770 Hearing Record, at 1. During the hearing, another proposed bill was noted (S. 3509), which would have provided the ICC with authority under section 1(15) to impose "reverse demurrage" charges, which was described as a "new approach" that would authorize the Commission to impose reverse demurrage in the event "a shortage or threatened shortage of cars has created an emergency or threatened emergency in any section of the country ... and the serving carrier does not furnish the requisitioned cars within 10 days." S. 2770 Hearing Record at 33–35. Neither proposed bill became law.

injecting operational inefficiency into a network whose cost will be borne by all rail customers. And finally, the concept is massively burdensome and impractical, sharply contrary to the minimalistic regulatory thrust of the Staggers Act.

For all of these reasons and many more set forth in these comments and the comments of the Association of American Railroads (AAR), the Board should terminate this proceeding as an unwise, unauthorized, and unjustified proposal that would ultimately harm the North American rail network and its customers.

Section I of these comments explains why the STB lacks authority to adopt the proposed rule, which impermissibly seeks to regulate transportation service, not car service, under § 11122. Section II shows that there is no problem that would justify the proposed rule. Section III makes clear that Petitioners' application of demurrage principles to railroads' use of private railcars is inapt and should be rejected by the Board. Section IV describes in great detail how the proposed rule would result in operational problems, inefficiencies, higher rates, and harm to many shippers who would not benefit from the proposed rule. Finally, Section V describes why the proposed rule is impracticable for railroads to implement.

I. THE STB LACKS AUTHORITY TO ADOPT THE PROPOSED RULE.

The Board has asked for public comment on whether Petitioners' proposed rule would regulate "car service" under 49 U.S.C. § 11122(a) or "transportation service" and also whether a finding of inadequate car supply is a prerequisite for Board action in this proceeding.⁴ This section answers each of these questions and explains why the Board lacks authority to adopt the proposed rule.

⁴ Decision Seeking Comments at 4, 6.

A. The Petition Seeks to Regulate Transportation Service, Not Car Service.

Petitioners’ proposed rule, which would impose a private railcar *delay* charge, is a regulation of how quickly railroads move private cars that is wholly unrelated to the adequacy of the national railcar supply. As Section II explains below, there is no industry-wide problem with railcar supply, much less private railcar supply, and, even if there were, Petitioners’ proposed rule would actually make any car supply problem *worse*.

For example, and as explained in more detail in Section IV below, there may be good reasons why a railroad might hold a railcar for a certain amount of time (including 72 hours, which is the arbitrary limit drawn by Petitioners). Yet Petitioners are asking the Board to punish railroads for these kinds of efficient operational decisions.

Ultimately, Petitioners’ proposal attempts to use § 11122 to regulate transportation services when no car supply problem exists. In particular, Petitioners are attempting to regulate transportation service standards to secure service guarantees that the actual customers who pay the freight bill are unwilling to negotiate and pay for. Ironically, this proposal would inject a new cost of providing service into the rail network, which like all operating costs would be shared with rail customers, in essence forcing a contract-like service standard that customers and the marketplace have not indicated is desirable. Indeed, the Petition itself makes clear that the proposed rulemaking is an attempt to acquire by regulation “contract service-standard provisions” across the board for all private car owners—without having to pay for such service guarantees.⁵

⁵ Petition at 10–11.

Petitioners’ proposal asks the Board to regulate how quickly railroads move private railcars but cannot point to any existing railcar supply problem that would be solved by their proposal. The Board does not have authority under § 11122 to do what Petitioners request: regulate transportation service.

B. The Board’s Authority Under § 11122 Relates to Railcar Supply and Does Not Extend to Transportation Service.

With no other feasible statutory authority to support their proposed rulemaking, Petitioners try to tie their proposed rule to § 11122 by asserting that the “goal” of their proposal “is to maximize the Class I railroads’ efficient use of Private Railcars.”⁶ But § 11122 cannot bear the weight that Petitioners place on it.

Section 11122 does not authorize the Board to adopt any rule that could merely increase the efficiency of how railroads *move* railcars—such a rule would micromanage railroad operations in a way entirely contrary to the deregulatory thrust of the Staggers Act and its progenies. Likewise, in light of the deregulatory purposes of these Acts, it cannot be that § 11122(a)(2) authorizes the Board to impose “service-standard provisions” for private railcar use.⁷ Congress did not have transportation service in mind at any point in the long history of its drafting, amending, and recodification of § 11122. Rather, the long and consistent history of § 11122, from its original enactment to its current form—along with federal and agency precedent—make clear that § 11122 does not authorize the Board to regulate transportation service, including for private railcars.

⁶ *Id.* at 2.

⁷ *Id.* at 10–11.

i. Legislative history as well as court and agency precedent establish that the Board’s authority under § 11122 is for addressing the adequacy of railcar supply.

Section 11122 originated in the Esch Car Service Act of 1917.⁸ As the U.S. Supreme Court has explained, the Esch Car Service Act of 1917 was enacted “[b]ecause of critical freight-car shortages experienced during World War I.”⁹ Over time, the original language was recodified and modified to some extent, but never did Congress indicate any new or different purpose or intent behind what is now § 11122. This is confirmed by both federal court and agency precedent, which has consistently acknowledged that the agency’s authority under § 11122 is for addressing a railcar supply problem and must be predicated on evidence of such a problem.

For example, in affirming an ICC rulemaking under what is now § 11122, the U.S. Supreme Court acknowledged with approval that “[c]entral to the justification for the Commission’s promulgation of these rules [pursuant to § 11122] is its finding that *there was a nationwide shortage of freight car ownership*. ... [T]hat finding ... was supported by substantial evidence.” *Allegheny-Ludlum Steel*, 406 U.S. at 746 (1972) (emphasis added). Even more to the point, the D.C. Circuit affirmatively acknowledged the ICC’s understanding that “the congressional purpose behind section 11122 [is] encouraging an appropriate supply of cars.” *LO Shippers Action Committee v. ICC*, 857 F.2d 802, 804–05 (D.C. Cir. 1988) (emphasis omitted).

