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STB Docket No. EP 768

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

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Reply 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 reply comments related to the Board’s April 1, 2022, request for comments (“Request”) in this proceeding.

Railroad comments in response to the Request mischaracterize the proposed rules as unnecessary, counterproductive, and impractical to implement. First, although railroads claim that they have adequate incentives to handle private cars efficiently, these incentives are weak and not automatic, allowing railroads to pursue cost-cutting measures at the expense of private car providers. Second, railroad concerns that the proposed rules will degrade operations overlook several facts, including that dwell times exceeding the 72 hours allowable under the proposed rules are not a normal part of rail operations, the proposed rules do not hold railroads accountable for excessive dwells that they do not cause, and shippers<sup>1</sup> have strong incentives to avoid making excessive shipments to generate delay charges. Also, concerns that the proposed rules could lead to gaming or reduce flexible service options can be addressed with minor adjustments to the rules. Third, although railroads claim that certain characteristics of the delay program under the proposed rules make it impractical to implement, these are features that the program shares with the railroads’ demurrage<sup>2</sup> programs. At bottom, the

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<sup>1</sup> In these comments, “shippers” refers to shippers who own or lease private cars to make rail shipments.

<sup>2</sup> Unless otherwise indicated, references in these comments to demurrage include private-car storage.

proposed rules are necessary and appropriate to discourage railroads from cost-cutting measures and other operational decisions that lead to excessive private-car dwell, which places significant burdens on shippers who rely on private cars.

**I. The proposed rules are necessary to encourage efficient handling of private cars.**

While railroad commenters claim that they have strong incentives to handle private cars efficiently, they fail to identify any automatic incentive that flows from inefficient dwells. They instead identify incentives that are illusory, have almost no tie to inefficient car dwells, or do not discourage a wide range of inefficient handling. Moreover, even with these incentives, railroads have been laser-focused on cutting operational costs at the expense of inefficiently handling private cars.

**A. Railroads do not have an automatic incentive to avoid inefficient dwell of private cars.**

No railroad commenter has identified an automatic incentive to avoid inefficient private-car dwell, nor could it. Railroads face no automatic incentive to avoid excessive private-car dwells.

For instance, railroads do not provide compensation for using private cars during dwells. Under the existing compensation system for using private cars, railroads pay a mileage-based rate called a mileage allowance, if at all. While mileage allowances provide an automatic incentive to reduce route mileage, they provide no incentive to constrain car dwell to efficient levels.

Railroads also do not automatically incur other operational costs when they cause private cars to dwell for extended periods. If dwell occurs at a yard that has capacity to hold the car, the dwell would not impact operations or materially add to

operating or plant costs, since the railroad incurs the cost of the yard space and the switch to or from the dwell regardless of the dwell length.

For these reasons, railroads have flexibility to cause private cars to dwell inefficiently without considering the burden on private car fleets or incurring additional operating costs.

**B. Railroad incentives to handle private cars efficiently are weak.**

Although railroad commenters claim they have strong incentives to handle private cars efficiently, the only incentives they identify are illusory, tenuously related to railcar handling, or ineffective at discouraging a wide range of inefficient conduct.

Among the illusory incentives, railroads suggest that they will earn more revenue if they use private cars efficiently because it frees cars so shippers can make more shipments.<sup>3</sup> But this contradicts railroad commenters' assertions that shippers have enough private cars.<sup>4</sup> It also ignores that shippers who use private cars already have a strong incentive to move their shipments by rail: their investment in their private car fleet. To the extent these shippers use trucks to handle shipments that could move by rail, it usually is on a one-off basis to avoid a supply disruption arising from a rail service issue. These shippers otherwise

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<sup>3</sup> Ass'n of Am. R.Rs. (AAR) Comments 7; Union Pac. R.R. (UP) Comments 8.

<sup>4</sup> AAR Comments 29 (“[T]here is no shortage [of railcars].”); Norfolk S. Ry. (NS) Comments 4 (“[N]o car supply problem exists.”); UP Comments 6 (“Petitioners present no evidence of a nationwide freight car shortage or other long-term freight car supply issue.”).

account for inefficient dwell by adjusting the cadence of their rail shipments, not by avoiding rail shipments.

The Association of American Railroads (AAR) similarly asserts that efficient handling of private cars helps railroads gain and retain market share.<sup>5</sup> But private cars are most prevalent for transportation over which a rail carrier possesses substantial market power, which means there is little risk that a rail carrier will lose market share based upon its handling of private cars. For example, railroads possess substantial market power over traffic moving in tank cars, which are all private.

