

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 768

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

COMMENTS OF BNSF RAILWAY COMPANY

I. Introduction

BNSF Railway Company respectfully submits these comments in response to the Board's April 1, 2022 decision in the above-captioned proceeding seeking additional stakeholder input on the petition for rulemaking proposing that the Board adopt regulations to allow private car owners or lessees to assess charges against railroads when a privately-owned car remains idle on a railroad's network for longer than 72 hours. BNSF joins the comments opposing the petition filed by the Association of American Railroads (AAR). We submit these separate comments to highlight the negative effects the proposed rule would have on the service BNSF provides all our customers, and how the proposed rule would be contrary to BNSF's growth efforts and harm smaller and more remote rail customers for whom rail service would be less viable due to changes that railroads would need to make to conform to the proposed rule.

II. The Proposed Rule Would Degrade Rail Service

The Board has specifically sought input on how rail network efficiency would be affected by the proposed rule.¹ The petitioners state that the goal of the proposed rule is to maximize the

¹ Decision, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Ex Parte No. 768, at 7 (Apr 1, 2022) ("April 1 Decision").

efficient use of private cars by railroads;² however, the petitioners do not acknowledge that railroads already have every incentive to efficiently handle private railcars and they largely ignore the role that decisions made by shippers play in how efficiently private cars are handled. When accounting for this, the proposed rule would offset the limited means railroads have to control car inventories and would incentivize railroads to make unnatural, inefficient operating choices regarding private cars, ultimately encouraging greater congestion and leading to less reliable service, longer transit times, and, ironically, less efficient use of all rail cars.

In the current rail service proceeding,³ the Board has received copious evidence from stakeholders about the relationship between excess car inventory and service efficiency. As BNSF has stated throughout that proceeding, the understandable reactions from individual shippers to put more cars online in order to increase their odds to obtain their needed volumes has been a substantial driver of the congestion that has slowed down our network.⁴ The proposed rule would eliminate the downside for private car owners or shipper lessees to engage in such behavior in times of service degradation because even if their additional equipment made a railroad's service worse and contributed to their cars sitting idle more frequently, they would be provided a financial reward for doing so.

The proposed rule would do this by substantially reducing the efficacy of the limited measures railroads have to control car inventories for the benefit of the larger customer base on an ongoing basis. Railroads have essentially two principal tools for managing car inventory:

² Petition for Rulemaking, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Ex Parte No. 768, at 2 (July 26, 2021) ("Petition").

³ Urgent Issues in Freight Rail Service-Railroad Reporting, Ex Parte No. 770 (Sub-No. 1).

⁴ See, e.g., Service Recovery Plan of BNSF Railway Company, *Urgent Issues in Rail Service—Railroad Reporting*, Ex Parte No. 770 (sub nom. 1), at 5 (June 23, 2022).

incentivizing shippers to efficiently use cars via demurrage and the embargo process. BNSF uses activity-responsive fees like demurrage to promote the efficient use of railroad capacity and equipment and to preserve the operational and competitive potential of the national rail network. The proposed rule would undermine demurrage as a means to achieve these goals and would encourage individual shippers to add more cars to the network, increasing congestion and degrading service.

Petitioners attempt to characterize their proposal as simple reciprocity with carrier demurrage policies, but it clearly is not. Under the proposed rule, a railroad would be liable to a private railcar provider for a charge equal to the demurrage charge it could assess the provider whenever the car was held longer than 72 hours at any point along the railroad's network, whereas the shipper would be subject to demurrage only when cars were constructively placed, usually at the yard serving its facility. If an individual shipper perceives a benefit to overloading their car pipeline to get cars to their facility, even the slight moderating influence that the railroad's demurrage charges might have will then be negated by the charges it would collect from the railroad due to the congestion it has helped to create. Petitioners' proposal also runs counter to a key underlying premise of the principles the Board has enunciated regarding carrier demurrage charges. The Board has stated that when demurrage charges are imposed on shippers for situations that are beyond their reasonable control, they do not accomplish their valid purpose of incentivizing good behavior and encouraging efficiency.⁵ Here Petitioners propose a rule that would do just that—penalizing railroads for the consequences of congestion that was caused by car owners or lessors themselves overloading the network with unnecessary inventory.

⁵ See, e.g., Decision, *Policy Statement on Demurrage and Accessorial Rules and Charges*, Ex Parte No. 757 (Apr. 30, 2020).

In an environment where shippers have weakened incentives to control their own car supply, railroads could be faced with unsatisfying choices—make unnatural operating decisions designed only to avoid potential charges, provide separate service plans that benefit private cars at the expense of shipments in railroad-controlled cars (assuming such service plans would even be feasible), consider making investments in railroad-controlled cars that market conditions otherwise would not support, or possibly to employ embargoes more frequently to maintain balance and avoid having yards overwhelmed with excess cars.

The prospect of paying significant charges to private car owners would create incentives to shuffle cars around the network not to achieve efficient overall rail operations, but rather to reduce exposure to demurrage costs by minimizing private car dwell at any given location. Specifically, carriers would be incentivized to move cars from one location to another every 72 hours, regardless of the service plan or the best way to get those cars to destination. Under such rules, operations would not be dictated by what makes sense from an efficiency perspective or a customer's overall transit time, but rather by the need to avoid new and potentially significant costs.