Petitioners point to *SCOT-5*,¹⁰ but that case does not support their position. Rather, that decision clearly states that the “statutory goal in [§] 11122 [is] *an*

⁸ Esch Car Service Act of 1917, 65 Cong. Ch. 23, May 29, 1917, 40 Stat. 101.

⁹ *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 744 (1972).

¹⁰ Petition at 16.

*adequate car fleet.” Shippers Comm., OT-5 v. The Ann Arbor R.R. Co., 5 I.C.C. 2d 856, 865 (1989) (emphasis added) (“SCOT-5”). And, unlike here, in SCOT-5, there was an actual problem related to car supply. The OT-5 approval process was being misused by railroads to refuse to accept private railcars altogether for commercial reasons such that shipper owners of private cars were left unsure whether they would be able to access rail transportation at all using private cars. *Id.* at 865, 867. The ICC found that these OT-5 approval practices were a true threat to the national car supply because they disincentivized private railcar ownership. The Board could not possibly make that finding in this case, where the record makes clear that private railcar ownership is widely incentivized and popular among shippers, who enjoy greater control over how their railcars are used, which gives them “a number of transportation and marketing advantages,” including the ability to avoid demurrage fees and other financial incentives. *Id.* at 868.*

Importantly, in *SCOT-5*, the ICC rejected “the more sweeping form of relief sought by SCOT-5” because the “relief sought ... could have a serious detrimental impact on carrier efficiency, because ... [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.” *Id.* at 865–66. As Section IV explains in more detail, Petitioners’ proposed rulemaking would result in the same “serious detrimental impact[s]” the ICC identified in *SCOT-5*—reduced efficiency over the entire network and higher freight rates for all shippers, not just those that own railcars. *Id.*

Indeed, the Board cannot point to any evidentiary predicate for the sweeping new regime Petitioners seek. As in *SCOT-5*, Petitioners here have pointed only to instances of service delays but cannot show a “pervasive industry-wide refusal to

provide service that ... would be a *necessary predicate* for changing the basic ground rules concerning ... car service on the nation's rail transportation system." *Id.* at 867 (emphasis added).¹¹

ii. Legislative history as well as court and agency precedent establish that the Board cannot regulate transportation service under § 11122.

Congress has given the Board authority to regulate transportation service in some circumstances,¹² but § 11122 is not one of them. The legislative history of the Esch Car Service Act—§ 11122's origin, *see supra*—offers a useful glimpse into the intended breadth of the agency's authority granted in the Esch Car Service Act and thereafter. When discussing the Act, the bill's author (Mr. Esch) is asked whether "there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods." 55 Cong. Rec. at 2021 (May 9, 1917). In response, Mr. Esch defines this as "reciprocal demurrage"—i.e., what Petitioners purport to seek here¹³—and clarifies that the only instance in which the agency might have the authority to order reciprocal demurrage is "*in case of emergency*" under what is now the Board's § 11123 emergency service authority. *Id.*

¹¹ Petitioners also rely on *In the Matter of Private Rail Cars*, 50 I.C.C. 652, 672 (1918), but that merely states the obvious—that Congress gave the ICC authority to regulate car service in 1917. Yet it is abundantly clear that Congress did not grant the ICC authority to impose "reciprocal demurrage" charges on carriers under § 11122 at that time, or any time thereafter.

¹² For example, the Board has authority to regulate transportation service in a service emergency under 49 U.S.C. § 11123 and also has the authority to resolve complaints asserting violations of a railroad's common carrier obligation under § 11101 or its reasonable rules and practices obligation under § 10702.

¹³ Although, as explained in Section III, demurrage principles are not applicable to carriers as Petitioners wrongly assume.

In other words, even in the heyday of intensive, micromanaging railroad regulation, the ICC did not have the authority to impose “reciprocal demurrage” or similar schemes on railroads absent a service emergency justifying such temporary action under what is now § 11123.¹⁴

The U.S. Supreme Court and federal circuit courts have likewise made clear that the agency does not have the authority to regulate transportation service under § 11122. In *Peoria & Pekin Union Railway v. United States*, 263 U.S. 528 (1924) (“*Peoria*”), the Supreme Court explained that the term “car service” means “the *use* to which the vehicles of transportation are put; not the transportation service rendered by means of them.” 263 U.S. at 533 (emphasis added).

This distinction between the “use” of railcars and “the transportation service rendered by means of them” is reflected in the language of § 11122, which repeatedly authorizes the Board to regulate the “use” of railcars. *See, e.g.*, § 11122(a) (“efficient *use* of freight cars” (emphasis added)), § 11122(a)(1) (“compensation to be paid for the *use* of a locomotive, freight car, or other vehicle” (emphasis added)); § 11122(a)(2) (“the other terms of any arrangement for the *use* by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using [it]” (emphasis added)). The choice of the word “use” so consistently in § 11122 post-*Peoria* indicates that Congress meant for the STB to have the authority only to regulate “the use to which the vehicles of transportation are put

¹⁴ *See also ICC v. Or. Pac. Indus., Inc.*, 420 U.S. 184, 190 n.7 (1975) (“*when an emergency exists*, the Commission can, without hearing, issue effective *for a limited time*, orders in respect to these [regular demurrage] charges” (emphasis added) (quotation marks and citation omitted)).

[and] not the transportation service rendered by means of them.” *Peoria*, 263 U.S. at 533.¹⁵

Likewise, in *Atchison, Topeka & Santa Fe Ry. Co. v. ICC*, 607 F.2d 1199 (7th Cir. 1979), the Seventh Circuit distinguished “car service”—*i.e.*, the *adequate supply* of railcars—from “transportation service” and determined the ICC did not have authority under § 11122 to regulate the latter. *Id.* at 1205. In particular, the Seventh Circuit held that the ICC did not have authority to require railroads to publish “operating schedules” in their tariffs because that related to “transportation services” instead of “car service.” *Id.* at 1204–05. The court specifically noted that the background to the Commission’s action was an investigation “into ... deficiencies in Railroad Freight service.” *Id.* at 1204–05. The Seventh Circuit’s reasoning is directly applicable here. Petitioners complain about service delays, citing examples of “delays on the system.” Petition at 13. If the ICC did not have authority under § 11122 to require railroads to publish operating schedules in their tariffs, the Board certainly does not have authority under § 11122 to impose financial penalties on railroads when private railcars do not move in transportation service as quickly as their owners would like.

