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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 768

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

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

On April 1, 2022, the Board requested comment on issues relating to the petition for rulemaking in this proceeding.¹ The petition for rulemaking asks the Board to create a new regulatory regime that would impose on a railroad a “private railcar delay charge” whenever a private railcar exceeds an allowable transit idle time (72 hours) on a railroad’s system.² The Petition was filed by a group of trade associations who argue that such a Board-imposed regulatory fee on delayed private railcar movements is necessary to incentivize railroads to move private cars efficiently.

CSX Transportation, Inc. (“CSXT”) previously explained in its August 2021 reply to the Petition that railroads have ample incentives to move private cars efficiently, and that there is no market failure justifying an extensive new

¹ Decision, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768 (STB served Apr. 1, 2022) (“Decision Requesting Comments”).

² Petition for Rulemaking, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 18 (filed July 26, 2021) (“Petition”).

marketplace intervention.³ CSXT noted the absence of any evidence that railroads require further incentive to transport private railcars as quickly as possible and explained that, if adopted, the proposal would create market distortions and unintended consequences. In response to the Decision Requesting Comments, CSXT joined in support of the opening comments filed by the Association of American Railroads (AAR), and stated that it would review carefully any evidence submitted suggesting that railroads move private cars less efficiently than system cars and reserved the right to respond to any new evidence or argument on reply.

As explained below, the Board should discontinue this proceeding given the lack of justification, the lack of any legitimate benefits, and the significant potential costs and impacts associated with the proposal.

I. There Is Still No Evidence of a Problem that Justifies the Requested Regulations.

Petitioners initiated this proceeding by petition last year. Following the round of comment on the Petition, Petitioners filed a surreply, which the Board accepted, and the Board has now sought an additional round of comments and replies. Despite multiple opportunities to support their requested regulations over the past year, Petitioners and their supporters still have not provided any evidence of a unique problem with private car service justifying the requested regulations.

³ CSX Transportation Inc.’s Reply to Petition for Rulemaking, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 2-4 (filed Aug. 30, 2021) (“CSXT Reply”).

Petitioners continue to argue that the proposed rules should be adopted because the majority of railcars are privately owned.⁴ But as the AAR and others have already explained, this does not provide a justification for sweeping, industry-wide regulation.⁵

Petitioners also suggest “the *possibility* of Private Railcar shortages” if the Class I railroads are not incentivized to move private cars more quickly, and provide an anecdote of a shipper who has apparently experienced a shortage of covered hoppers and tank cars in the past year.⁶ Notwithstanding this one anecdote, the record contains no suggestion of a car supply problem. In fact, other commenters concede that railcar supply is not an issue.⁷

⁴ Petitioners’ Opening Comments, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 2 (filed June 30, 2022) (“Petitioners’ Comments”). See also Petition at 1.

⁵ Association of American Railroads’ Reply to Petition for Rulemaking, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 6 (filed Aug. 30, 2021) (“AAR’s Reply to Petition”); Comments of Norfolk Southern Railway Company, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 12-13 (filed June 30, 2022) (“NS Comments”).

⁶ Petitioners’ Comments at 14 (emphasis added).

⁷ Comments of Portland Cement Association, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 7 (filed June 30, 2022) (“Portland Cement Association Comments”) (“[t]he level of railcars supplied by customers is not the issue” and stating that current service levels are not being informed by railcar supply issues but rather by operating changes); Comments of The American Chemistry Council, the Corn Refiners Association, and The Fertilizer Institute, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 10 (filed June 30, 2022) (“Coalition

Likewise, there continues to be no evidence to support the claim that railroads move private cars inefficiently when compared to system cars. The Petition contained five anecdotal examples of alleged operational inefficiencies. In response to the Decision Requesting Comments, Petitioners provide five additional anecdotal examples describing the impacts of service issues, but nothing specific about those service issues. There is simply no way to tell whether the vague references to “carrier delays” or “service variability” indicate a lack of incentives to move private cars or general service issues impacting the network or something else entirely.⁸

In sum, although Petitioners allege that current incentives *may* favor system cars over private cars, there is simply no evidence to suggest that railroads move private cars inefficiently when compared to system cars. This is not surprising. As CSXT previously explained, it has ample incentive to minimize delays in moving cars—whether private or system. That is because CSXT’s business depends on efficient car movements to keep its network fluid and to allow it to compete with other modes.⁹ Other rail commenters have likewise explained the powerful

Associations Comments”) (“most shippers maintain railcar fleets that are sufficient to handle their traffic”).

⁸ See Petitioners’ Comments at 5, 9-10. Petitioners also provide what is described as an analysis of CLM Event Sighting Codes data. As explained in AAR’s reply comments, however, the data provided do not support Petitioners’ contention that there is an issue with how railroads move private rail cars.

