

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 768

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

PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION COMMENTS

Private Railcar Food and Beverage Association (“PRFBA”) submits these comments in response to the April 1, 2022 Surface Transportation Board (“STB”) Decision in the above-captioned proceeding which sought comments regarding a petition by the North America Freight Car Association, The National Grain and Feed Association, The Chlorine Institute, and The National Oilseed Processors Association to adopt regulations governing railroads’ use of private freight cars and several specific related issues.

PRFBA INTEREST IN THE PROPOSED RULES

PRFBA is comprised of 18 global food and beverage companies and manufacturers headquartered in North America. These members include PepsiCo, Inc., Molson Coors Beverage Company, KraftHeinz Food Company, General Mills, Inc., McCain Foods USA, Inc, Sysco Corporation, Bonduelle America, Boardman Foods, Inc., G3 Enterprises, Inc., JD Irving/Cavendish Farms, The Martin-Brower Corporation, Lamb Weston Holdings, Inc., Univar Solutions, Darigold, Inc., Kellogg Company, Land O’ Lakes, Inc., National Sugar Marketing, LLC, and Leprino Foods. They are major rail shippers that rely on the railroads to produce and distribute their food and beverage products that are vital to the health and welfare of our nation.

These companies are responsible for feeding the citizens of this nation. Without adequate rail service, their food and beverages will not be on store shelves in the US. Moreover, during this period of inflation, the last thing these companies need is additional expenses caused by poor rail service which have become more commonplace over the past year.

PRFBA members meet regularly to discuss opportunities and solutions to their “similar” challenges with railcar service. The membership collaborates with other trade associations with regard to industry changes and proposed legislation and regulations that directly impact the association’s food and beverage transportation needs. PRFBA meets with the Class I North American railroads where group discussions are held on rail service issues unique to its membership. PRFBA provides its members with a forum to work together to harness the railroad service challenges ultimately providing a better industry foundation for private railcar food and beverage shippers in North America.

PRFBA appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve rail service in our nation in line with the intent of Congress. These rules are especially appropriate now considering the self-inflicted rail service problems that presently plague our nation. The Board has made it clear that the railroads’ irresponsible job cuts under the guise of Precision Scheduled Railroading have been the primary cause of these service issues. However, the railroads have been extremely slow to respond to these problems and have even ignored the STB’s request for plans to restore service to an adequate level. Therefore, it is absolutely necessary to have the proposed rules in place to compel railroads to behave in a manner consistent with their common carrier obligation. Otherwise, the railroads will continue to shirk their responsibilities to their customers and the public.

PRFBA STRONGLY SUPPORTS THE PROPOSED RULES

Petitioners' proposed rules address a profound need to adopt regulations that reflect changes in the rail industry over the last five years. Rail carriers owned the majority of railcars when demurrage charges began, but today private businesses own some 73 percent of railcars – and 100 percent of rail tank cars and other specialized cars. It should come as no surprise that rules developed prior to a sea-change in railcar ownership no longer protect the right parties. Rail carriers with less skin in the game now lack sufficient incentive to be efficient in moving private railcars. In today's rail industry, a framework that assesses demurrage charges to carriers without commensurate protection for freight car owners is wholly one-sided. As Petitioners state:

[C]urrent railroad common carrier demurrage, storage, and accessorial practices and charges were implemented and drafted for the purpose of creating incentives for a railroad's customers and other parties to maximize *their* efficient use of railroad and private railcars for the *railroad's* benefit. In contrast, there are no Board regulations and very few, if any, Class I railroad tariff provisions, that create incentives for a *railroad* to maximize the efficiency with which it possesses and uses Private Railcars....

The proposed rules seek to ensure modern rail regulation matches the interests of the modern rail industry, one in which railcar owners should be better protected from inefficient decisions of rail carriers. PRFBA urges the STB to not let the existing rules sit idle.