The D.C. Circuit has also acknowledged affirmatively the ICC’s understanding that “the congressional purpose behind section 11122 [is] encouraging an appropriate supply of cars” such that it was inappropriate to “prescribe industry-wide allowances, especially in light of the Staggers Act

¹⁵ The Supreme Court later affirmed this distinction in *Oregon Pacific Industries*. 420 U.S. at 189 (affirming its prior decision in *Peoria*, in which it “emphasized that the car service authority extends to the ‘use’ of cars and not to a ‘transportation service’” and holding that the ICC’s order was properly related to the “use” of railcars because it prevented cars from being used as “warehouses” instead of “as carriers”).

preference for individual over collective rate-making” and where the requested action “*was not required to ensure an adequate supply* [of railcars]”—wisdom that should guide the Board here to likewise reject the industry-wide penalty proposed by Petitioners in this proceeding. *LO Shippers Action Committee*, 857 F.2d at 804–05 (emphasis added).

iii. The Board has no authority to insulate private railcar owners from market forces.

Petitioners seek “regulatory changes ... to protect the investment Private Railcar owners and lessees make in their fleets”¹⁶ Nothing authorizes the Board to do any such thing. There is no provision (nor have Petitioners even cited to any purported provision) that authorized the Board to regulate for the mere purpose of protecting the financial interests of shippers or private railcar owners. To the contrary, federal courts and the ICC have made clear that the Board has no role in protecting the investments of private railcar owners and lessees.

In *General American Transportation Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), the D.C. Circuit affirmed the ICC’s decision to allow railroads to charge owners of private railcars for the cost of transporting their cars when empty to repair shops and noted that it was appropriate for the Commission to do so “against a background of congressional desire for ... increased reliance on market forces” where “[p]rivate car providers *have no statutory right to insulate themselves from market forces* generally in fixing allowances to be paid by carriers for the use of railcars.” 872 F.2d at 1057 (emphasis added); *see also Shippers Comm., OT-5 v. ICC*, 968 F.2d 75, 78–79 (D.C. Cir. 1992) (“Neither does the statute, nor the record, nor economic theory make it self-evident that an adequate car fleet cannot be

¹⁶ Petition at 14.

obtained unless the purchaser’s investment is guaranteed. Every investment is surrounded by some uncertainty.”).

Likewise, the ICC determined that it would “contravene the law and sound economic policy to insulate [private railcar owners] from the normal market forces ... [including giving private] cars priority over rail-owned cars.” *Allied Corp. v. Union Pac. R.R. Co.*, 1 I.C.C.2d 480, 484, 490 (1985). Nothing has changed since *Allied Corp.* to authorize the Board to initiate a new regime that would give private railcars “priority over rail-owned cars” in transportation service in order to “insulate” private railcar owners from the risks of transportation service delays—a “normal market force[]” that private railcar owners are well aware of when they decide to invest in their railcars. *Id.*

II. THERE IS NO PROBLEM THAT JUSTIFIES ANY CHANGE TO THE BOARD’S RULES.

The Board’s decision asks for comments regarding the alleged inefficient use of private freight cars. Petitioners’ few anecdotal examples of transportation *service* delays do not even address how railroads “use” private railcars, and there is no evidence elsewhere in the record indicating any problem with how railroads use private railcars or any industry-wide problem with the national railcar supply.

A. The Fact that Railroads Move More Private Cars than Railroad-Owned Cars Does Not Justify Regulatory Intrusion.

Petitioners assert that the proposed rule is justified by the mere fact that the majority of railcars on the U.S. rail network are private.¹⁷ It is not. As explained in Section I, above, the Board’s authority under § 11122 is limited to addressing problems with the national railcar supply as a result of how railroads put private railcars to “use.” Whether the majority of railcars are privately owned or railroad-

¹⁷ Petition at 1.

owned is irrelevant to § 11122's predicate question—is there a railcar supply problem? Here, there is zero evidence of any such problem.

Moreover, Petitioners' idea that regulatory intrusion is justified because private railcar owners have “made substantial investments that deserve ... protection[]” has already been debunked in Section I.B.iii, above. More fundamentally, this argument disregards the fact that private car owners are compensated for the railroads' use of their cars and enjoy the many benefits, including competitive advantages and increased profits, from being able to exercise more control of their cars—including having cars available for opportune times when demand for their products surges beyond the availability of railroad-owned cars. *See SCOT-5* at 866.

Importantly, private railcar owners take the investment risk with full knowledge that there are risks of transportation service delays and unforeseeable disruptions when shipping by rail. *See Allied Corp.*, 1 I.C.C.2d at 484, 490 (it would “contravene the law and sound economic policy to insulate [private railcar owners] from the normal market forces”). Petitioners' suggestion that shippers are being forced to invest in private railcars is simply false. *See* Petition at 6. Petitioners themselves acknowledge that there are strong market incentives to invest in private cars: “Rail shippers have *large financial incentives* to invest in railcars and size their fleets carefully ... [in a way] that enables a shipper to earn a reasonable return on its investment in its railcar fleet.” Petition at 12.

B. There Is No Evidence of Any Problem with How Railroads Use or Move Private Railcars.

Despite Petitioners' assertion that railroads lack incentives to efficiently move private railcars, Petitioners have supplied zero evidence to support their claim. A few anecdotal instances of service delays do not support a finding of any

industry-wide problem with how railroads “use” private railcars (or how they handle private railcars in transportation service, although the Board cannot regulate this under § 11122 in any event, *see supra*, Section I).

As Mr. Rodney Moore, NS’s General Manager for the Southern Region, explains in his attached verified statement, NS does not handle private cars differently from system cars, and Petitioners’ assumption to the contrary is simply wrong. Exhibit 1, Verified Statement of Rodney Moore (“Moore V.S.”) at 2. NS looks at its system as a whole and does not run the network based on individual cars or shipments. *Id.* There simply is no reason or incentive for NS to move cars more or less efficiently depending on ownership type. *Id.* In fact, doing so would cause significant operational complications and degrade service for all customers. *Id.* And that is precisely what would happen if railroads were incentivized to move private cars faster for the mere sake of it. *See id.* at 4–9.