⁹ CSXT Reply at 3-4.

incentives that already exist to efficiently handle private cars.¹⁰ And as has already been pointed out, railroads move private and system cars together in manifest service—something that even the Coalition Associations acknowledge.¹¹

Many of the shipper interest comments state that the private car delays they complain about are attributable to causes that affect private and system cars alike. In explaining why they believe private cars are held, they cite, for example, “general congestion” and “shortages of locomotives and crews.”¹² As the Board is aware, these can lead to service issues. Assuming that these comments are correct in attributing any delays to such causes, discontent with general service conditions

¹⁰ See Association of American Railroads’ Comments, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. 768, at 6-7 (filed June 30, 2022) (“AAR Comments”); Comments of BNSF Railway Company, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 2 (filed June 30, 2022); Comments of Union Pacific Railroad Company, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 8-9 (filed June 30, 2022).

¹¹ See Coalition Associations Comments at 12 (arguing that “any operational changes that railroads make to handle private cars more efficiently in manifest service will likely improve handling of railroad-provided cars, since they move alongside private cars in manifest service.”); AAR Comments at 8.

¹² See American Fuel & Petrochemical Manufacturers Comments, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 7-8 (filed June 30, 2022) (responding that the reason private cars are held is due to service design issues, “general congestion,” and personnel issues); Comments of Institute of Scrap Recycling Industries, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 5 (filed June 30, 2022) (citing bunching and crew shortages as primary reasons that the private cars are held); Portland Cement Association Comments at 4 (citing “shortages of locomotives and crews as well as general rail congestion for why private railcars are held for more than 72 consecutive hours”).

impacting the network does not show a lack of incentive to move private cars, and certainly does not provide a sufficient justification to impose a complex new regulatory scheme for the benefit of private car owners that will skew incentives and impact operations.

In sum, there is no problem justifying the requested regulatory action.

II. The Record Reveals That There Are No Legitimate Benefits Associated With This Proposal, Yet Significant Potential Costs.

Putting aside the fact that the Board lacks authority to even adopt the requested regulations,¹³ the record in this proceeding reveals that there are no legitimate benefits associated with the proposal and significant potential harms to the rail network. As explained above, there is no problem involving car supply or the way that railroads move private cars. Some comments suggest that private car owners are not being sufficiently compensated. The U.S. Department of Agriculture (“USDA”), for example, states that the heart of the proposal is the need for owners of privately owned cars to be properly compensated for the costs of using their cars. This ignores that the Petition in this case does not invoke the compensation

¹³ See AAR Comments at 2-6; AAR’s Reply to Petition at 3-6; NS Comments at 3-11.

provisions in § 11122(a)(1) and § 11122(b), but rather specifically points to § 11122(a)(2).¹⁴

Other commenters are transparent in their desire to obtain preferential treatment for their private investments.¹⁵ Coal Shippers, for example, concede that they seldom experience delays at a single location that exceeds 72 hours. In order to partake in the regulatory windfall that would benefit private car owners under the requested regulations, Coal Shippers seek a regulatory scheme whereby they would be compensated whenever their private cars are held for a shorter period or where unit trainsets are held cumulatively for more than 72 hours.¹⁶

There is no legitimate reason for the Board to intervene in markets to protect the private investment of private railcar owners or lessees. Nor is there a basis to conclude that the proposal, with its potential “incentive-distorting effects,”¹⁷ would

¹⁴ This appears to be based on USDA’s mistaken belief that the Petition falls under the compensation provisions of 49 U.S.C. § 11122(a). *See* Comments of the U.S. Department of Agriculture, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 3 (filed June 30, 2022) (“USDA Comments”). Even if Petitioners had invoked that provision, it would not be appropriate to rely on the compensation provision for the regulatory scheme sought and there is nothing in the record relating to the requirements of § 11122(b), which qualify the compensation authority in § 11122(a).

¹⁵ *See* Petitioners’ Comment at 5 (“the adoption of financial incentives for railroads to transport Private Railcars more quickly will protect the significant investments that shippers incur to acquire and maintain” their private car fleets).

¹⁶ *See* Comments of the Western Coal Traffic League, Freight Rail Customer Alliance, and National Coal Transportation Association, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, Docket No. EP 768, at 24 (filed June 30, 2022).

¹⁷ USDA Comments at 5.

improve service provided in private railcars. In fact, the record is replete with information explaining that this ill-conceived proposal would likely result in unintended and adverse consequences, including operating inefficiencies, less fluid gateways, increased congestion and overall transit times, impacts on smaller railroads, more frequent embargoes, and higher rates.¹⁸ It would also bury the Board in litigation about which delays were reasonable or justified.

If the Board were to conduct a cost-benefit analysis for this proceeding, it would be readily apparent that there are no legitimate benefits and significant potential costs. A cost-benefit analysis would also evaluate alternatives, for which there is an obvious one: if a shipper believes that a rail carrier is moving their cars in violation of a provision of the Interstate Commerce Act, that shipper can file a complaint before the Board. In the meantime, the Board should not gamble on this substantial revision to the regulatory scheme given the complete lack of justification, the lack of any legitimate benefits, and the significant potential costs and impacts associated with it.

¹⁸ Even if a subset of traffic were to move more quickly under this proposal, there would be costs associated with those operations. Some consumers with specific service needs might be willing to pay an increased price to account for these costs, but not all. As AAR points out, there are factors that differentiate shipments from one another—including premium rates that are commensurate with premium services.

III. Conclusion

For the reasons stated herein, CSXT urges the Board to terminate this proceeding.

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Respectfully submitted,

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