

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 768

Petition for Rulemaking to Adopt
Rules Governing Private Railcar Use by Railroads

Comments of
The American Chemistry Council, the Corn Refiners Association, and
The Fertilizer Institute

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The American Chemistry Council (ACC), Corn Refiners Association (CRA), and The Fertilizer Institute (TFI) (collectively, “Coalition Associations”) submit these comments in response to the Board’s April 1, 2022, request for comments (“Request”) in this proceeding.

Statements of Interest

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

CRA is the national trade association representing the corn wet milling industry of the United States. Corn refiners produce essential inputs for the American economy, including for food, feed, pharmaceuticals, medical devices, personal care products, and a wide assortment of industrials ranging from construction adhesives to compostable plastics. CRA members process approximately 13% of the United States’ corn supply, resulting in \$9.33 billion in value-added revenue. This accounts for 7,200 jobs and impacts an additional 160,000 jobs, with an annual economic impact of \$47.5 billion. CRA members rely

extensively on rail transportation for inputs and finished product, and nearly all members own or lease the railcars that railroads use to transport their rail shipments.

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

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

Comments

Coalition Associations support the regulations proposed by Petitioners in this proceeding. Coalition Associations' members rely heavily on private railcar fleets, and the growing operational inefficiencies arising from railroad attempts to lower their operating ratios and please Wall Street investors have made owning and

¹ See Petition 2.

sizing an adequate supply of private cars more difficult and expensive. The proposed regulations would mitigate these problems by encouraging railroads to use private cars efficiently.

These comments explain that:

- Contract commitments are not sufficiently available to address inefficient railcar use.
- The proposed regulations are consistent with the directive at 49 U.S.C. § 11122(a) to encourage efficient use of freight cars and are necessary due to inefficient use of private cars by railroads, which is persistent and growing.
- The proposed regulations would not automatically disadvantage shippers that use railroad-provided cars.
- Equating Petitioners' proposed charge to demurrage and storage charges is an efficient approach that ensures the charge reflects what railroads believe is an appropriate incentive to encourage efficient use of rail assets.
- Basing the proposed charge on projected transit times would undermine its usefulness because these times reflect anticipated inefficiency.
- Railroads should be responsible for administering Petitioners' proposed delay-charge program because they have direct access to relevant railcar movement data, this simplifies the credit reconciliation process, and this ensures that the program provides an incentive to handle all private cars efficiently.

- If credits under the proposed program exceed outstanding demurrage and storage charges owed by a shipper, the railroad should pay the credits directly to the shipper at the end of the month.

A. Private railcar providers do not have sufficient access to contract commitments that encourage railroads to use private railcars efficiently.

Contract commitments are not a solution to railroads' inefficient use of private cars.² If they were, the Petition would not exist, and the Board would not be hearing shipper concerns in this and other proceedings about how railroad inefficiency is straining the private railcar fleet.

Contract commitments related to service or efficient railcar usage are effectively unattainable in modern rail transportation contracts. After extensive rail industry consolidation in the 1980s and 1990s, railroads broadly eliminated service and efficiency commitments from their contracts with shippers. To the extent railroads make such commitments, they are more aspirational than binding and carry few, if any, consequences for non-compliance. Thus, fundamental changes in the rail transportation market have long eliminated contract commitments as a viable mechanism to broadly encourage railroads to use private cars efficiently.

Moreover, even if rail transportation contracts "sometimes"³ contain specific commitments that encourage efficient railcar handling, these contracts are too

² Question 2 of the Request asks whether contract service commitments render the proposed regulations unnecessary. Request 6.