In addition, there are good reasons why a railroad might hold a car (private or system) for 72 or more hours. That delay might be built into the trip plan itself, such as when a customer receives Tuesday/Thursday service, and a car arrives at the local yard on a Friday. *Id.* at 3–4. In other instances, a car may need to sit for 72 or more hours to relieve congestion for the sake of the entire rail network. *Id.* Other reasons for holding a car for 72 or more hours include when a car is pulled from a customer or interchange without proper forwarding instructions, when a customer has overloaded a railcar, or when a car is bad ordered, among other reasons. *Id.* at 4.

Petitioners’ few anecdotal examples of service delays related to private cars simply do not establish any industry-wide problem with car supply or how railroads use private cars. Ultimately, Petitioners would like to see the Board force railroads to perform certain “contract service-standard provisions” they claim that their

members want but have not negotiated.¹⁸ This myopic and self-interested proposal (and one that would come at the expense of other shippers) does not rest on any evidence of any problem with how railroads use private railcars that would justify Board action under § 11122.

III. APPLICATION OF DEMURRAGE PRINCIPLES IS INAPPROPRIATE.

The Board has invited public comment regarding whether it is “appropriate for the Board to equate the amount of the ‘private railcar delay charge’ to a demurrage or storage charge in most cases”¹⁹ The answer is no. Petitioners argue that because demurrage and accessorial charges allow railroads to incentivize shippers’ efficient use of railcars, the Board should apply those principles against railroads when private railcars are delayed in transit to fix what Petitioners claim is a “current imbalance.”²⁰ This superficial logic is flawed.

First, Railroads must incentivize shippers’ efficient movement of railcars on the railroads’ networks because shippers are *not sufficiently incentivized otherwise* to do so. By contrast, railroads *are* sufficiently incentivized already by the market to move all railcars on their system in the quickest, safest, most efficient manner. When railroads move their cars quickly and efficiently, they win and keep competitive business, enjoy revenue gains from more efficient operations, and ultimately add value to the business. These powerful incentives are what drive railroads to innovate, improve, and compete—ultimately to the benefit of shippers and the public.

¹⁸ Petition at 10–11.

¹⁹ Decision Seeking Comments at 8.

²⁰ Petition at 2, 8.

Second, even if the agency concluded there was some market failure that warranted a reciprocal demurrage regime (and there is no evidence of any such market failure), there is no economic basis to equate a private railcar delay charge to the demurrage or storage charge in any case. If there were a market failure, the level of any charge would be designed to internalize the opportunity costs associated with the inefficient use of a particular resource. In the case of railroad supplied railcars, demurrage charges achieve multiple goals. They compensate the railroad for the opportunity cost of equipment that is no longer available to provide transportation services, the opportunity cost associated with storage of equipment on scarce railroad propriety that consumes network capacity, and then in some instances a penalty component to incentivize rail customers to return those assets into service more quickly. If a carrier decided that combination of factors should result in a demurrage charge of \$100 per day, there is no reason to assume that a similar charge is appropriate to be paid to the owner of private equipment if cars are held in a yard for more than 72 hours. The reasonableness of any such reverse demurrage charge must be a function of the private companies' opportunity costs, not those of the carriers. And indeed, there is very little evidence, if any, of any incremental opportunity costs borne by the owner of the private equipment attributable to such delay.

Ultimately, Petitioners' simplistic logic fails. There is no need to further incentivize railroads to move their cars more quickly or efficiently, nor does the Board have the authority to do so under § 11122 in any event, nor is there any logic to equating the opportunity costs reflected in a carrier's demurrage charges to any harm incurred by private companies when a car is delayed in transit. And, ironically, Petitioners' proposed rulemaking would not even be effective at incentivizing efficiency. Prioritizing the movement of private railcars within the

network could actually *disincentivize* the efficient movement of railcars on the whole, as explained in the next section.

IV. THE PROPOSED RULE WOULD HAVE HARMFUL, UNINTENDED CONSEQUENCES.

While Petitioners assert their proposed rulemaking would result in the more “efficient use” of private railcars,²¹ this is unlikely. To begin with, the proposed rule has nothing to do with the efficient “use” of private railcars and everything to do with how quickly railroads move private railcars in transportation service. As the ICC has already explained, prioritizing private railcars over system cars would “contravene the law and sound economic policy.” *Allied Corp.*, 1 I.C.C.2d at 484, 490. This is, in part, because government-imposed mandates to arbitrarily move private cars faster through the network would have harmful unintended consequences on the broader rail network, with shippers and the public bearing the brunt of the harm.

A. The Proposed Rule Would Cause Widespread Operational Problems.

Petitioners’ proposed rule would create artificial, non-market-based incentives to move private railcars more quickly for the mere sake of moving them, even when that would not be the most efficient choice for the broader rail network. Because railroading involves many complex variables—including variables outside of a railroad’s control that cannot be predicted beforehand—it can often be the most efficient decision to hold a railcar (private or system) to most efficiently move it *and all the other cars that need to move* on the network. The proposed rule would disrupt this common-sense approach and create artificial incentives for railroads to avoid these charges rather than move cars in the most efficient way.

²¹ Petition at 2.

The proposed rule could have widespread impact—and not a positive one—on almost every aspect of rail operations. If railroads begin prioritizing private car movements, that practice would impact gateways, interchanges, first-mile last-mile service, and more. Moore V.S. at 4–7. For example, if railroads are incentivized to push private cars through the network, this would result in congestion and supply chain bubbles that would ultimately hurt last-mile service and lead to inventory and facility capacity problems for customers. *Id.* at 5.

