

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 768

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

**AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
COMMENTS**

American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submits its comments on the Surface Transportation Board’s (“STB” or “Board”) Proposed Rule governing private railcar use by railroads.¹

On July 26, 2021, the North America Freight Car Association (“NAFCA”), National Grain and Feed Association (“NGFA”), Chlorine Institute (“CI”), and National Oilseed Processors Association (“NOPA”) (collectively, “Petitioners”) filed a joint petition for rulemaking proposing that the Board adopt regulations allowing private railcar providers to assess a “private railcar delay charge,” if railroads delay private freight cars beyond a specified period of time. In this proposed rule, the Board invites additional comment on the issues raised in the petition in general, as well as input on a list of specific questions.

AFPM thanks the Board for this opportunity to voice its strong support for these proposed new rules that are even more necessary now with the change in ownership of rail assets

¹ See 87 Fed. Reg. 20370, Docket No. EP 768 “Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads” published April 7, 2022, <https://www.govinfo.gov/content/pkg/FR-2022-04-07/pdf/2022-07349.pdf>

(specifically tank and rail cars) over the past decades. Demurrage charges were developed at a time when the railroads owned most rail cars in North American interchange service. Since then, the railroad industry has evolved to the point that approximately 73% of the railcars in service today – approximately 1.2 million railcars – are no longer owned by railroads, but are private railcars which are purchased or leased, and maintained, by non-railroad entities, including AFPM members.² This paradigm shift in rail car ownership necessitates a corresponding regulatory change. An update to the rules governing the railroads’ use of private railcars is long overdue to incentivize the efficient utilization of the working capital deployed in them, similar to standards railroads have long enforced on shippers and other carriers for their own assets.

The proposed regulatory changes in this rulemaking would provide reasonable demurrage charges and practices that are essential to ensure the efficient flow of commerce on our nation’s rail system. The current rules provide no incentive to the railroads to return shipper-owned rail cars in a timely manner and in turn rail shippers, including AFPM members, are forced to either acquire additional tank cars to transport feedstock and products or slow production at their facilities.

AFPM INTEREST IN THE PROPOSED RULES

AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. We make the products that make life better, safer, and more sustainable. Rail transportation is vital to our

² See “Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads” Docket No. FD EP 768 published July 26, 2021, https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1627328946706/302777.pdf

members, as well as to manufacturers and customers downstream who depend on our products. Refineries and petrochemical manufacturers across the country rely on a healthy rail network as an essential part of their supply chains.

Over the past two decades AFPM members made significant investments in rail assets, including building rail Storage in Transit (“SIT”) yards as well as purchasing and leasing tens of thousands of rail cars. In fact, like the broader network of rail shippers, approximately 75 percent of refiners and petrochemical manufacturers own or lease their rail cars.³

Rail shippers are often saddled with burdensome demurrage tariff charges that are easily triggered; whereas rail carriers face limited to no penalties when they fail to provide an adequate level of service or delay return of a shippers’ asset (the rail car). This situation is inherently unreasonable and one-sided, particularly since rail shippers and lessors are now responsible for the ownership of rail assets. In many of our members’ experience, demurrage is nothing more than a storage charge for their cars sitting idling in rail yards while the railroads miss switches or delivery windows and hold shipper-owned cars for extensive periods of time. With many refiners and petrochemical manufacturers held “captive” to a single rail carrier, there is no practical ability to negotiate service, rate determinations, or demurrage fees.

AFPM members frequently face late or partial rail shipments in direct conflict with agreed-upon service agreements. The result is potential facility slow or shut-downs, lost profits, disappointed customers, and partial orders that disrupt the supply chain and goods delivered to the American consumer. In addition, delayed shipments cause refineries and petrochemical manufacturers to incur overtime or trucking costs to make up for a missed railcar.

³ See “Why We Need Freight Rail Reform” <https://www.freightrailreform.com/wp-content/uploads/2015/02/Why-Rail-Presentation-32415.pdf> published by the Rail Customer Coalition, accessed June 30, 2022.

