

**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**

U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION COMMENTS

The U.S. Clay Producers Traffic Association (“USCPTA”) respectfully 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.

USCPTA INTEREST IN THE PROPOSED RULES

The USCPTA was formed on January 16, 1953 as a non-profit trade association dedicated to the goal of furthering transportation knowledge of members engaged in industrial mineral production through group discussion of common experience and concerns and the sponsoring of educational forums designed to inform members of technical and regulatory developments. Unlike other transportation groups dedicated to general topics of transportation, The USCPTA has focused specifically on monitoring governmental regulation and carriers’ rules and tariffs affecting the transportation of clays, nonmetallic minerals, earths, ores, aggregates, and similar minerals.

The USCPTA's earliest focus was on railroad transportation regulated by the Interstate Commerce Commission and over the years has expanded to also involve truck, air, and ocean transport and engaging with the various domestic and international governmental and non-governmental organizations which bear oversight impacting transportation. Its mission is to promote the common interests of members on transportation issues, in recognition of the emerging issues members face in their export trade and to advocate initiatives and educational forums to encompass multiple forms of product transportation and supply chain management.

The USCPTA 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. *See Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub-No. 1) (STB served May 6, 2022). The STB 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. *Id.* However, the railroads have been extremely slow to respond to these problems and have even underperformed when the STB requested plans to restore service to an adequate level. Therefore, it is absolutely necessary to have the proposed rules adopted. *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub-No. 1) (STB served June 13, 2022). Otherwise, the railroads will continue to shirk their responsibilities to their customers and the public.

USCPTA 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. The USCPTA 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. 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 the 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.

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 STB'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, the USCPTA urges the STB 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, the USCPTA fully supports the STB instituting the new rules.

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