Railroad commenters also suggest that railcar handling commitments in transportation contracts provide an adequate incentive to handle private cars efficiently.<sup>6</sup> Yet, as Coalition Associations explained in their opening comments, these commitments are rare and generally aspirational, with few, if any, consequences.<sup>7</sup>

Among the incentives that are tenuously tied to efficient private car use, AAR suggests that railroads have incentives to operate private cars efficiently because they seek operating efficiency.<sup>8</sup> But the operating efficiency railroads seek does not automatically translate to efficient use of private railcars. As AAR states, railroads

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<sup>5</sup> AAR Comments 7–8.

<sup>6</sup> AAR Comments 9; UP Comments 12.

<sup>7</sup> Coalition Ass'ns Comments 6.

<sup>8</sup> AAR Comments 8.

operate more efficiently when they reduce their costs.<sup>9</sup> Since expenses from operating trains far exceed those of maintaining storage track infrastructure, railroads can achieve their version of greater operating efficiency by running fewer trains, even if that means increased car dwell between handling events.

AAR also claims that railroads' incentive to use their own cars efficiently flows through to private cars, since they move alongside railroad-owned cars and railroads treat them the same as railroad-owned cars.<sup>10</sup> But no railroad commenter provides data showing that it treats railroad-owned and private cars similarly. Additionally, since railroads prize returns on investment,<sup>11</sup> they have a strong incentive to single out railroad-owned cars for special treatment that allows high car utilization despite cuts to operating staff and resources. Further, nothing indicates that singling out railroad-owned cars for special treatment is impractical, especially since they are the vast minority of cars on the rail network.<sup>12</sup>

Among the incentives that discourage only highly inefficient dwells, AAR points to the cost of consuming network resources.<sup>13</sup> But extending car dwell does

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Pet. 28–29, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, EP 766 (Sept. 1, 2020) (arguing that railroads cannot effectively compete for capital unless they earn a return on investment better than half of S&P 500 firms); AAR Comments 8, *R.R. Revenue Adequacy*, EP 722 (Nov. 26, 2019) (arguing that railroads must earn returns on investment substantially above their cost of capital over a sustained period).

<sup>12</sup> Pet. 1.

<sup>13</sup> AAR Comments 9.

not automatically consume network resources, aside from track space, since the car would not necessarily need additional handling. Also, consuming track space by extending dwell does not pose an issue until the railroad runs out of track capacity. And even when a railroad runs out of track capacity for car dwells, adding additional capacity may be cheaper than providing the additional train operations to prevent the dwell. Thus, the consumption of network resources provides little incentive to avoid extended dwells until the dwells become so significant that they consume a substantial portion of available track capacity.

Along similar lines, Union Pacific Railroad (UP) posits that railroads have strong incentives to keep cars out of yards because yard congestion can quickly get out of hand.<sup>14</sup> While yard congestion could quickly increase from weather or other unforeseen network events, that does not mean that railroads have a strong incentive to avoid excessive dwell at all costs. Instead, all yards likely have a point beyond which they will not have enough capacity to handle demand fluctuations. Further, despite the risk that yard congestion problems can form quickly, railroad commenters state that they purposely hold cars in their yards for extended periods.<sup>15</sup> Railroads thus choose to dwell cars despite congestion risks.

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<sup>14</sup> UP Comments 8–9.

<sup>15</sup> BNSF Comments 7; NS Comments 21. *See also* BNSF Comments 5 (explaining that longer dwells allow BNSF to build longer car blocks).

**C. Absent appropriate incentives to handle private cars efficiently, railroads have pursued greater operating efficiency at the expense of private-car providers.**

Despite railroad commenters' claims that they have strong incentives to handle private cars efficiently, their operational decisions in recent years show little regard for efficient handling of private cars.

Today's rail-service crisis reflects that railroad incentives to use private cars efficiently are not strong. Strong incentives would subject railroads to a cost reflecting the immense burden that inefficient handling places on private-car providers. But railroad operational decisions do not reflect *any* cost of inefficient handling. Railroads instead have pursued extensive cuts to their operating expenses, all but guaranteeing inefficient private car handling except in ideal conditions.

For example, railroads cuts to operating personnel and equipment have left them with essentially no resiliency to handle fluctuating demand or normal operating challenges. In 2019, before the first confirmed Covid case in the United States and while railroads were reducing train operations as they implemented precision scheduled railroading, Class I train crews dropped by 13% and maintenance of way and stores personnel by nearly 17%.<sup>16</sup> Railroads have been

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<sup>16</sup> STB, Employment Data for All Railroads (Dec. 2019), <https://www.stb.gov/reports-data/economic-data/employment-data/>.

operating with essentially skeleton staffing ever since,<sup>17</sup> and nearly every Class I railroad is experiencing chronic service issues.