AFPM appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and finds it encouraging that the STB is seeking ways to make demurrage practices more balanced and equitable. A well-crafted demurrage program that addresses changes in asset ownership will ensure the efficient movement of rail assets and foster a healthy rail network. AFPM urges the Board to act and publish a much-needed update to address the use of private railcars by railroads.

BACKGROUND

Demurrage is subject to Board regulation under 49 U.S.C. § 10702 and 49 U.S.C. § 10746.⁴ Per 49 U.S.C. § 10702(2), the Interstate Commerce Commission Termination Act, requires that a railroad “establish reasonable...practices” related to “transportation and service.” “Transportation” as it is used in 49 U.S.C. § 10702 includes providing assets such as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.”⁵

The board has discretion in handling and oversight of demurrage charges issued by rail carriers. Under 49 U.S.C. § 10746, “[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to: 1) freight car use and distribution; and 2) maintenance of an adequate supply of freight cars to be available for

⁴ See 49 U.S.C. § 10702 <https://www.law.cornell.edu/uscode/text/49/10702> and 49 U.S.C. § 10746 <https://www.law.cornell.edu/uscode/text/49/10746>

⁵ See [Definition: transportation from 49 USC § 10102\(9\) | LII / Legal Information Institute \(cornell.edu\)](#)

transportation of property.”⁶ These regulations require railroads to establish reasonable rates and transportation-related rules and practices, and mandate that railroads determine demurrage charges alongside rules related to those charges, in a way that will fulfill national needs relating to freight car use, distribution, and maintenance of an adequate car supply.

The principle underlying demurrage is straightforward - when a person or entity holds someone else’s assets (*e.g.*, a rail car) beyond a reasonable time, the owner of that asset should be compensated. At the same time, when a person or entity holds someone else’s assets beyond a reasonable time, it negatively impacts the fluidity of the rail network and the broader supply chain and manufacturing operations.

Demurrage charges serve two purposes: (1) to compensate the asset owner for added costs associated with the loss of the use of assets (*e.g.*, compensate the car owner for the use of its assets over an extended period of time); and (2) to encourage entities (*e.g.*, shippers and railroads) to return freight cars to the system promptly, thereby making the entire system more efficient. An efficient rail network is in the best interests of both carriers and shippers; therefore, a reasonable, equitable, and workable demurrage system should benefit all parties and create the proper incentives for shippers, asset owners, and railroads.

It should be noted that demurrage charges were developed in a time when the railroads provided both “transportation” (*i.e.*, the tank car assets per 49 U.S.C. § 10702) and “services” (*i.e.*, the movement of those assets). This is no longer the case as railroads do not provide all “transportation” assets. Specifically, over 73% of tank car assets are owned by rail shippers or rail lessors, not the railroads. Despite this rail carriers are historically the only entities charging

⁶ Per 49 U.S.C. § 10702(2).

demurrage, shippers are not compensated for their assets should they be delayed, and railroads do not pay demurrage.

With respect to demurrage charges, the Board has looked at the policy behind these tariffs several times over the last decades to see if railroads are applying demurrage reasonably. Now, more than ever, the levying of demurrage charges require revision. The Board should rethink the existing demurrage system so that it ensures that the *asset owner* is compensated with demurrage—here, AFPM members, who own the railcars—rather than the railroads reaping the benefits of the asset without the costs.

COMMENTS AND RESPONSE TO BOARD INQUIRES

In response to the Petitioners’ assertion that the Board’s current regulations and policies do not create sufficient incentives for Class I carriers to use private freight cars efficiently, the Board in the proposed rulemaking invited commenters to provide detailed, concrete examples of carriers’ inefficient use of private freight cars. In particular, the Board asks commenters to address 10 topics in a series of specific questions posed in the proposed rulemaking. AFPM provides comment and answers to those questions below.

1. Detailed examples of carriers’ inefficient use of private freight cars

How frequently do carriers hold private freight cars for more than 72 consecutive hours? The Board requests that commenters provide supporting data on the frequency of this occurrence, where available?