At gateways and interchanges, the proposed rule would undermine cooperation and make it more likely that carriers would dispute prioritization and delays. *Id.* Particularly at interchange points, carriers would be incentivized to pass a car to another railroad simply to avoid a delay charge, rather than using the same resources to work together to achieve the most efficient outcome for *all* the cars that need to move. *See id.* Interchange presents further complicated scenarios. For example, how would the railroads determine (or agree) on which Class I is responsible for the car being held? *Id.* This could have a chilling effect on interchanges and impact the fluidity of important gateways. *See id.*

Unit trains present a unique set of challenges with respect to this proposal. Currently, a railroad might hold a unit train based on capacity needs, including both railroad capacity and capacity at the receiving customer's facility, or for other operational reasons, such as to accommodate Amtrak traffic. *Id.* at 5–6. Under the proposed rule, however, holding a unit train of private cars for more than 72 hours would result in exorbitant fees, given that a unit train is typically comprised of 85 to 100 cars. *Id.* Given the potential for such a high cost of delay, this proposal would skew incentives dramatically to move unit trains through the system particularly fast, to the detriment of receiving customers if they cannot accept the train, and to the detriment of other customers whose shipments were not

prioritized. *Id.* at 6. There could be other customer impacts, too. If NS must hold a unit train of private railcars because of capacity constraints at the receiving customer's facility, NS would no longer be incentivized to work with customers to pace the train in order to give customers a day or two of flexibility. *Id.* at 9. Instead, under the proposed rule, railroads would be forced to forward a private unit train to a destination that was not ready to accept it, even in lieu of a critical system car unit train whose receiver *is* ready to accept it. *Id.* This would result in higher unit train detention charges for private unit train receivers, sub-optimal operations of system unit trains, and potential service problems for the receivers of system unit trains. *Id.*

The proposed rule would also cause problems with how railroads move and handle empty private cars. For example, before moving private empty tank cars used in hazardous service, NS must have sufficient, accurate instructions from the appropriate party. *Id.* at 6. Without such proper instructions, logistics and transit time will increase because, as Mr. Moore explains, "it takes time for NS employees to look up the controlling entity of the equipment, and the contact details in Railinc systems may be out of date and/or it may take time for the controller to provide NS with proper shipping instructions." *Id.* All of these common scenarios add to dwell time and thus overall transit time, as the car(s) will not move before the above-mentioned instructions are received. *Id.* Additionally, the proposed rule could negatively impact the way NS handles empty cars if a customer cannot accept them. Currently, if a customer cannot accept empty cars—due to production issues, for example—NS will typically take that into account as it plans the most efficient use of its crews. *Id.* Under this proposal, however, NS would be incentivized to deliver the cars anyway to avoid a delay charge. *Id.* This result is not better for customers.

Because private car owners are not subject to the disciplining forces of demurrage, the proposed rule would incentivize private car owners to send as many private cars as possible onto the system.²² *Id.* at 7. Under the proposed rule, private car owners would reap a benefit (in the form of reverse demurrage payments) by adding more equipment to the system, adding congestion, and causing more cars to be subject to this reverse-demurrage windfall. As a result, NS would need to manage the congestion (and its increased financial exposure) that these counterproductive incentives might cause by operating a significantly leaner supply chain. *Id.* This, in turn, would look like more frequent embargoes, a slower overall network, and poorer service. *Id.* The Board should be particularly wary of imposing a payment regime that incentivizes private owners to add private cars to the network when service is struggling, which is precisely the opposite action the STB should be encouraging.

B. The Proposed Rule Would Harm Customers.

The proposed rule would result in overall poorer service for customers. *Moore V.S.* at 7–9. As noted above, rushing private cars through the network would not account for congested locations, creating supply chain bubbles that would ultimately result in poorer last-mile service and inventory management / facility capacity problems for customers. *Id.* at 7. Customers who receive private cars would bear the brunt of this. *Id.* However, the more frequent embargoes, less fluid gateways, and more contentious interchanges would add up to all customers receiving their shipments more slowly and less reliably. *See id.* at 7–9. In addition,

²² While it is true that in the special context where a private car owner is also the shipper, the private cars would be exposed to storage charges, this does not change the fact that the proposed rule would incentivize flooding the network with private cars because private car owners-shippers might experience a net profit under the proposed rule, even with any storage charges.

the resources railroads would have to allocate to the monitoring of delays and their causes would take crucial resources away from improving service, innovating, and attending to customer needs. *Id.* at 9.

Because private car owners would be financially incentivized to push more private cars onto the system, NS would also need to take action to control the overall number of railcars on its system to protect the network's fluidity and its financial exposure. *Id.* at 8. For example, while NS currently works with its customers and waits until 2–3 days' worth of cars have accrued in the local serving yard (depending on the circumstances) before requesting a plan from the customer, under the proposed rule, NS may no longer be able to offer that flexibility. *Id.*

The proposal would also decrease customer's choice in service schedules. Currently, NS works with its customers to determine a service schedule that works for both the customer and the railroad. *Id.* at 8–9. However, the proposed rule would create artificial incentives for NS to, instead, choose service schedules that would avoid delay charges. *Id.* For example, if railroads will be charged for a car that sits for three days by plan, railroads may change service schedules to seven days a week to ensure cars are constantly moving, despite the fact that many customers would oppose such a service schedule. *Id.*

Not only would the proposal degrade service and other customer-friendly service options, it would also impact railroad negotiations with customers. The added costs to rail operations will likely result in higher rates—including for shippers that do not use private cars. *Id.* at 9. NS would also likely require customers to forecast maximum and minimum volumes at more frequent intervals than the current yearly forecast. *Id.* at 8.

Thus, in multiple ways, the proposed rule would actually achieve the opposite of what it purports to do, leading to slower service, more disputes, and a waste of

resources that would otherwise be allocated towards improving service, innovating, and prioritizing the needs of *all* customers on the network.

V. THE PROPOSED RULE WOULD BE IMPRACTICABLE TO IMPLEMENT.

One additional problem with the proposed rule is that it would be impracticable to implement, particularly when it comes to railroads' ability to collect and code data. *Moore V.S.* at 10–14. In particular, the proposed rule would require data that NS currently does not track or code (nor could it with its existing resources). For example, NS tracks when equipment is delayed or held but does not track why the equipment is delayed or held with the specificity that would be required for the proposed rule. *Id.* at 10. Such an exercise would be highly complex, labor-intensive, and a waste of resources. *See id.* at 10–14.