Railroads have little to lose by pursuing lower operating ratios without considering the impact on private-car providers. The only form of compensation for using private cars are mileage allowances. So, if a private car sits on otherwise empty track for longer periods, the car provider almost always bears the cost. It is no wonder that railroads have extensively cut staffing and equipment in recent years; private-car providers bear a large portion of the risk.

Railroad justifications for pursuing their version of efficiency at the expense of private-car providers ring hollow. Some railroad commenters claim they do not get a “free ride” because they provide economic benefits in return for use of private cars.<sup>18</sup> But these commenters do not identify those benefits aside from mileage allowances, which do not compensate for dwell, and zero-mileage rates, which do not adjust to account for dwell. Further, as if these commenters realize that they do not bear any cost associated with inefficient use of private cars, they argue that they should be entitled to inefficient use because private-car providers derive many

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<sup>17</sup> Transportation crews and maintenance of equipment and stores personnel dropped 9% and 18%, respectively, in 2020 and 3% and 7%, respectively, in 2021. STB, Employment Data for All Railroads (Dec. 2021), <https://www.stb.gov/reports-data/economic-data/employment-data/>; STB, Employment Data for All Railroads (Dec. 2020), <https://www.stb.gov/reports-data/economic-data/employment-data/>.

<sup>18</sup> AAR Comments 21; NS Comments 13.

benefits from using private cars.<sup>19</sup> But those benefits do not flow from railroads; they arise completely from private-car providers' investment in their private cars.

At bottom, without adequate incentives to use private cars efficiently, railroads have had little to discourage them from initiatives that result in their inefficient use of private cars and, thus, are at shippers' expense.

## **II. Railroad concerns that the proposed rules will degrade rail operations or penalize railroads for shipper decisions are misplaced.**

Railroad concerns that the proposed rules will degrade rail service are overblown. Data from Petitioners indicate that the rule would affect a fraction of total movements.<sup>20</sup> Further, railroad commenters base these concerns on both the assumption that railroads have optimized their networks to provide efficient services and the distorted view that the rules would require railroads to single out private cars for special treatment. But recent railroad performance dispels the notion that railroads' networks are models of efficient service. Also, because most cars on the rail network are private,<sup>21</sup> the rule would not encourage special service for private cars, but rather a higher level of efficiency for all cars.

Similarly, railroad concerns that the proposed rules would penalize them for shipper conduct are misplaced. The rules expressly exclude railroads from delay charges that they do not cause.

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<sup>19</sup> AAR Comments 22; NS Comments 13.

<sup>20</sup> Petitioners' Comments, V.S. Johnson 6.

<sup>21</sup> See Pet. 5–6 (stating that Class I railroad fleets compose less than 20% of railcars in service nationwide).

**A. Necessary dwells exceeding 72 hours are not a normal part of rail operations.**

While railroad commenters claim that railroads have many good reasons to hold cars longer than the 72-hour allowable dwell under the proposed rules,<sup>22</sup> railroads hold few cars this long. The proposed rules thus do not discourage dwells that are a normal part of efficient rail operations.

Petitioners' data indicates dwells subject to a delay charge under the rules are abnormal. According to the data, private cars dwell for more than 72 hours on approximately 30% of movements.<sup>23</sup> Since this figure includes dwells that railroads do not cause, which are not subject to a delay charge under the proposed rules, the proposed rules will likely impact fewer movements. Additionally, the data show a steep drop in dwell events when dwells increase from 48 hours to 72 hours,<sup>24</sup> further indicating that dwells exceeding 72 hours are abnormal.

Further, railroad terminal-dwell data indicate that 72 hours is an ample dwell period. The average weekly terminal dwell of each railroad's ten largest terminals is 23.9 hours since March 29, 2017,<sup>25</sup> well below the 72 hours "free time" limit set by the rule. Further, the average weekly dwell for these terminals

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<sup>22</sup> AAR Comments 11–13; BNSF Comments 4; NS Comments 14.

<sup>23</sup> Petitioners' Comments, V.S. Johnson 6.

<sup>24</sup> Petitioners' Comments, V.S. Johnson 7.

<sup>25</sup> STB, Rail Service Data for All Class 1 Railroads (Aug. 24, 2022), <https://www.stb.gov/reports-data/rail-service-data/#railroads-tab-content-1->. The terminal dwell time systemwide for all railroads, excluding run through trains, was 21.8 hours and reached a maximum of 43 hours. *Id.*

exceeded 72 hours only 0.09% of the time.<sup>26</sup> The proposed rules thus provide railroads sufficient leeway to extend dwells when necessary to provide more efficient service.