AFPM members are directly impacted by the inefficient use of their owned and leased private rail cars. Poor performance by the railroads creates longer transit times of both loaded and empty movements, and these delays frequently exceed 72 consecutive hours. These delays put operations in jeopardy as railcars are needed to maintain production rates at refineries and petrochemical facilities. One challenge AFPM members face is creating accurate metrics for these data, which is not readily available or provided by rail carriers. Some members have even implemented technology solutions such as adding GPS units to railcars to get a better line of sight on the movement of their privately owned cars but this use is limited to higher cost assets and not on the entire fleet.

While the level of impact varies amongst AFPM members and over time, all members surveyed noted that at any given time they have some cars idle for 72 hours or more, with one member noting that at the date of submittal they had over 350 cars in transit delayed more than 72 hours. AFPM members also note that a long-term systemic issue we have experienced is that empty rail cars take on average two days longer than the transit time for loaded tank cars.

To the extent known by the commenter, why do carriers hold private freight cars for more than 72 consecutive hours?

Although railroads would be best suited to answer this question, rail shippers have observed that rail cars are typically held in two locations—major terminals and local serving yards. Private cars held at major terminals are often related to service design issues (e.g., not enough departing trains to handle throughput, available trains are already at tonnage limits and cannot add additional cars) and general congestion. In local service yards delays are often attributed to personnel issues and availability such as holding for power or train crews.

With the implementation of Precision Scheduled Railroading (“PSR”), railroads have reduced the number of service days available to shippers, closed hump yards, storage, and maintenance facilities, missed switches due to crew issues, and experienced many other service issues. AFPM members have noted that the leaning of operations associated with PSR has coincided with increased turn times of private rail cars as well as an increased hold of private cars over 72 hours. For example, one AFPM member noted that mishandling of traffic (*i.e.*, inefficient rerouting such as rerouting a trip from Texas to Oregon through Chicago and Kansas City) has led to a doubling of turn times, making it impossible to adequately serve customers unless this member increases its fleet size.

To the extent known by the commenter, at which location(s) on the rail system are private freight cars held for more than 72 consecutive hours?

Given geographical diversity of AFPM member companies we have witnessed impacts across multiple regions. As stated above, more generally, rail cars are typically held in two locations—major terminals and local serving yards but geographically the problem is nationwide.

How are rail users’ operations, facilities, production, and/or finances affected?

When railroads delay the delivery or return of private cars, rail users are negatively impacted in a variety of ways. These impacts can start small but cascade and ultimately lead to disruption of a facility’s production. These delays have secondary impacts on our ability to serve customers who rely on our fuels and feedstocks.

To combat these impacts rail shippers have had to increase the size of their rail fleets to account for delayed return of shipper owned assets. For example, one AFPM member added

over \$7.5 million of rail car leasing costs (\$1.5 million per year over a five-year contract) to expand their fleet to compensate for rail service issues experienced in 2022.

It should be emphasized that this increase is not a recognition by AFPM members that their fleet size was not optimal under normal service conditions, but rather that service conditions have deteriorated to a point where rail shippers have had to take extraordinary action (*i.e.*, increasing their fleet) is required to avoid facility slowdowns caused by the railroads' service issues. Rail shippers have also made significant investments, tens of millions of dollars, in SIT yards at their facilities to provide them with added protection against slowing production.

When our rail shipper owned assets are not returned in a timely manner, AFPM members may attempt to move products by truck, if feasible. Movement of petrochemicals and refined products by highway truck requires specialized vehicles that are approved by the U.S. Department of Transportation as well as drivers with specific commercial driver's license endorsements. Unfortunately, both drivers and tank trucks are in limited supply. Moreover, trucking typically increases transportation costs by \$10 – \$30 per ton compared to rail transportation. Tank trucks are a much less efficient and environmentally friendly way to move large volumes of product, as one rail car would necessitate 4 trucks for the same shipment of petrochemical pellets or 5 tanker trucks of refined products or crude oil.