³ UP Reply 11.

scarce to materially impact railroad behavior. Railroads have continually adjusted their business models to operate as leanly as possible, without any apparent regard for whether they are adequately and efficiently handling traffic. And in recent years, railroads have achieved record-low operating ratios while also reducing headcount. The results speak for themselves. Union Pacific Railroad (UP) recently told customers that it would not serve all their traffic. For the weeks ending May 6, 2022, through June 17, 2022, the weekly percentage of railcars in manifest service that BNSF Railway (BNSF), CSX Transportation (CSXT), Norfolk Southern Railroad (NS), and UP have failed to deliver within 24 hours of their original estimated time of arrival is 43%, 31%, 49%, and 32%, respectively, on average.⁴ Further, at the Board's April 2022 hearing on rail service under docket EP 770, multiple Class I railroads acknowledged that they are not meeting operational expectations. This operational performance demonstrates that specific contract commitments that encourage efficient railcar handling, if they even exist, are ineffective.

While UP claims that the proposed rules are unnecessary because rail transportation contracts generally obligate the railroad to provide service in the same manner and on the same basis as it provides service to customers that do not have a contract,⁵ these obligations are also ineffective. Like with specific

⁴ Coalition Associations calculated these values using data that these carriers filed in docket EP 770 (Sub-No.1), *Urgent Issues in Freight Rail Service—Railroad Reporting*.

⁵ UP Reply at 11.

commitments regarding railcar handling, actual railroad performance demonstrates that these commitments are inadequate. This is no surprise. An obligation to provide service in the same manner and on the same basis as service is provided to other customers does not identify a standard that is clear enough to encourage efficient use of private rail cars or sufficiently meaningful to enforce the obligation with clarity. Additionally, since most of the nation's railcar fleet is private, the consequences of service failures upon the nation's rail car supply fall disproportionately upon private railcar owners and lessees.

At bottom, the notion that contract commitments can address inefficient railcar handling is misguided. Railroads rarely agree to these commitments, and railroad performance in recent years demonstrates that whatever commitments railroads have assumed are ineffective.

B. The proposed regulations would promote an adequate supply of railcars by encouraging efficient use of the cars.

Today, shippers that rely on private cars must maintain enough cars to support their traffic no matter how inefficiently railroads use these cars. But 49 U.S.C. § 11122(a) directs the Board to encourage an adequate and efficient car fleet. Given this directive and the inefficient handling of private cars, which has grown worse in recent years, the proposed regulations are necessary and appropriate.⁶

⁶ Question 3 of the Request asks several questions about whether the proposed relations would regulate car service within the meaning of 49 U.S.C. § 11122(a) by encouraging the purchase, acquisition, and efficient use of freight cars. Request 6.

The plain text of 49 U.S.C. § 11122(a) directs the Board to promote adequate car supply by encouraging efficient use of railcars, stating that the Board’s regulations “on car service shall encourage the purchase, acquisition, **and efficient use of freight cars.**”⁷ This directive reflects that, when railroads use railcars more efficiently, less railcars are necessary to support traffic levels and car supply improves. Thus, the directive rejects the position that shippers who rely on private cars should have to maintain an adequate fleet without the benefit of effective incentives that encourage railroads to use private cars efficiently.

The proposed regulations would be consistent with 49 U.S.C. § 11122(a) by providing efficiency incentives that would help shippers maintain private car fleets at adequate levels. In particular, the regulations would discourage excessive private car dwells, which increase car cycle times and thereby increase the number of cars necessary to handle shipments in private cars.⁸

Further, shippers that rely on private cars urgently need the proposed regulations. Since railroads do not supply these cars, the efficient use of these cars is not a priority for them. In fact, as the fleet of private cars has grown from a

⁷ 49 U.S.C. § 11122(a) (emphasis added).