For these reasons, several railroad claims about the negative consequences of the rules are unfounded. For example, Norfolk Southern Railway Company (NS) claims that the rule would require railroads to rush cars through their networks, causing congestion and poorer service.<sup>27</sup> But NS fails to explain why rushing would be necessary when most movements incur dwells that do not exceed 72 hours<sup>28</sup> and terminal-dwell data shows that terminal dwells could be extended by two days, on average,<sup>29</sup> before charges accrue under the rules. Similarly, BNSF Railway (BNSF) claims that the rule encourages shorter trains and less efficient blocks,<sup>30</sup> but the extent to which this would occur is unclear since Petitioners' data show that the rule would not impact most traffic.<sup>31</sup> Tellingly, no railroad has provided data explaining how a rule impacting less than 30% of movements and that allows cars to dwell at terminals for nearly two days longer than current average dwell times, would have any negative impact on rail service.

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<sup>26</sup> *Id.* Of the 19,648 weekly average terminal dwell figures reported to the Board for each railroad's ten largest terminals, only 18 reached 72 hours. *Id.*

<sup>27</sup> NS Comments 18, 20.

<sup>28</sup> Petitioners' Comments, V.S. Johnson 6.

<sup>29</sup> STB, Rail Service Data for All Class 1 Railroads (Aug. 24, 2022), <https://www.stb.gov/reports-data/rail-service-data/#railroads-tab-content-1->.

<sup>30</sup> BNSF Comments 5.

<sup>31</sup> Petitioners' Comments, V.S. Johnson 6.

Further, no railroad commenter accounts for the benefits that would accrue by encouraging railroads to eliminate unnecessarily long dwells. Even if some dwell events exceeding 72 hours are efficient, railroads have not provided any basis for concluding that a material number of dwell events exceeding 72 hours are efficient. Further, railroads have not explained why the proposed delay charge outweighs the benefits of discouraging unnecessary dwells exceeding 72 hours.

Also, railroad commenters provide no clarity on whether or why the proposed rule would cause them to reduce network efficiency to prevent individual cars from dwelling more than 72 hours, if and when such instances occur. Any delay charges would have to be more costly than the efficiency benefits that a railroad allegedly would forego by avoiding the charges. Thus, claims that railroads would reduce their efficiency to avoid delay charges, including by inefficiently moving cars to avoid exceeding the 72-hour allowable dwell period, are dubious. Further, because delay charges would force railroads to consider dwell costs more fully, it would likely encourage railroads to develop innovative solutions to achieve their efficiency goals.

**B. The proposed rules will not create a premium service for any group of shippers that use private railcars.**

The notion that the proposed rules would create a premium service for shippers who use private cars<sup>32</sup> or would create winners and losers among these

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<sup>32</sup> AAR Comments 8, 31; BNSF Comments 8; UP Comments 2.

shippers<sup>33</sup> ignores the low volume of traffic that the rules impact, the incentives railroads have to prioritize their own cars, and that the rules do not favor any particular shipper that uses private railcars. It also conflicts with railroad commenters' argument that they treat private cars moving in manifest trains the same as railroad-owned cars because they move in the same trains.<sup>34</sup>

First, it is not clear how the proposed rules will create a premium service for all private cars when the rules would result in delay charges for only a small percentage of private-railcar movements. Petitioners' data show that, at most, approximately 30% of private-railcar movements would incur delay charges under the rules.<sup>35</sup> Further, this number overstates the true impact of the rules because it includes dwells that the rules exclude from delay charges and it includes dwells that railroads would choose to maintain despite the delay charges.

Second, the rules merely level the playing field between private cars and railroad-owned cars by requiring railroads to account for their extended use of private cars. Today, railroads are not automatically accountable for their extended use of private cars because they compensate the car owners by mileage, if at all. In contrast, railroads incur the costs of their own cars regardless of how efficiently they use them and, thus, have a direct and automatic incentive to handle those cars

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<sup>33</sup> BNSF Comments 8; NS Comments 21–22; UP Comments 2.

<sup>34</sup> See AAR Comments 8; NS Comments 14.

<sup>35</sup> Petitioners' Comments, V.S. Johnson 6.

efficiently. The proposed rules thus encourage railroads to treat private cars like they treat their own cars, without favoring either.

Third, the rules do not provide large shippers that use private cars with more leverage than small shippers in rail-contract negotiations. BNSF suggests that this will occur because railroads will have greater exposure to large shippers for delay charges since larger shippers have more traffic.<sup>36</sup> But this ignores that the relative traffic volumes of large and small shippers do not change under the rules and, thus, railroad exposure to small shippers will increase. Thus, large shippers do not obtain any bargaining advantage from the proposed rules.