If alternative transportation modes, such as trucking, are not available, facility production rate curtailments are necessary until service resumes. Incremental transportation costs related to shifting to trucking and facility curtailments have cost one AFPM member over \$10 million this past year.

Has the frequency and severity of the issue changed with the implementation of operating changes by Class I railroads?

As noted above, with the implementation of PSR, AFPM members have experienced reductions in service days, the closure of hump yards, storage, and maintenance facilities vital to our operations, an increase in missed switches due to crew issues, and many other detrimental service issues. One AFPM member noted that since 2020 the severity and frequency of holding of private rail cars has increased by a factor of three.

2. Alternative Avenues to Pursue Relief

Railroads asserts that Petitioners' proposed regulations are unnecessary because private railcar providers have other avenues to pursue relief, such as through specific service commitments in contracts. AFPM strongly disagrees with this assertion.

Do such contract service commitments include similar terms to the regulations proposed by Petitioners?

There are currently no feasible ways for rail shippers to pursue relief or recoup costs associated with holding of private cars for greater than 72 hours. While contract service commitments may be included for the premium intermodal service offered by rail carriers, this is certainly not the case for non-intermodal shippers. AFPM members have tried unsuccessfully for years to get carriers to include a service-level agreement in private contracts. Given almost 80 percent of AFPM members are captive to a single railroad, those same railroads have incredible negotiating power, and thus will not include service commitments in private contracts under any circumstances.

Class 1 railroads refuse to enter into service agreements that hold them accountable to service a facility on a particular schedule or to move cars on an agreed to level. The biggest flaw

in the Class 1's argument is that the railroad must be willing to agree to a private agreement that includes service commitments, but the fact is that they will not.

If AFPM members were able to get a railroad to agree to include service commitments, any contract stipulations would likely have time consuming hurdles to prove a potential breach of contract. Lastly, even if a breach of contract was proven, the railroad is most likely the only option for transportation, so moving business to another option would be limited.

3. Statutory Authority to Regulate “Car Service”

How would Petitioners' proposal regulate “car service” within the meaning of 49 U.S.C. 1122(a) by “encourage[ing] the purchase, acquisition, and efficient use of freight cars”?

Per 49 U.S.C. § 11122 “car service” includes “the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier.” The petitioners' proposal is consistent with the Board's statutory authorities. The Board already has the authority to regulate demurrage in its current form under 49 U.S.C. § 11122(a) (e.g., railroads charging shippers). Nothing in 49 U.S.C. § 11122(a) precludes rail shippers from collecting compensation, as rail carriers do when they own the rail car. Further as previously noted per 49 U.S.C. § 10702(2), the Interstate Commerce Commission Termination Act, requires that a railroad “establish reasonable...practices” related to “transportation and service.” The petitioners' proposal would regulate “transportation”⁷ – the providing of rail assets – and not “car service” – the movement of those assets. The petitioners' proposal creates an incentive for railroads to

⁷ Per 49 U.S.C. § 10702 “transportation” includes providing assets such as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.”

efficiently use assets owned by other entities and this is common practice across all modes to implement penalty fees for improper use of equipment (i.e., ocean containers).⁸

To what extent is a finding of inadequate car supply a prerequisite for the Board to adopt Petitioners’ proposed regulations?

A “finding of inadequate car supply” is by no means a prerequisite to adopt the petitioner’s proposal. The issue at the heart of this matter is how carriers move private equipment, not the supply of available rail cars. The appropriate size of the rail fleet is a function of rail service. In AFPM members’ experience, the size of a rail fleet is adequate if a reasonable level of service is provided, which currently is not the case. Flawed implementation of PSR has resulted in unreasonable levels of service and this led many shippers to increase fleet size so they may remain agile.

Put simply, there are sufficient rail cars in North America to meet demand if cars were promptly returned to service. It is the lack of service performance that requires an increased supply of private cars to satisfy the same demand tonnage that creates the appearance of inadequate car supply. The petitioners’ proposal would solve the issue at heart of this matter—inefficient use of someone else’s asset.