In addition, determining the reason (or multiple reasons) why each individual car is delayed would be completely impracticable. Not only is this not something NS currently codes, coding for the precise cause(s) of delay for each and every private railcar would be extremely complicated and time-intensive, if not impossible. *Id.* For example, what should the code be if there are multiple, overlapping reasons for a delay? Say a foreign railroad is a day behind on switching the car, but the car also arrived 12 hours late for its switch due to NS operational problems, and the car is now further delayed due to weather conditions. Or say two railroads involved in a movement cannot agree on the cause of a delay (or who or what caused it). How should these situations be coded (and liability assigned)? Multiply that complexity times the thousands of private railcars moving on NS's system that may be delayed at any one time. The reality is that such complexity is not conducive to efficient or consistent data gathering or coding. *Id.* at 11–14.

Coding problems get even worse in the interchange context. Interchange operations are very complicated and involve countless number of scenarios for potential car delays (and disputes about delays). *Id.* at 11. Determining the root cause(s) of why cars are held and getting two railroads to agree on i) the cause and ii) the scope (number of cars impacted) would be next to impossible.²³ *Id.* This would result in significant headwind to the carriers working together and would carry a significant risk of shutting down major gateways. *Id.* at 11–12.

The data used for interchange operations would also result in confusion with regard to fault for delays. For example, standard coding will indicate that a car has been switched and is available for pickup by a foreign carrier regardless of whether or not it is actually ready to be pulled. In this scenario, the burden of proof (that the car is not actually switched out and available to be pulled) is on the receiving road, which would incentivize railroads to manipulate their reporting to avoid unjustified penalties, adding further confusion to the data. *Id.* at 12.

Moreover, at dual reporting locations, coding occurs on both the delivering and receiving carrier's side, and that coding can conflict. *Id.* Similarly, with regard to CLM Event Sighting Codes, for locations within the same operation station (but with different yards within that area), the coding simply does not reliably report where the car actually is or whether it has, in fact, moved. *Id.* For example, if a car does move from one yard to the next in the same operation station, the coding will not show any movement and it will appear the car has been delayed even though it has moved. *Id.* Ultimately, carrier data cannot be depended upon to accurately

²³ Petitioners envision the proposed rule applying to only Class I railroads, Petition at 1–2, but Class II and III railroads also cause delays on NS's network at interchange points. Moore V.S. at 11. This would further complicate the implementation of the proposed rule and result in mismatched incentives between Class I railroads and their Class II and III partners. *See id.*

determine when the clock should start and stop for purposes of measuring private railcar delay. *Id.*

The reality is that using existing data and coding cannot fairly represent fault for delays, and it would be impracticable and a waste of resources for railroads to overhaul the way they monitor and code their operations in order to implement the proposed rule. For all of these reasons and more, the implementation of the proposed rule would be complex, costly, and impracticable—ultimately to the harm of railroad customers and the public.

CONCLUSION

For the foregoing reasons and those in the comments filed today by the AAR, NS urges the Board to terminate this proceeding.

Respectfully submitted,

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Dated: June 30, 2022

EXHIBIT 1

Verified Statement of Rodney Moore

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Docket No. EP 768

VERIFIED STATEMENT OF RODNEY MOORE

My name is Rodney Moore. I currently serve as General Manager Southern Region for Norfolk Southern Corporation (“NS”), a role I assumed in 2022. I am responsible for the operation of the network in the Southern Region, including the allocation of resources and movement of cars, including private cars, in transportation. Given the nature of my work, I am familiar with the process of monitoring and coding traffic, including CLM codes. The Southern Region includes the Gulf, Coastal, and Blue Ridge Divisions.

I have been with NS since 2004, when I started as a Management Trainee. I progressed through various Transportation roles: the Assistant Trainmaster in Georgetown, Kentucky; the Lead Terminal Trainmaster in Toledo, Ohio; a Road Trainmaster between Toledo, Ohio and Elkhart, Indiana; the Assistant Terminal Superintendent in Chicago, Illinois; the Superintendent of Terminals in Conway, Pennsylvania; the Assistant Division Superintendent in Harrisburg, Pennsylvania; the Division Superintendent of the Alabama Division; the Assistant General Manager for the Southern Region; the Assistant General Manager of the Northern Region; and

the Assistant General Manager of the Network Operations Center. My role immediately prior to my current position was Superintendent Coastal Division, which is responsible for the operation of the network in the Coastal Division, including the appropriate allocation of resources and movement of cars. Given this progression, I have experience with operations across the Norfolk Southern network. I hold a Bachelors in Operations Management from the University of Alabama at Tuscaloosa.

Given my current role and years of experience in various Transportation leadership roles at NS, I am intimately familiar with how the proposed rulemaking in this proceeding would impact NS's operations, network, and customers.

I. THE PROPOSAL RELIES ON INCORRECT ASSUMPTIONS.

It is my understanding that the proposed rulemaking is based on an assumption that railroads move private cars less efficiently than system cars. That is incorrect. NS does not handle private railcars any differently from its system cars. Likewise, NS does not discriminate against private railcars in its operations, and NS does not move cars more or less efficiently depending on ownership type. In fact, NS does not run its network based on individual cars or shipments at all. Instead, NS looks at the rail network as a whole.

Everyone wins when we can move *all* our cars through the network safely and efficiently. There is no incentive for us to move system cars more efficiently than private cars or vice versa. Doing so would only slow down the network and reduce efficiency. The goal is a fluid network where all cars are moving in the most efficient way *together*.

In addition, our non-unit trains are made up of a mix of private and system cars, so both type of cars literally move together anyway. There is no difference in how quickly or efficiently we move these different types of cars. For unit trains, even if it is made up entirely of private cars, NS is incentivized to move that unit train as quickly and safely as possible because it is taking up network resources if it is not moving. Moreover, NS is a service provider. We are paid to deliver freight, and therefore also have every economic incentive to serve our customers and quickly, safety, and efficiently as possible. Ultimately, for any kind of private car movement, NS is strongly incentivized to move private cars as efficiently as possible and as efficiently as we move any other type of car. Our goal is the highest level of transportation service to our customers, which add not only revenue to our business but value to the company. To achieve this goal, every car matters equally to ensure a fluid, safe, and efficient system.

It is also my understanding that the proposed rule would impose a penalty charge on railroads if a private car is delayed more than 72 hours (and the railroad cannot rebut the presumption that it was at-fault). This idea—that any delay over 72 hours is problematic—is, again, based on an incorrect assumption. Just because a car remains in one location for 72 hours or more does not necessarily indicate a service problem or an inefficient delay.