⁸ To justify their demurrage practices, railroads have explained that dwell leads to inefficiency and increased need for railcars. *See* UP Reply at 2, *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757 (Dec. 6, 2019) (“a . . . highly efficient operational state is achieved, in substantial part, by controlling car dwell in our terminals”); CP Comments at 5-6, *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757 (Nov. 6, 2019) (explaining that dwell contributes to congestion, which “drives a need for more equipment”).

minority of all cars to over 73% of cars on the rail network,⁹ railroads have cut staff, switches, and trains, causing their operations and use of private cars to become increasingly unreliable and unpredictable. These ongoing and extensive problems with rail operations have had significant consequences for shippers who supply private cars. These shippers have had to maintain larger fleets, shift traffic to trucks, or eliminate traffic, all of which increase business costs.

The fact that most shippers maintain railcar fleets that are sufficient to handle their traffic, despite inefficient railcar use by railroads, does not prevent the Board from adopting the proposed regulations or suggest that these regulations are unnecessary. As stated above, 49 U.S.C. § 11122(a) directs the Board to encourage efficient use of railcars, which reduces the number of cars necessary to serve traffic and, thus, helps ensure an adequate supply of cars.

Additionally, few shippers that maintain adequate private car fleets despite railroads' inefficient use of private cars have an alternative. Coalition Associations' members that maintain private car fleets either rely on railcars that railroads do not supply (e.g., tank cars) or have unique transportation needs, such as storage-in-transit or product specification requirements, that railroad-provided cars cannot support (e.g., covered hoppers). Railroads' inefficient use of these shippers' private cars forces these shippers either to acquire more cars to keep their businesses operating or forego business opportunities. The proposed rules would discourage

⁹ Petition 5.

inefficient use of these cars and thus help ensure that these shippers' fleets are adequate.

In sum, shippers who provide railcars have an interest in not only the adequate supply of cars, but also the efficient use of the cars. Congress has protected these interests by directing the Board under 49 U.S.C. § 11122(a) to establish rules that encourage adequate and efficient railcar supply. Adopting the proposed regulations would be consistent with this directive because they discourage extended private railcar dwell, which railroads have recognized as a significant driver of inefficient railcar use. Moreover, shippers urgently need the proposed rules to help curb increasing railroad inefficiency, which has made maintaining an adequate supply of private railcars more difficult, if not impossible, for many shippers.

C. The proposed regulations would not disadvantage shippers that use railroad-provided cars.

Question 4 of the Request asks how the proposed regulations would affect rail users that do not use private railcars, noting that railroads argue that the regulations would create incentives for carriers to prioritize private cars to the disadvantage of rail users that use railroad-provided cars.¹⁰ Coalition Associations assert that the proposed regulations do not encourage railroads to prioritize private cars over traffic moving in railroad cars. To the contrary, encouraging efficient handling of private cars would likely benefit all shippers.

¹⁰ Request 6-7.

First, railroad commenters incorrectly argue that the proposed regulations would force them to choose between private cars and railroad cars. Nothing in the proposed regulations prevents railroads from handling both types of cars efficiently.

Second, railroads have a strong incentive to handle their own cars efficiently. As many railroads have emphasized in other proceedings, railroads have a strong interest in maximizing their return on their investment. Railroads can maximize their return on investment in their railcars by minimizing the time those cars spend empty or delayed. Thus, a railroad currently has a strong financial incentive to prioritize its cars over private cars. Any delay charge under the proposed rules would merely make the playing field more level so that a railroad would not gain a clear benefit by prioritizing railroad-provided cars to the detriment of shippers who must use private cars.

Third, encouraging efficient handling of private cars could benefit shippers who use railroad-provided cars. For one, it would promote increased network fluidity for all traffic by providing railroads a financial incentive to reduce delays involving private cars, which are most railcars on the rail network.¹¹ As railroads have explained, reducing delays eases network congestion and, thus, improves network fluidity. For another, any operational changes that railroads make to handle private cars more efficiently in manifest service will likely improve handling of railroad-provided cars, since they move alongside private cars in manifest service.

¹¹ See Petition 5-6.