Fourth, the efficiency gains that the rules engender for private cars moving in manifest service will flow through to railroad-owned cars, resulting in equivalent service for private or railroad-owned cars. While railroads argue that the rules will create premium service for private cars,<sup>37</sup> they also claim that they treat private and railroad-owned cars the same because both car types move together in the same manifest trains.<sup>38</sup> Railroads cannot have it both ways. If they treat private and railroad-owned cars the same because both car types move in the same trains, any increased efficiency from the proposed rules would benefit both private and railroad-owned cars without creating a premium service for private cars.

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<sup>36</sup> BNSF Comments 9.

<sup>37</sup> AAR Comments 8, 31; BNSF Comments 8; UP Comments 2.

<sup>38</sup> AAR Comments 8. *See* NS Comments 14 (stating that NS does not handle private cars differently from system cars because it looks at its system as a whole and this would cause significant complications and service degradation).

**C. The proposed rules do not penalize railroads for actions of car owners.**

Concerns that the proposed rules would penalize railroads for actions of car owners<sup>39</sup> overlook that the rules do not make railroads responsible for railcar dwell that they do not cause. They also assume that shippers would unnecessarily overload the rail network, which is burdensome for shippers and would undermine the rail service that shippers rely upon.

The proposed rules would not penalize railroads for decisions by private car owners to use their cars inefficiently.<sup>40</sup> Charges arise under the rules only for excessive dwell that a *railroad* causes.<sup>41</sup> Nowhere do the rules indicate that charges would arise from a car owner's decision to use an inefficient route, hold its cars, or otherwise exercise control over the use of its cars.

Similarly, the notion that shippers that use private cars would overload the rail network with unnecessary inventory, leading to congestion and charges under the proposed rules is nonsense. An unnecessary increase in car inventory is burdensome and disruptive for shippers because it would increase demands on private-car fleets, increase inventory related to the goods carried within the cars, and increase service variability. Moreover, the proposed rules state that charges do not apply for extended dwells caused by the shipper.<sup>42</sup>

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<sup>39</sup> AAR Comments 27; BNSF Comments 3.

<sup>40</sup> AAR Comments 27.

<sup>41</sup> Pet. 24 (proposed 49 C.F.R. §1334.2).

<sup>42</sup> *Id.*

**D. The rules do not penalize railroads for inherent inefficiency of private cars.**

Claims that the rules would penalize railroads for alleged inherent inefficiency of private cars conflict with the plain language of the rules. According to AAR, private cars operate less efficiently than railroad-owned cars because shippers have greater control over how their cars move.<sup>43</sup> But the proposed rules do not hold railroads accountable for how shippers use their cars. In fact, they excuse railroads from delay charges that they do not cause.<sup>44</sup> So, a railroad bears no liability under the proposed rules solely because a shipper placed cars into storage, directed the railroad to move the shipper's cars on a circuitous route, or otherwise chose to use its cars inefficiently.

**E. The proposed rules do not encourage overinvestment in railcars or excessive shipments.**

Several railroad commenters claim that the proposed rules would provide railcar-leasing companies and shippers an income stream that encourages overinvestment in railcars and excessive shipments.<sup>45</sup> But the rule provides no benefits to railcar lessors. And making excessive shipments increases shipper costs relative to any delay-charge revenue, which is not even assured.

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<sup>43</sup> AAR Comments 27.

<sup>44</sup> Pet. 24 (proposed 49 C.F.R. §1334.2).

<sup>45</sup> AAR Comments 15; BNSF Comments 3; UP Comments 15.

According to AAR, delay charges would create a new income stream for railcar-leasing companies, encouraging them to add more cars to the rail network.<sup>46</sup> This assertion has no basis in the rule, which requires railroads to pay delay charges to the shipper who provides a private car, not to a car manufacturer or bank that owns the car and leases it to the shipper.<sup>47</sup>

Similarly, nothing indicates that the proposed rules will provide railcar lessors an indirect income stream by awarding shippers delay charges that they can use to acquire additional cars. Shippers have little appetite for acquiring additional railcars for the sake of acquiring cars. Even AAR acknowledges that, for shippers, “more cars is not always better.”<sup>48</sup> Further, AAR’s observation that “[a] right sized fleet operated efficiency is the goal [for railroads] because having railcars is subordinate to railroads’ primary interest in generating returns from a freight transportation service that meets customer needs”<sup>49</sup> applies equally to shippers, whose primary interest is generating returns from the goods that they move by rail. In fact, the point of the Petition is to encourage railroads to adopt practices that allow shippers to reduce their fleets.