For instance, a terminal in Fort Worth that has cars bound for Chicago may know an inbound train has a substantial block of Chicago-bound cars that would allow the terminal to build a train to move all of the cars directly to Chicago; however, waiting for this inbound train would cause charges to accrue on the cars already present. This prompts the railroad to instead release the cars on a westbound train to be set out at Amarillo, and then picked up by a Chicago-bound train at some later date. Hundreds of miles and several days are added to the cars' journey, but from the perspective of the proposed rule, this would be an optimal outcome as the cars continue to move and do not accrue charges. Utilizing multiple traffic outlets in this manner has been

perceived by shippers to be detrimental to service in the past,⁶ and there is no reason to think shippers would realize a service benefit from the steps railroads would be incentivized to take to comply with the proposed rule.

These service-detrimental operational charges could take other forms as well. For instance, average dwell time may trend longer at large classification yards such as our Argentine Yard in Kansas City. This is natural given the opportunity that exists at these facilities to build long, efficient blocks of cars that can move deep into our network before being handled again, thereby avoiding intermediate classifications that slow transit times. However, the proposed rule would incentivize building trains of smaller blocks that would have to be broken up and reclassified at other terminals in order to clear them out from the large terminal. Likewise, railroads would be incentivized to depart a larger number of shorter trains to manage dwell at large terminals, creating more congestion on the line segments between terminals and requiring additional train meets. Operating in this manner would permit BNSF to avoid charges under the proposed rule but would likely increase the customer's overall transit time by introducing more car handlings.⁷

Adopting the proposal here would seem to send the signal that in making such operating choices, a carrier could and should minimize financial exposure to the enterprise by prioritizing private car shipments on behalf of car owners over shippers utilizing railroad-controlled cars. That approach would have a disproportionately negative impact on many of BNSF's more fragmented

⁶ As alluded to in the AAR's comments, there are significant, unanswered questions about how Petitioners' proposal to establish a private car demurrage regime would interact with the mileage equalization structure that currently applies to private tank cars pursuant to Ex Parte 328, *Investigation of Tank Car Allowance System*. One question, out of many, is how the routing circuitry incentivized by Petitioners' proposal would be treated under the empty mileage calculations pursuant to the mileage equalization system. Notably, a group of private car owners has previously sued the rail industry complaining about the type of routing decisions that Petitioners' proposal would undoubtedly prompt. See, *Cargill, et al. v. Aberdeen & Rockfish, et al.*, Dkt. No. 42117.

⁷ Additionally, such an operating plan would be a greater impediment to intercity passenger service as passenger trains contended with the additional train meets that would be required as it traversed a host railroad's network.

and most truck-competitive market segments. For example, the vast majority of railcars handling chemicals and chemical products, such as plastic pellets, move in privately owned tank cars or covered hoppers, and the majority of coal shipments on BNSF move in privately owned gondolas or open top hoppers. But railroad-controlled equipment predominates in highly truck-competitive market segments such as palletized freight moving in boxcars, lumber and building supplies moving on centerbeam cars, and steel plate and pipe moving on flat cars. Regulatory incentives to favor traffic moving in private equipment to the detriment of truck-competitive commodities moving in railroad-controlled cars would unavoidably make rail a less attractive competitive option to truck for these shippers.

If embargoes became a more frequently utilized tool, railcar providers could find themselves with more stranded assets in cars that cannot be brought online or tendered for shipment, thus resulting in an overall less efficient utilization of private cars contrary to the proposed rule's stated purpose. This is not a hypothetical—the excess car inventory currently on the national rail network already demonstrates that the existing market forces may not be strong enough to discourage shippers from placing too many cars online; it follows that any change in regulatory policy that further weakened these incentives would only make the problem worse.

III. The Proposed Rule Could Render Many Existing Service Products Unviable at Market Rates, Harming Growth and Customer Relationships, and Creating Winners and Losers Amongst BNSF's Shippers

Beyond creating these negative service incentives and outcomes, the proposed rule could eliminate many of the efficiencies that make a variety of service offerings viable at market rates, interfering with market dynamics and pushing increased costs to shippers, which will ultimately drive volume away from rail. The impact of these charges would be felt acutely with respect to the truck-competitive growth traffic that BNSF has focused on. Some of the most truck-competitive

traffic that BNSF handles moves in smaller blocks or individual carloads of private railcars, and BNSF is able to create cost-decreasing service efficiencies for that traffic by allowing cars to gather in yards to create densities. If the Board were to propose and adopt the rules at issue here, that operating strategy would face substantial new hurdles and disincentives that would particularly affect this traffic.