Do rail users currently lack access to an adequate supply of freight cars or anticipate a future freight car shortage?

Rail shippers have inadequate access to operable rail cars due to service issues. Rail shippers’ access to adequate supply of freight cars is limited due to the increased number of cars

⁸ For example, see [46 U.S.C. 41102\(c\)](#).

required to meet demand in the current performance environment and railroads purposely storing system assets to reduce congestion. Should performance return to normal, we do not anticipate a shortage of freight car supply.

Petitioners contend that their proposed regulations would “result in the national railcar fleet being of a more rational size to utilize existing rail system capacity and meet demand.” How would the proposed regulations lead to a more rationally sized freight car fleet?

As rail shippers are currently subject to demurrage charges, our members have firsthand knowledge that penalties will in fact encourage operations that minimize those penalties. Railroads will have a similar incentive to limit their own demurrage exposure.

Railroads would invest in the resources needed, or reintroduce mothballed equipment or furloughed staff, to move the freight if they were penalized for holding railcars. In fact, railroads may revisit some of the PSR related cost cutting mechanisms they put in place realizing that some PSR operational changes made the network less, not more efficient. This will force them to focus on providing a better service product which will result in greater velocity. Higher velocity means shorter cycle times which will require fewer cars to move volumes. The railroads must have an incentive to move cars as safely, efficiently, and quickly as possible. To the extent that those incentives align, fewer overall cars will be required to move the same tonnage in demand.

How would a more rationally sized freight car fleet ensure an adequate supply of freight cars?

Supply of rail cars is a separate market, and AFPM will defer to car manufacturers on that issue. That said, as recent government mandated tank car fleet upgrades for both flammable

liquids and toxic by inhalation materials have shown, the manufacturers of railcars have been able to adjust production to meet demand.

4. Impact of Proposal on Railroad-owned Freight Cars

How would Petitioners' proposed regulations affect rail users that do not use private freight cars? For example, some argue that the proposed regulations would create incentives for carriers to prioritize private freight cars to the disadvantage of railroad-owned freight cars.

Both private rail car owners and railroad car owners would be positively impacted by a better performing railroad network that would be fostered by more equitable and balanced demurrage regulations. In a variety of forums rail carriers have noted that demurrage charges are meant to drive efficiency and are not used as a revenue stream for the railroads. The same principle should hold for so-called “reverse” demurrage. Having the carriers subjected to reverse demurrage will incentivize them to run their networks more efficiently and that cannot happen if they are picking favorites between car ownership type or commodity type (*i.e.*, intermodal shipments or the most profitable commodities).

In addition, the Association of American Railroads (“AAR”) Code of Car Hire Rules employed already incentivizes railroads to efficiently use system-owned cars.⁹ If moving their own cars, they are incentivized to move cars to obtain the highest possible revenue (time and mileage-based). If moving another carrier’s asset, the railroads are incentivized to return the car to home line as quickly as possible to avoid paying excess car hire. The Class 1s have proven to

⁹ Car Hire rules are promulgated by the AAR and govern rental paid by a user of rail equipment to the owner of that equipment. See FREIGHT TARIFF RIC 6007-O issued April 25, 2022, effective May 20, 2022, https://public.railinc.com/sites/default/files/documents/RIC_6007_O_05-20-22_iss_Apr25.pdf. See also Association of American Railroads, Circular No. OT-10, in effect as of June 1, 2022. <https://public.railinc.com/sites/default/files/documents/OT-10.pdf>

be very sensitive to the pooling agreements that govern railroad-owned cars. The proposed rules would put privately owned cars on a similar footing to those owned by the railroads and bring to bear the same efficiency incentives.

5. Due Diligence/ Burden of Proof

Petitioners propose that charges would be assessed unless “the rail carrier demonstrates that it was not a cause of the [72 hours] being exceeded despite exercising due diligence.”