There are operational reasons why a railroad might hold a car for 72 hours or more. For example, holding a car for 72 hours or more might be part of the trip plan. If a customer receives Tuesday/Thursday service by plan, cars that arrive to the local

yard on Friday would sit *by plan* until Tuesday. Additionally, if there is significant congestion on a particular part of the network where the car needs to move, allowing the car to move would only exacerbate the congestion by adding more cars to the already congested part of the network. In that scenario, it may be more efficient for the network as a whole, and for *all* customers, to hold cars until the congestion is reduced. This, of course, is not ideal, but it is a common reality in railroading, where many unforeseen and impossible-to-predict scenarios occur that cause congestion that needs to be addressed before adding more cars to the network.

Other valid reasons for holding a railcar for longer than 72 hours include: (i) when a car is pulled from a customer or interchange without proper forwarding instructions; (ii) when a customer has overloaded the railcar; (iii) when a car is bad ordered; (iv) when a car is reclassified following a customer requested diversion or reship; (v) when we need to do a dimensional inspection or measurement for clearance purposes; and (vi) embargoes.

II. THE PROPOSAL WOULD CAUSE OPERATIONAL PROBLEMS.

The proposed rule would cause serious operational problems. Rather than deciding the most efficient way to move *all* cars, NS would be incentivized to push private cars through the network more quickly, or move them merely to change the CLM code, in order to avoid charges. This would not be the most efficient handling. The incentives the proposed rule would create would negatively impact all aspects of the network—from gateways to interchanges to first-mile last-mile (FMLM) service and more.

NS would be incentivized to push private cars through the network more quickly or move them to change the CLM code simply for the sake of avoiding these penalty fees (or disproving its liability), and that would result in congestion and supply chain bubbles that would ultimately degrade last-mile service for all customers and lead to inventory and facility capacity problems for our customers who receive private railcars.

The proposed rule would also create serious problems with interchanges (including at major gateways where many crucial interchanges take place). At interchange points, cooperation would be undermined because each interchanging carrier would be incentivized to protect itself from private car penalty charges instead of working together to move *all* cars in the most efficient manner for both carriers. I have no doubt carriers would dispute prioritization and the causes and scope of any delays that occur related to the interchange. For example, how would the interchanging partners determine (or agree) on which railroad is responsible for the car being held? This would further complicate the interchange process, which is already extremely complex and vulnerable to delays, and could negatively impact the fluidity of operations at gateways.

Operating unit trains under the proposed rule would become problematic as well. Normally, we might hold a unit train based on capacity, which includes both railroad capacity and the capacity of the receiving customer's facility. There are also other operational reasons to hold a unit train, such as to accommodate Amtrak traffic. However, under the proposed rule, *a single instance* of holding a unit train of private

cars for more than 72 hours would result in exorbitant fees, given that a unit train is typically comprised of 85 to 100 cars. This extremely high cost for even a single delay would skew our operational incentives dramatically and focus our attention and resources on moving unit trains through the system merely to avoid the penalty fee—regardless of whether that decision is going to harm other customers, including receiving customers who may not be able to accept the train or other customers whose shipments were deprioritized.

How we move empty cars would also be negatively impacted by the proposed rule. This is because the billing of empty private railcars is an entire world of its own. For example, in order to handle empty tank cars used in hazardous service, NS needs to have sufficient, accurate instructions from the appropriate party. Without proper instructions, logistics and transit time are negatively impacted because it takes time for NS employees to look up the controlling entity of the equipment, and the contact details in Railinc systems may be out of date and/or it may take time for the controller to provide NS with proper shipping instructions. Each of these issues will add to dwell time and thus overall transit time, as the car(s) will not move before the proper instructions are received. The proposed rule could also impact the way NS handles empty cars if a customer cannot accept them. Currently, if a customer cannot accept empty cars—due to production issues, for example—NS will typically try to work with the customer by taking these issues into account as we plan the most efficient use of our crews. Under this proposal, NS would be incentivized to deliver the cars anyway to avoid a delay charge.

Operations would also be impacted by the behavior of private car owners, who would be incentivized to send as many private cars as possible onto the system. Their financial incentives would not be aligned with the overall goals of a healthy rail network, such as safety, fluidity, and efficiency. In my experience, NS works with shippers with private cars to manage their fleet to facilitate smooth operation of the network. I am concerned that this proposal would remove that incentive to work cooperatively with NS and would actually incentivize behavior that could further congest the network. To manage the number of private railcars on the system (to avoid congestion and its financial exposure), NS would have to operate with a significantly leaner supply chain and may also have to consider using more embargoes as a tool to manage congestion. In practice, this would likely lead to a slower overall network and poorer service for all customers.

III. THE PROPOSAL WOULD NEGATIVELY IMPACT CUSTOMERS.

The proposed rule would negatively impact customers in multiple ways. First, customers would experience poorer service because NS would not be able to operate in the most efficient way. Prioritizing the movement of private cars would undermine the overall fluidity of the network and leave customers using system cars in second-class status. As noted above, rushing private cars through to avoid the penalty fees (or having to dispute liability) would create congestion and bubbles in the supply chain that would slow down last-mile service and frustrate our customer's ability to manage their inventory and facility capacity. Prioritizing private cars would also

negatively impact smaller shippers who rely on system cars because they do not have the resources to buy their own private cars.

The proposed rule could have other unanticipated negative impacts on customers as well. Currently, NS works with customers and waits until 2-to-3 days' worth of cars have accrued in the local serving yard (depending on the circumstances) before requesting a plan from the customer, and customers appreciate this flexibility. However, if the proposal were implemented, NS likely could not afford to be as generous. Customers that receive private cars would likely feel the brunt of this negative impact. Likewise, and as discussed above, the proposed rule would force NS to operate with a significantly leaner supply chain in order to manage the number of private railcars on its system. This would be necessary both to avoid problematic congestion and to protect NS's financial exposure. Other measures to manage the overall number of private cars on the system might look like, for example, NS considering embargoes more often or asking its customers to forecast maximum and minimum volumes at more frequent intervals than the current yearly forecast to better manage its resources and network capacity.