For example, BNSF serves a truck-competitive carload receiver of private tank cars of asphalt located in a remote area north of Albuquerque, New Mexico. The customer is a relatively low volume customer who receives one day per week service. The service plan is sufficient to serve the customer's volume, but it is also necessary from a network perspective because there is little concentration of carload traffic originating or terminating in the customer's specific area, which is on a line that also handles passenger service. Providing more service days would be difficult given the other trains on the line and the lack of demand to sustain the additional day's work for a local train. It is true that the customer's cars may dwell for longer than 72 hours as enough density accumulates to build a local train, but that density allows for the costs to provide the service to be spread among more customers, making the service economically viable. Thus, the service plan works for both the customer and BNSF.

However, under the proposed rule, any one day per week service plan would cause BNSF to incur charges. BNSF must then decide to either recoup those costs directly from the shipper, design a service product that complied with the rule by increasing service days (which would necessarily be at a higher cost), or assume the cost as overhead, which would increase BNSF's costs generally and thus could affect the rates all customers paid. Whichever option BNSF chose, when aggregated over the large number of similarly situated customers, would make our service product less competitive with truck and ultimately result in volume moving from rail to truck.

Another example illustrates how the proposed rule would stifle the development of innovative service products that respond to customer needs. A BNSF frac sand customer in the Powder River Basin (PRB) needed manifest quantities of sand in private covered hopper cars in remote areas where BNSF did not have manifest service. To fulfill the customer's needs, BNSF devised a plan to move sand cars to Alliance, Nebraska to be added to empty coal unit trains bound for the PRB and then be set out en route. This service was tailored to meet the customer's need, but under the proposed rule, BNSF would have been exposed to charges that would have negatively affected the efficiencies of the service for both us and the customer.

In both of these examples, some dwell of the customer's cars is an inherent part of the designed service that is necessary to make the service viable. A proposed rule that pushed railroads to create what would amount to a premium service product for all carload traffic would price these services out of the market. The end result would be frustrated customers who have traffic that is viable to move by rail under prevailing market conditions but cannot, and railroads who cannot compete that business away from other modes.

Finally, the proposed rule would likely create winners and losers among rail customers. This is most immediately apparent with respect to private car shippers versus shippers who rely on railroad-controlled cars to move their product. As discussed above, the proposed rule will incentivize railroads and private car owners to take actions to conform their conduct to the rule, and it is simple enough to see how a railroad might choose to prioritize moving private cars over railroad-controlled cars in an environment where dwell on the private cars causes charges to accrue to the railroad. Thus on its face, the proposed rule creates a different service regime for rail customers who ship in private equipment versus railroad-controlled equipment to the detriment of the latter group.

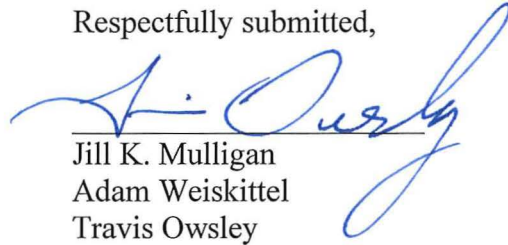
However, the proposed rule will also create winners and losers among customers who ship in private cars. Large shippers who have already invested in large owned or leased car fleets will be able to leverage the increased exposure railroads will face under the proposed rule with respect to their traffic to extract more favorable terms. Smaller customers seeking to compete with the larger incumbents will thereby be disadvantaged. Unlike the benefits that may organically arise from an economy of scale in a functioning market, this will be an economy of scale that is created by regulatory fiat and will amount to the Board placing its thumb on the scale in favor of large shippers.

For example, large shippers in the plastics industry build and release large blocks of cars containing a particular variety of product to be stored in Storage in Transit facilities until ordered by their own customers. When the shipper receives orders, the shipper releases the specified quantity of cars for transportation to the receiver. On the other end of the movement, the receiver is often a small volume receiver that doesn't receive daily service and would thus have to contend with the distorted market forces created by the proposed rule. However, because the large shipper has a substantial fleet of cars that may be on the railroad's network at any given time, the shipper is more likely to extract commercial concessions due to the railroad's exposure to charges under the proposed rule. A smaller plastics shipper that does not possess a large car fleet will necessarily not have the same market power, and thus both the shipper and the shipper's customers will be disadvantaged in the market versus the larger shipper and its customers due to market forces created from whole cloth by this proposed rule. Thus, the negative effects of the proposed rule on competition and growth would affect not only railroads, but the broad spectrum of industries that rely on railroads to move their product and help them grow their business.

IV. Conclusion

BNSF has been able to grow volumes because it has been successful in creating efficient transportation solutions for truck-competitive traffic. The proposed rule would create incentives for private car owners and carriers to take actions that would raise costs and inhibit service. Under the best of circumstances, the conditions created by such actions would make it more difficult for BNSF to compete for traffic, resulting in more freight being transported by truck. In times when conditions are similar to BNSF's and other railroads' current service challenges, the result would be significant harm to the rail network and the public interest. Rather than allowing railroads to make operational decisions to extract the maximum utility of the rail network and drive overall throughput for all customers in a dynamic environment, the rule prioritizes *movement* for just the freight in private cars, whether that movement is productive or not. For these reasons and the reasons articulated by AAR, the petition for rulemaking should be denied and this proceeding discontinued.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J. Owsley", is written over a horizontal line.

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