In what kinds of circumstances should carriers be able to show that they were not “a cause” of the 72 hours being exceeded?

Natural disasters or other force majeure (weather, derailments, civil unrest) events would be examples of events for which carriers may not be held accountable. Beyond these events, imposed embargoes from receiving railroads beyond the handling line’s control would be another area where a railroad might demonstrate it was not the cause of the delay.

The Board’s “Policy Statement on Demurrage and Accessorial Rules and Charges” published in May 2020 stated that “charges generally should not be assessed in circumstances beyond the shipper's or receiver's reasonable control.” This policy statement also provides examples and guidance of what is beyond an entity’s “reasonable control.”¹⁰ The Board should look to this Policy statement to ensure that “reasonable control” is defined consistently for rail shipper and railroads.

¹⁰ See 85 Fed. Reg. 26866, Docket No. EP 757 “Policy Statement on Demurrage and Accessorial Rules and Charges” published May 30, 2020, [Federal Register :: Policy Statement on Demurrage and Accessorial Rules and Charges](#)

What kind of actions should constitute “due diligence”?

The appropriate due diligence required of rail carriers should include good faith efforts to secure alternate or relief routing, and/or demonstrated attempts to interchange with receiving railroad that have been unsuccessful. The Board should apply its recently implemented demurrage policy statement in this area.

How would this standard account for the possibility that carriers may hold private freight cars longer than 72 consecutive hours to improve the overall efficiency of the rail network?

The practice of holding private rail cars for longer than 72 hours is often done not to improve overall network efficiency but rather to support, and favor, the most profitable business. It is our experience that railroads prioritize certain business like the premium intermodal business over manifest shipments, as it benefits them financially. So, while this existing practice might efficiently move preferred customers’ freight it certainly does not equate to a more efficient network for all. Evaluating network efficiency should encompass a broader set of externalities such as inefficiencies for all rail customers

The proposed standard will incentivize rail carriers to give equal service treatment to all customers. The standard will also incentivize the railroad to properly staff up and provide the needed resources to run their railroad. Shippers will be less likely to be told that the railroads do not have crews or locomotives to run traffic.

How would this standard account for rail users’ own car supply decisions? For example, railroads argues that the proposed regulations would “incentivize shippers to acquire additional freight cars and deploy them during service disruptions, despite their potential to contribute to congestion problems.”

Currently, rail shippers are incentivized to increase their supply of rail cars to overcome the service problems created by PSR, as rail shippers must move freight to a destination most efficiently to remain competitive. Timely return of private cars, which railroad responsible demurrage would incentivize, would counter the fleet increases rail shippers are currently resorting to.

Regarding localized disruptions, AFPM members would seek alternatives to route around the disruption. System wide disruptions such as AFPM members are currently experiencing, are entirely within the railroad's control to mitigate and prevent with intelligent service design and staffing plans. This assumes there is no dialogue between carrier and customer in times of disruption which will certainly cause the network to fail, as is happening now.

6. Impacts on Rail Network Efficiency

The Board requests that commenters provide data, where available, to support claims that the rail network would be more (or less) efficient because of Petitioners' proposed rule.

AFPM does not have any specific data, as currently, railroads have no deterrents, such as demurrage fees, that would punish them for not efficiently moving a rail shipper owned asset. This lack of data is simply due to the inability of rail shippers to charge demurrage. That said, the fundamental principles of demurrage that the Board uses to justify allowing railroads to charge demurrage should work when the roles of shipper and carrier are reversed.

AFPM members are very aware of accessorial and demurrage charges and implement practices that improve efficiency to minimize these costs where possible. No data is needed to deduce that railroads would do the same if they knew holding cars for an unreasonable amount of

time would cost them revenue, particularly when railroads are currently laser focused on reducing operating ratios.

Under Petitioners’ approach, to what extent would carriers have incentives to make potentially inefficient movements solely to avoid charges?