With regard to service schedules, NS currently works with its customers to determine a service schedule that works for both parties. However, if the proposal were implemented, NS would be incentivized to avoid penalty fees by changing its customers' service schedules to seven-days-a-week service, which many customers did not like at the onset of NS's PSR implementation. Seven-days-a-week service allows NS to move inventory off of the NS network more quickly to alleviate

congestion but doesn't always align with customer facility schedules. Unfortunately, this would be the new reality for customers under the proposed rule.

Similarly, when moving unit trains, NS currently works with customers to pace unit trains in a way that gives customers a day or two of flexibility. Under the proposed rule, however, NS could not offer this kind of flexibility and, instead, would be forced to make choices like forwarding a private unit train to a destination that is not ready to accept it—even in lieu of a critical system car unit train whose receiver is ready to accept it. These incentives would result in higher unit train detention charges for private unit train receivers, sub-optimal operations in general for system unit trains, and potential service problems for receivers of system unit trains.

Finally, the proposed rule would take crucial resources away from NS's pro-customer goals of innovating, improving service, increasing efficiency, and attending to our customers' needs. As described in more detail in Section IV, the proposed rule would require a host of additional resources—labor, training, operations, logistics, financial, legal, etc.—that would otherwise go to improving service quality and service offerings for customers. These added costs to rail operations would negatively impact contract negotiation terms for customers and likely would result in higher transportation rates for all customers—including shippers that do not use private cars. These unfortunate changes would add up to an overall poorer experience for all customers.

IV. THE PROPOSAL IS IMPRACTICABLE.

Aside from the operational problems and negative impacts on customers that the proposal would cause, merely implementing the proposal internally at NS would be impracticable. In particular, coding or otherwise tracking the “why” of a delay for each and every private railcar on NS’s system would be highly complex, resource-intensive, and essentially impossible. This is because the “why” of a delay is often complicated and not often limited to a single, simple reason.

NS currently codes for *when* equipment is delayed or held using the Industry CLM code (H). While identifying when cars are delayed or held is fairly simple and routine, determining the precise reason (or, as is often the case, the multiple reasons) why each individual car is delayed would be impracticable. This is not something NS currently codes, as this would be extremely complicated, time-and-labor-intensive, and practically impossible to do for every delay of every single car on the entire NS network. The reality is that some data is appropriate to code and monitor on a broad scale because the input is fairly clear-cut and therefore reliable. When the data is not clear-cut, has multiple variables, or is nuanced—as is often the case with the reason for railcar delays—such data is not appropriate for coding and regular monitoring.

For example, how should our system code a situation where there are multiple reasons for a delay (or where the reason for the delay is disputed by multiple carriers)? Consider a situation where a foreign railroad is a day behind on switching, but the car also arrived 12 hours delayed for the switch due to an NS mistake (which made it miss the prior switching window), but then the car is also delayed due to weather, all of which equals a delay over the 72-hour cut-off point. What code could

possibly be used for such a situation, and how could liability thereafter be determined? The reality is that tracking the precise cause for every increment of a delay would be practically impossible.

Or consider a situation where two carriers are involved in a movement and cannot agree on the cause of the delay, much less who caused the delay. How would this be coded, and how would liability be resolved? Such situations would take up massive amounts of resources for NS and other carriers because these kinds of situations are very likely to occur *frequently*. These disputes will inevitably slow down the entire network and suck crucial resources away from where they need to go—improving service and collaborating to achieve a highly efficient rail network.

The coding problems would get even more complicated in the interchange context. Interchange operations are very complicated, with countless scenarios for potential car delays with multiple causes for the same delay. Determining the root cause(s) as to why cars are held and getting two Class Is to agree on 1) the cause and 2) the scope of the cars impacted would be next to impossible. In addition, coding would be complicated in the many instances in which NS interchanges with Class II and III railroads, which also cause delays on the NS network at interchange points but are not contemplated as being subject to the proposed rule.

In addition, in the interchange context, standard coding will indicate that a car has been switched and is available for pickup by a foreign carrier regardless of whether or not it is actually ready to be pulled. In this scenario, the burden of proof (that the car is not actually switched out and available to be pulled) is on the receiving

road, which would incentivize railroads to manipulate their reporting to avoid unjustified penalties, adding further confusion to the data. The reality is that existing data cannot fairly represent, and would even cause confusion about, fault for private car delays, and it would be next to impossible to create a monitoring system that would efficiently track such information. Particularly in the interchange context, the proposed rule would result in a significant headwind against carriers working together and would carry a significant risk of slowing down or shutting down major gateways.

Other types of standard coding currently used by NS (and all the other carriers) would cause further confusion under the proposed rule. For example, at dual reporting locations, coding occurs on both the delivering and receiving carrier's side, and that coding could be conflicting. In addition, for locations within the same operation station (but with different yards within that area), CLM Event Sighting Codes are not reliable in terms of reporting where the car actually is or whether it has, in fact, moved. For example, if a car does move from one yard to the next in the same operation station, the coding will not show any movement, and it will appear the car has been delayed even though it has moved, inaccurately triggering liability. For this reason (and others), carrier data cannot be depended upon to accurately determine when the clock should start and stop for each railroad for purposes of monitoring car movement.

Moreover, the coding that would be required merely to monitor private car delays (and the various reasons for such delays) would require an entire staff

dedicated to this task, and, even then, the reasons for the delay would likely remain complicated and conflictual in many cases. It would also take an army of labor and legal resources to assess and rebut NS's liability for the thousands of penalty charges that would automatically accrue due to private car delays beyond 72 hours.

The vast resources required to implement the proposed rule would distract NS's focus and resources away from improving service quality, innovating, and investing in the rail network to more strongly compete in the future. NS has for decades worked to give customers what they need while at the same time doing what is most efficient for the entire rail network. This is what our coding, labor force, and operating plans focus on. The proposed rule would throw a wrench in all of these important whole-network goals, to the ultimate harm of our customers and the public.

VERIFICATION

I, Rodney Moore, verify under penalty of perjury that I serve as General Manager Southern Region at Norfolk Southern Corporation, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on June 30, 2022

DocuSigned by:
Rodney Moore
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Rodney Moore