D. Basing the proposed charges on projected transit times would undermine their usefulness.

Projected transit times are not an appropriate metric for calculating the proposed charges.¹²

Basing the proposed charges on projected transit times would defeat the purpose of the charges, which is to promote efficient use of railcars. Since projected transit times account for anticipated inefficiency, they do not indicate whether actual car transits were efficient. Thus, basing the proposed charges on projected transit time will not provide railroads an incentive to eliminate anticipated inefficiency.

Basing the proposed charges on projected transit times also provides railroads a loophole to avoid the charges. Since railroads set projected transit times, they can inflate them to mask delays caused by inefficient railcar use and, thus, reduce their exposure to the proposed charges. For example, if a railroad frequently cancels a switch at a particular location, it could increase the projected transit times for all cars that need the switch so that, when it cancels the switch, the cars do not appear to experience a transit delay and the railroad avoids the proposed delay charge.

Further, basing the proposed charges on projected transit times would undermine the proposed regulations by excluding many empty railcar movements

¹² Question 7(b) of the Request asks whether the proposed charges should be based on projected transit times. Request 7.

from the charges. Railroads typically do not provide projected transit times for empty return movements of private cars. So, if the Board bases the proposed charges on projected transit times, there would be no way to calculate the proposed charges for many empty return movements. Without these charges to provide an incentive to use empty cars efficiently, the proposed regulations would produce fewer benefits and likely would encourage railroads to improve the efficient use of loaded cars at the expense of empty cars.

E. Setting the proposed charges at the same level as demurrage or storage charges is appropriate.

Equating the proposed charges to demurrage and storage charges is an appropriate and administratively straightforward method for encouraging efficient use of private cars.¹³

Demurrage and storage charges reflect what railroads have determined is an appropriate economic incentive to encourage efficient use of their assets. These charges have a principal purpose to encourage the efficient use of rail assets, including cars and track.¹⁴ Likewise, the proposed charges are principally intended to encourage the efficient use of private cars. The only difference—the ownership of the railcar—is immaterial to the appropriateness of the charge. If the Board sets the proposed charges at the same level as demurrage and storage charges, the

¹³ Question 8(a) asks whether it is appropriate for the Board to equate the proposed charge to a demurrage or storage charge. Request 8.

¹⁴ *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 4 (STB served Apr. 30, 2020).

proposed charges will thus reflect the level of charges that railroads deem necessary to encourage efficient use of railcars.

Railroads claim that the proposed charges are unnecessary because they have other incentives to use private cars efficiently. But like railroads, shippers also have other incentives, apart from demurrage and storage charges, to use rail assets efficiently. For example, holding railroad-provided cars causes congestion at shipper facilities that can threaten a facility's ability to operate. Also, allowing private cars to dwell on railroad tracks while awaiting delivery increases the number of cars that a shipper needs to serve its traffic, requiring the shipper to incur higher fleet costs. Yet railroads still insist on demurrage and storage charges, which indicates that a charge equivalent to demurrage and storage charges is necessary and appropriate to encourage efficient use of railcars despite existing incentives to handle railcars efficiently.

Additionally, equating the proposed charge to demurrage and storage charges will significantly reduce the administrative burden of the proposed delay-charge program. It would relieve the Board of periodically reviewing and updating the proposed charges. Also, it would avoid requiring railroads to track the level of the charges assessed by hundreds of different shippers as opposed to applying each railroad's own existing demurrage and storage charges.

F. Railroads should be responsible for tracking delays and providing credits in accordance with the proposed regulations.

The proposed delay charge program will be inefficient and ineffective unless railroads are responsible for tracking delays and providing credits.¹⁵ Not only do railroads have direct access to railcar handling information necessary to track and calculate delays, but they also have systems in place that allow them to track car location and dwell, including to assess demurrage and storage charges. Having railroads track delays and provide credits also promotes uniform and efficient administration of the delay charge program.