Unfortunately, this practice already happens today via the railroads’ own benchmarking metrics on dwell and velocity. These metrics incentivize local operating personnel to send cars to wrong destinations to avoid impacts to the metrics which govern local management pay and incentives. Multiple AFPM members have experienced such inefficient movements. This should not discourage the Board from addressing a very real problem. AFPM members are confident that the metrics proposed in our comments to the First Mile / Last Mile (“FMLM”) rulemaking docket EP 767 would provide the Board the tools it needs to track such movements and alert the Board to the behavior.¹¹ This data would also potentially identify instances where the delay is beyond the railroad’s control.

7. Measuring and defining inefficient use of private rail cars

Under Petitioners’ proposed regulations, private railcar providers would be able to assess charges if the Car Location Message (“CLM”) location city of CLM Sighting Code of a private freight car has not changed for more than 72 consecutive hours.¹²

¹¹ See comments to STB Docket No. EP 767, “Opening Comments of the American Chemistry Council, American Fuel & Petrochemical Manufacturers, and The Fertilizer Institute” filed December 17, 2021; https://www.afpm.org/sites/default/files/issue_resources/EP767_Shipper_Assns_Opening_20211217.pdf and “Comments Reply Comments of the American Chemistry Council, American Fuel & Petrochemical Manufacturers, and The Fertilizer Institute” filed February, 2022 https://www.afpm.org/sites/default/files/issue_resources/EP767_JS_Reply_20220217.pdf

¹² Car Location Message is a specialized type of Electronic Data Interchange message that is used by the railroad industry to track the movements of railcars. See <https://public.railinc.com/products-services/messaging->

Why is 72 hours an appropriate timeframe and not, for example, 48 hours or 96 hours?

Railroad service plans do not place cars on dwell reports until they are idle for 72 or more hours. This is consistent with railroad service plans. Most service design plans have trains run at least every other day for crewing reasons, so 72 hours would provide a realistic opportunity for rail carriers to move a car and avoid demurrage.

Why should charges be based on when cars are idle for more than 72 consecutive hours, as opposed to, for example, overall transit idle times for the entire trip or when the placement of private freight cars exceeds projected transit times?

Using entire trip time could inadvertently bias longer trips and create an incentive against long haul freight, (i.e., smaller delays on a long trip add up more than on short trips). If a metric of overall trip delay could be created based on lane length, this metric may be effective. The railroads currently measure their own success by terminal dwell (among other metrics) and using the idle time measurement is a way to hold them accountable to their existing benchmarks.

Are CLM Event Sighting Codes a practical way to measure idle time?

CLM Event Sighting Codes are the only means available to shippers today and since it is used for current demurrage calculations, the Board should use it for accessing fees on railroads for inefficient use of rail shipper owned assets. AFPM acknowledges CLM codes have flaws (e.g., CLM code generated by a work order vs. car passing a reader), but there is no other viable alternative objective measure currently. AFPM does see an opportunity for the Board to develop

[service#:~:text=CLM%20%E2%80%93%20Car%20Location%20Message%20\(CLM,reported%20by%20over%20460%20railroads.](#)

FMLM metrics, in concert with this rulemaking, that could serve as a basis to determine inefficient use of private rail cars.

At what point should the timeframe begin?

The timeframe should be based on scheduled pickup based off the original trip plan. Regardless of when a shipper offers a railcar, the railroad has a scheduled window to pick it up based on the service schedule for a given industry. Once the first available service window to receive a railcar has passed, the 72-hour demurrage calculation should begin. This would give the railroad three additional days to receive a railcar or be penalized. Similarly, if in transit, once a railcar has missed its scheduled departure window for a train, the 72-hour calculation should begin.

If the 72-hour timeframe begins when private freight cars are released, how would this timeframe apply to rail users that receive service only once or twice per week?

The desired outcome would be that carriers would agree to more frequent service but if carrier and shipper agree on one or two day per week service then the 72-hour clock could begin after a service miss on a regularly scheduled service day. Railroads should be expected to provide make-up service after a missed service event if there is no scheduled service within a 72-hour timeframe to provide adequate competition to alternate modes of transportation.