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<sup>46</sup> AAR Comments 15.

<sup>47</sup> Pet. 23–24 (§ 1334.1(d) (defining “private railcar provider” as a party that provides a private railcar to a railroad); § 1334.2 (stating that railroads are responsible to private railcar providers for the delay charge)).

<sup>48</sup> AAR Comments 18.

<sup>49</sup> *Id.*

Railroad commenters also equate the proposed rules to the “incentive per diem” regime that existed in the 1970s, which artificially encouraged investment in boxcars, leading to operating inefficiencies and long-term disinvestment.<sup>50</sup> But the incentive per diem program is nothing like the proposed rules. Under that program, certain railcars supplied by railroads earned a heightened per diem charge to encourage investment in those cars.<sup>51</sup> Because incentive per diem charges sometimes exceeded the cost of a new railcar, the incentive per diem program caused railroads to return foreign cars received in interchange from other railroads as soon as possible after completing the loaded movement and invest in their own cars to originate loaded moves, saving money but reducing utilization of the national car fleet and causing overinvestment.<sup>52</sup> In contrast, the proposed rules do not encourage overinvestment because they do not guarantee shippers a delay charge and nothing indicates that the delay charge under the rules will cover the investment to acquire a railcar. Additionally, the proposed rules would not reduce utilization because private-car utilization increases when private cars are returned promptly to the shipper.

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<sup>50</sup> *Id.*; UP Comments 5–6.

<sup>51</sup> *Elimination of Incentive Per Diem Charges*, 364 I.C.C. 116, 117 (1980).

<sup>52</sup> *Id.* at 130.

Another baseless railroad prediction is that the proposed rule will encourage shippers to make excessive shipments so that they can earn delay charges.<sup>53</sup> This claim has several problems.

First, it assumes that shippers will bet big on delay charges that are not guaranteed. Increasing shipments above necessary levels places a greater demand on a shipper's railcar fleet and the origin and destination infrastructure that must handle the additional cars. It also increases product inventory and, in many cases, requires the shipper to incur railroad storage charges at the destination. Yet, if a shipper increases shipments to earn delay charges, it would have little knowledge of whether the railroad has the capacity to handle the additional shipments or could make operational changes to handle them without exceeding 72 hours of dwell.

Second, even if a shipper earns delay charges from this gamble, the shipper's costs will be high. Railcar investment, increased inventory related to the goods within the cars, and storage charges add up quickly and would with near certainty exceed revenue from delay charges.

Third, excessive shipments pose a high risk of overloading the rail network, which would expose the shipper to service meltdowns. These meltdowns could disrupt the shipper's or its customer's supply chain, preventing the shipper from operating or meeting customer expectations.

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<sup>53</sup> BNSF Comments 3; NS Comments 20.

In sum, neither the proposed rule nor the “incentive per diem” issues in the 1970s suggest that the rule will cause overinvestment in railcars. Further, shippers have ample disincentives to avoid making excessive shipments.

**F. The rules can be adjusted to address gaming concerns and preserve flexible service options without undermining their purpose.**

Although railroads have raised concerns that the proposed rules will cause gaming and reduced service options, the Board can address these concerns and preserve the rules’ efficiency benefits by making minor adjustments to the rules.

Gaming concerns can be addressed by starting the 72-hour dwell clock in relation to the next scheduled origin switch. With this adjustment, a shipper could not release a car early to earn a delay charge.<sup>54</sup>

Similar adjustments could provide more service and railcar handling flexibility. To address concerns that railroads would be subject to a delay charge if they accept cars without complete shipping instructions,<sup>55</sup> the rules could include clear text stating that dwell time awaiting necessary instructions would not count toward the 72-hour dwell period.<sup>56</sup>

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<sup>54</sup> See UP Comments 15 (stating that starting the clock when a shipper releases a car would encourage gamesmanship).

<sup>55</sup> NS Comments 19.

<sup>56</sup> Coalition Associations understand proposed 49 C.F.R. § 1334.2 would excuse carriers from exceeding the 72-hour dwell period in situations where the shipper has not provided necessary shipment instructions for a car.

The Board should not, however, provide exceptions that allow railroads to avoid delay charges when cars arrive at a destination local yard far in advance of the recipient's scheduled delivery switch unless the recipient set the switch schedule. Doing so would allow railroads to cut local service without having to account for the expense of having the car sit idle in a local yard. Also, unlike at origins, an exception is unnecessary to address gaming at destinations since the recipient has no control over when the car begins to dwell while awaiting the delivery switch.