Petitioners long-needed proposal addresses the rail industry as it is today. At their core, the proposed rules would allow private railcar providers to assess a charge when a private freight car does not move for more than 72 hours at any point on a railroad's system between the time it is

“released for transportation” and the time it is “either constructively placed or actually placed at the private railcar provider’s facility or designated location.” These proposed rules are necessary to encourage the efficient use of private freight cars because carriers do not presently have sufficient incentives to use private freight cars efficiently. Moreover, the proposed rules are needed to compensate private railcar providers for the costs they incur when carriers use private freight cars inefficiently.

Petitioners propose that charges would be assessed using Car Location Message (CLM) Event Sighting Codes published by Railinc. When the CLM location city has not changed for more than 72 hours, rail carriers would be charged at a rate equivalent to the greater of the carrier’s demurrage or storage charge. The proposed rules appropriately build on existing principles regarding demurrage and accessorial charges, and charges would be assessed only if a rail carrier cannot demonstrate that it did not cause the delay after exercising due diligence. The rules provide for a dispute mechanism whereby carriers are given the opportunity to prove the charge is unreasonable and inappropriate.

Such a framework would provide carriers a necessary commercial incentive to efficiently move private railcars and would give private railcar owners needed protection. The costs of owning and maintaining private freight cars have increased significantly in the last decade, and private freight car owners should be compensated for costs incurred due to rail carrier inefficiency. Moreover, carrier inefficiency hurts shippers’ efforts to keep their fleets to a rational size:

If there are too many railcars in a fleet for a shipper's production rates and transportation needs, they constitute expensive unused assets that result in costs not associated with any revenues. By the same token, a railcar fleet that is too small... can result in missed sales opportunities caused by sub-optimal production, because insufficient raw materials would then be received and finished outbound products could not be made and delivered to end-use customers. In the worst case, a lack of sufficient railcars in use caused by a railroad's failure to pick up or deliver railcars for an extended period of time can result in plant shutdowns and employee layoffs.

Because private railcar owners often lack the commercial strength to negotiate service-standard contract provisions, and because they often lack clarity and guidance regarding violations of the common carrier obligation, the proposed rules would serve as a necessary check on rail carrier's abuse of power and as an incentive to increase their efficiency. Indeed, when railroads provide inadequate service, shippers are forced to buy or lease more private rail cars because cycle times are slow. As a result, the railroads' inefficiencies create the need and use of more rail cars on the network further compounding rail congestion. However, if the railroads were incentivized to perform more efficiently when handling private rail cars, the massive rail network congestion that is occurring now would be lessened.

Moreover, when carriers unnecessarily leave private railcars idle, railcar owners are unable to generate returns on their assets, and commerce is slowed. Brainerd Chemical crystallized the situation on the ground in its comments to STB in EP 754:

If these cars are delayed because of railroad inefficiencies, my company is moving less product, which negatively impacts our bottom line. A specific instance occurred at our Danville facility when CSX reneged on a commitment to switch four rail cars with product into our yard. This caused our plant to shut down, our part-time workers to be furloughed, and delays for our customers on their orders.

Similarly, a PRFBA member, KraftHeinz, has a facility in North Florida that is single served by a Class I railroad. The railroad was unable to serve this facility adequately causing it to shut down production on at least one occasion for a week. To add insult to injury, the railcar that could have kept this plant operating sat idle for a full week in eyesight of the KraftHeinz facility. Despite numerous pleas to the railroad, nothing was done to remedy the situation despite these dire consequences. Private railcar owners, downstream businesses, and consumers bear the weight of rail carrier inefficiency.

Importantly, rail carriers object to the proposed rules precisely because they would force carriers to change their behavior to be more efficient. This proposal has the carriers' attention. Rail carriers take no issue with demurrage when the money flows in their direction and incentivizes the efficiency of others; but when compensation to freight car owners is on the table, the carriers plead that they have ample commercial incentives already and they try to diminish the Board's power to regulate this area of rail. With the statutory goal of 49 U.S.C. §11122(a) to "encourage the purchase, acquisition, and efficient use of freight cars" in mind, we urge the Board to embrace the proposed rules, giving freight car owners and dependent businesses and consumers the tools to get carriers moving.

Based on the foregoing discussion, PRFBA fully supports the Board instituting the new rules.

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