First, railroads have direct access to the railcar movement information and the information systems and experience needed to administer the program. They generate the car location messages that the program uses to identify car delay. Moreover, while shippers may access to or receive these messages, railroads have systems in place to record these messages, track and analyze railcar movements based on these messages, and calculate charges based on the movement information in these messages. Specifically, every Class I railroad maintains a demurrage and storage system that tracks railcar dwell, assesses demurrage or storage charges, and communicates this information to shippers. Railroads can adapt these systems to handle the proposed delay charges whereas shippers would have to develop these systems from scratch. Thus, having railroads manage the data and calculate the

¹⁵ Question 9(a) asks what party would be responsible for tracking movement data for private freight cars and invoicing in accordance with the proposed regulations. Request 8.

proposed charges would be much more efficient than placing these tasks with shippers.

Second, making railroads responsible for tracking data and providing credits simplifies administration of the proposed delay-charge program for all stakeholders. It would reduce the burdens of processing and disputing claims for delay charges by centralizing all information relevant to a claim. It also would reduce the burden of administering credits by allowing railroads to automatically award them. In contrast, if the proposed regulations require shippers to bill railroads for credits, railroads will have to receive and process potentially thousands of credit claims every month, and shippers would have to spend countless hours developing support for those claims even though railroads generate the relevant supporting data.

Third, requiring railroads to track delays and provide credits ensures that the proposed delay-charge program provides an incentive to handle all private cars efficiently. The proposed regulations encourage efficient handling of private railcars by applying a charge for excessive delay. Yet administering the proposed charges, which involves tracking data, calculating delays, and preparing and tracking claims, could overwhelm many shippers who use private cars, especially smaller shippers. Shippers thus are unlikely to uniformly administer the proposed charges, which will weaken or eliminate the incentive they provide railroads. In contrast, every Class I railroad has demonstrated through its demurrage and storage programs that it has the capability to uniformly administer the proposed delay-charge program across all its private-car traffic. Accordingly, requiring railroads to

administer the delay-charge program will help ensure that the program provides an effective incentive to use private cars efficiently.

G. Railroads should make payments directly to private railcar providers if delay charges exceed outstanding demurrage and storage charges.

Question 9(b) of the Request asks, if the Board requires railroads to credit charges against their demurrage invoices, how would compensation be handled for rail users that do not incur demurrage charges or incur fewer charges than would be owed pursuant to the proposed regulations? Coalition Associations submit that the Board should require the railroad to pay the excess delay charges to the shipper at the end of each month.

First, requiring a railroad to pay excess charges to the shipper is consistent with how railroads handle demurrage and storage charges. Under railroads' demurrage and storage programs, railroads do not carry forward excess charges from month to month until they are completely offset by demurrage and storage credits. Instead, a shipper whose demurrage or storage charges exceeds credits must pay the balance at the end of each month.

Second, requiring a railroad to pay excess charges to the shipper at the end of each month reduces complexity and confusion. Shippers and railroads would not need to carry these charges forward for months on end until they are offset, if that ever occurs. They also would not need to track the changes in the level of charges due the shipper as charges accrue or are offset by demurrage or storage charges due the railroad.

Third, requiring a railroad to pay excess charges to the shipper at the end of each billing cycle protects the efficiency incentive that the proposed regulations provide. If a railroad can defer payment of the proposed delay charges until they are offset by the demurrage and storage charges that the shipper owes the railroad, the delay charges will not provide a clear and timely efficiency incentive. Instead, whatever incentive the charges provide will materialize when the shipper accrues offsetting demurrage or storage charges, which could be months after the delay leading to the delay charges.

Simply put, requiring railroads to pay excess delay charges at the end of each month is the most appropriate approach to handling excess charges because it promotes the efficient-use goal of the proposed regulations, reduces complexity, and is consistent with how railroads handle demurrage and storage charges.

Conclusion

Coalition Associations appreciate this opportunity to provide information related to the Petition and urge the Board to issue proposed rules consistent with the Petition.

Respectfully submitted,

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