### **III. Railroad demurrage programs demonstrate that implementing the proposed program is practical.**

Claims that the proposed program would be impractical and burdensome lack merit. These claims are based on characteristics that the program shares with railroads' demurrage programs, which railroads maintain voluntarily and have characterized as appropriate.

A key railroad criticism of the program is that it requires complex, burdensome adjudication. AAR laments that determining whether a delay assessment is appropriate requires fact-specific inquiries that are burdensome for railroads to mount and that the Board is ill-equipped to decide.<sup>57</sup> It further asserts that the Board would need to establish bright line rules or create an entirely new

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<sup>57</sup> AAR Comments 14-15.

adjudication regime to address all the factual circumstances in which delay charges could arise.<sup>58</sup>

This criticism ignores that railroads have vociferously defended their demurrage programs even though they involve similar, if not greater, adjudicatory difficulties than the proposed dwell program. Demurrage and delay-charge adjudications both would involve fact-specific causation inquiries. Demurrage adjudications look at whether the rail user was unable to avoid the assessment for reasons beyond its control;<sup>59</sup> dwell adjudications look at whether the carrier caused the dwell.<sup>60</sup> Further, challenging a charge involves a greater burden under demurrage programs because carriers have direct access to all the relevant facts whereas shippers have access to only some facts.<sup>61</sup> Railroads nevertheless have not expressed any concern about demurrage inquiries being too complex or burdensome. In fact, they opposed the Board's efforts to clarify the lawfulness of demurrage assessments and require railroads to provide rail users with data supporting these assessments. They also have defended their own processes for resolving demurrage disputes as appropriate.

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<sup>58</sup> *Id.*

<sup>59</sup> *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 20 (STB served Apr. 30, 2020). Demurrage adjudications may also involve other factors, like transparency, timeliness, and mutual accountability. *Id.*

<sup>60</sup> Pet. 24 (proposed 49 C.F.R. § 1334.2).

<sup>61</sup> Because a railroad has physical possession of a railcar during dwell events, the railroad is likely the only party that has direct knowledge of the length of dwell and the reason for the dwell.

Similarly, AAR's assertion that the program would embroil the Board in burdensome operational inquiries that it lacks resources to conduct<sup>62</sup> are baseless. Demurrage programs require similar case-by-case inquiries, which involve whether rail users should have been able to use railroad assets more efficiently. But the Board has not become embroiled in those inquiries. Why would it be any different under the proposed program? Further, the Board has demonstrated in other proceedings, like stand-alone cost cases, that it has the resources to address complex operational matters. AAR provides no evidence suggesting that the Board would be unable to muster the resources to adjudicate delay-charge disputes under the program.

Another railroad criticism of the program is that it applies a one-size-fits-all approach that does not automatically result in efficient outcomes. AAR complains that delay charges do not adjust for a changing market and the dwell program does not reflect variations among the many market dimensions that exist. But delay charges are tied to the demurrage charges that AAR claims railroads continually revisit and adjust.<sup>63</sup> In this way, delay charges are controlled directly by the market. Further, AAR claims that railroad demurrage programs are market-based regimes because they account for geography, car type, and “many other dimensions.”<sup>64</sup> But demurrage programs apply a single charge and single free-time

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<sup>62</sup> AAR Comments 14–15.

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.*

period<sup>65</sup> across railroads' entire networks and all car types, with little variation except for certain hazardous-materials traffic.

Railroad commenters also complain that the proposed allowable dwell period is arbitrary and that the delay charge would be unrelated to opportunity costs. Yet, when railroads slashed free time a few years ago, they merely stated it was necessary to increase car utilization or remove private cars from their yards.<sup>66</sup> In contrast, Petitioners have provided data that shows a steep drop in dwell at 72 hours,<sup>67</sup> indicating that a 72-hour dwell period provides ample time for efficient dwells. Similarly, while railroad commenters claim that the proposed delay charge would be unrelated to the opportunity costs arising from inefficient use of private cars, their own demurrage charges bear no relation to opportunity costs. Instead, it is widely recognized that demurrage charges have a cost recovery element and a penal element intended to incentivize efficient use of railroad assets, and railroads

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<sup>65</sup> Demurrage typically involves a different charge and free-time period than storage.

<sup>66</sup> See, e.g., Data Submission of CSX Transp., Inc., App. A, *Oversight Hearing on Demurrage and Accessorial Charges*, EP 754 (May 1, 2019) (citing “improve asset utilization” as the reason for many changes to CSXT’s demurrage tariff); Report of UP, at 2–6, *Oversight Hearing on Demurrage and Accessorial Charges*, EP 754 (May 1, 2019) (citing “improved utilization” as the reason for many changes to UP’s demurrage tariff).