8. Calculation of “Private Railcar Delay Charge”

Petitioners’ proposal contemplates that the amount of the “private railcar delay charge” would correspond to the carrier’s applicable demurrage or storage charge unless the carrier could

demonstrate that such a charge would be “unreasonable and inappropriate” in a particular situation.

Is it appropriate for the Board to equate the amount of the “private railcar delay charge” to a demurrage or storage charge in most cases?

Yes, this places both parties on equal footing.

To what extent are there practical alternatives to equating Petitioners proposed “private railcar delay charge” to a demurrage or storage charge and what are the merits of those alternatives?

The primary practical alternative would be to make such private cars eligible for time-based car hire under the AAR Code or Car Hire Rules. The merit of such a system would be that a mechanism to calculate, bill, and pay such charges already exists in the AAR Car Hire Accounting Rate Master (“CHARM”) and Car Hire Data Exchange (“CHDX”) systems.¹³

9. Regulatory Implementation

Which party would be responsible for tracking the CLM Event Sighting Codes for private freight cars and invoicing in accordance with the proposed regulations?

AFPM members see two potential options for invoicing. First, rail shippers could be responsible. Rail shippers would implement this in the same manner the railroads currently

¹³ CHARM helps users manage and understand the costs of rail car use and repair. CHARM is the official source of time and mileage rates on freight cars. The rates contained in these customized files are confidential to each owner and user. They contain rates effective for the current month and are updated each subsequent month with the appropriate deprescribed or prescribed rates effective for the month. CHDX supports the periodic (post-operation) exchange of information to clarify payables and receivables. CHDX is a monthly exchange of time and mileage payment information. See [Car Hire | Railinc](#)

handle the demurrage charges they issue. In this case the shipper would also have the authority to accept or deny disputes, just like the railroads do but all actions would fall under the current demurrage policy statement the Board recently finalized.¹⁴ The benefits of this path forward are that it is consistent with the current regulatory regime.

An alternative mechanism would be for railroads to track this and deduct from the total freight bill or provide some credits. While rail carriers would currently have the operational expertise and systems to track this information (e.g., Railinc), rail shippers are concerned this would lead to disputes of charges. While the Board has made efforts to improve demurrage invoicing and disputes there are still discrepancies.

Joint Shippers suggest that the Board could require carriers to credit charges against their demurrage invoices. How would compensation be handled under this proposal for rail users that do not incur demurrage charges or incur fewer charges than would be owed pursuant to the proposed regulations?

AFPM members would support direct payments or credits on the corresponding trip's linehaul freight bill or as a credit memo to the overall balance a shipper owes. This could be aligned with current credit systems the railroads have in place, and a consistent period of time (e.g., quarterly or annually) for payments should be established by the Board.

10. Applicability of Regulations

¹⁴ See 85 Fed. Reg. 26866, Docket No. EP 757 “Policy Statement on Demurrage and Accessorial Rules and Charges” published May 6, 2020, <https://www.federalregister.gov/documents/2020/05/06/2020-09682/policy-statement-on-demurrage-and-accessorial-rules-and-charges>

How would Class II and Class III carriers be impacted by the proposed regulations, if limited to Class I carriers?

AFPM supports focusing this regulation on the Class 1 railroads. Many Class II and Class III carriers do not have the ability to generate CLMs. If CLM is the measure of delay, then an alternative metric would need to be chosen to be effective with other carriers. Typically, Class II and Class III railroads work much more collaboratively with shippers and are not hindered with the same performance issues as the Class Is.

CONCLUSION

AFPM commends the Board for considering ways to make demurrage and accessorial charges more equitable and reflective of the current rail asset ownership environment. Updating the Board's demurrage process will improve rail network fluidity and is essential given the service disruptions rail shippers are currently experiencing as a result of overly aggressive reductions in operations related to PSR implementation. The proposed rule changes in this rulemaking would ensure the efficient flow of commerce on our nation's rail system and AFPM appreciates consideration of our comments.

Respectfully submitted,



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