<sup>67</sup> Petitioners’ Comments, V.S. Johnson 7.

have justified their demurrage charges on the basis that they need to encourage more efficient use of their assets.<sup>68</sup>

Further, railroad concerns that they do not have sufficient data for use in the dwell-charge program are dubious and, in fact, demonstrate that the program is necessary.

First, while railroads claim that Car Location Monitoring (CLM) data do not reliably indicate whether a railcar moved because the sensors that generate the data are spaced at varying distances,<sup>69</sup> they fail to demonstrate that this is material. Even if CLM data do not show that a car moves between some yards within a terminal or station, the fact remains that the car is stuck within the terminal or station. Additionally, it is not clear why a car should remain within a terminal or station for more than 72 hours when the average terminal dwell time at each Class I railroad's top ten terminals by volume is 23.9 hours.<sup>70</sup>

Second, railroads overstate the burden of tracking the causes of dwells. Under the program, railroads have no reason to track the cause of every dwell. A railroad instead would need to know the cause of 72-hour or longer dwells, and then only if it seeks to defend against a resulting charge on the basis that it did not cause

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<sup>68</sup> See, e.g., Transcript of Hearing, at 112, *Oversight Hearing on Demurrage and Accessorial Charges*, EP 754 (May 22, 2019) (Mr. Adams of CSX stating “the purpose of these [demurrage]tariffs is to further the efficient management of assets . . .”).

<sup>69</sup> AAR Comments 34; NS Comments 23–24.

<sup>70</sup> STB, Rail Service Data for All Class 1 Railroads (Aug. 24, 2022), <https://www.stb.gov/reports-data/rail-service-data/#railroads-tab-content-1->.

the underlying dwell to reach 72 hours. So, railroads would not need to track the cause of dwells under 72 hours, which appear to be the vast majority of dwells according to Petitioners' data.

Further, while some dwells reaching 72 hours may present complex causation issues, nothing indicates that these dwells compose a material number of dwell events or that tracking and determining causation places a burden on railroads that is disproportionate to the burden that shippers bear to assert that demurrage charges arose for reasons beyond their control. In fact, railroads assume a similar tracking burden, and impose one on rail users, by maintaining their demurrage programs. The Board "expects rail carriers to bill for demurrage only when the charges are . . . warranted, consistent with the purpose of demurrage,"<sup>71</sup> and has made clear that demurrage charges generally are not warranted if they arise for reasons beyond the shipper's or receiver's reasonable control.<sup>72</sup> To comply with these principles, railroads must necessarily track the cause of demurrage. Similarly, for rail users to assert that demurrage charges are beyond their reasonable control, they also must track the cause of charges. Railroads thus should be well equipped to track the causes of dwells.

Third, concerns about the burden of tracking the cause of railcar dwells reaching 72 hours are alarming because they indicate that railroads may not be

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<sup>71</sup> *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757, slip op. at 16 (STB served Apr. 30, 2020).

<sup>72</sup> *Id.* at 21.

collecting data necessary to address delays. Without data about the cause of extended dwells, it is not clear how a railroad would know whether these dwells are efficient or how to address them.

At bottom, the administrative concerns that railroad commenters raise about the proposed program also exist with their own demurrage programs, yet railroads still defend those programs as being appropriate. Thus, there is no reason to believe that implementing the proposed program will be impracticable or impose undue administrative burdens on railroads.

**IV. Coalition Associations do not oppose AAR's suggestion that the rules should not require railroads to credit delay charges against demurrage invoices.**

In response to Question 9(b) in the Request, AAR suggests that carriers should not be required to credit delay charges against demurrage invoices.<sup>73</sup> While Coalition Associations believe that the credit requirement would provide administrative benefits to railroads and shippers, Coalition Associations do not oppose giving railroads the option of crediting delay charges against demurrage invoices or paying delay charges at the end of each month. Nevertheless, as Coalition Associations explained in their opening comments, the Board should require railroads to credit or pay these charges automatically, without receiving an invoice from the shipper, and otherwise administer the delay-charge program.<sup>74</sup> This would promote uniform and efficient administration of the delay-charge

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<sup>73</sup> AAR Comments 37.

<sup>74</sup> Coalition Ass'ns Comments 16-18.

program and, thus, ensure that the program encourages railroads to efficiently handle *all* private cars.<sup>75</sup>

## V. Conclusion.

For the foregoing reasons, Coalition Associations urge the Board to move forward with establishing the proposed rules.

Respectfully submitted,

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<sup>75</sup> *Id.*