

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 768PETITION FOR RULEMAKING TO ADOPT
RULES GOVERNING PRIVATE RAILCAR USE BY RAILROADS

ASSOCIATION OF AMERICAN RAILROADS' REPLY TO MOTION FOR LEAVE TO FILE

The Association of American Railroads ("AAR") submits this Reply to Petitioners' September 10 Motion for Leave to File a Reply to AAR's Reply. AAR does not object to the Board accepting Petitioners' "Response" – which Petitioners recognize is an impermissible "reply to a reply" – provided that the Board permits AAR to offer a very brief rejoinder to Petitioners' discussion of the scope of the Board's "car service" authority.¹

Petitioners' Response acknowledges that the regulatory authority it is invoking is limited to "car service" and should not "in any way be construed to ask the Board to directly order the Railroads to take any action regarding their provision of transportation services." Response at 4. Unfortunately for Petitioners, legal authority establishing the limits of "car service" makes clear that it does not extend to transportation services. Petitioners' effort to distinguish the seminal cases cited in AAR's Reply – *Peoria & Pekin Union Ry. v. United States*, 263 U.S. 528 (1924) ("*Peoria*") and *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 607 F.2d 1199 (7th Cir. 1979) ("*ATSF*") – cannot eradicate this limitation.

¹ The Board should reject Petitioners' "Response" outright as an impermissible reply to a reply. 49 CFR § 1104.13(c). The Board is fully capable of reading the cases cited in the replies to the Petition and evaluating the arguments based on those cases without considering Petitioners' additional arguments. Nonetheless, AAR has not filed a motion to strike as such a request would surely beget yet another pleading by Petitioners seeking the last word.

In the *Peoria* case – as here – the proposed Board action would dictate how railroads perform transportation services, namely switching services.² Although the case addressed an ICC order pursuant to Section 1(15) of the Act, the agency’s authority was delimited by the scope of the statutory term “car service,” and the Supreme Court’s decision – that “car service” means “the use to which the vehicles of transportation are put; *not the transportation service rendered by means of them*” – specifically considered Congress’ use of that term in the Car Service Act provisions upon which Petitioners rely.³ The point of the Court’s decision, therefore, is that the Board may not dictate how railroads provide switching service or any other transportation service under the guise of regulating “car service.” No matter how much Petitioners may think there is an intrinsic nexus between the transportation services railroads provide and how their cars are used, the statute does not allow for such a broad interpretation of the Board’s regulatory powers.

Petitioners’ argument about *ATSF* is even more misguided. In that case the ICC had argued – just like Petitioners here – that regulation directed at railroads’ transportation services was justified as “car service” regulation. The ICC had concluded that its authority to regulate car service allowed it to take action aimed at getting railroads to move shipments (in this case of perishables) more expeditiously because “[a]dequacy of car supply and the level of service provided cannot be dissociated from the effects of delays in transit.” *Investigation into the Need for Defining Reasonable Dispatch (Perishable Commodities)*, 351 ICC 812, 827-28 (1976).⁴ As

² Petitioners ironically criticize *Peoria* as a 1924 case immediately after explaining that they are relying on regulatory authority established in the 1920 Transportation Act. Response at 3.

³ *Peoria* 263 U.S. at 533 & n.7.

⁴ The ICC relied on this discussion of the agency’s authority when it took action in 1977 to require the publication of perishable schedules, which action was reviewed by the court of appeals in *ATSF*. See *Investigation into the Need for Defining Reasonable Dispatch (Perishable Commodities)*, 355 I.C.C. 162,

AAR pointed out in its Reply, however, the court of appeals disagreed. Citing to the Supreme Court's interpretation of "car service" in *Peoria*, the court of appeals held that the regulations were not valid "car service" regulations because schedules were "directly related to transportation services [and] do not fall within the definition of 'car service.'" *ATSF*, 607 F.2d at 1205. The rules Petitioners propose are no less transportation-focused than the requirement to publish schedules was in *ATSF*. Neither form of regulation could be pursued under the guise of the Board's authority to regulate "car service."

Therefore, as explained in AAR's Reply, the Board should reject the Petitioners' petition for rulemaking, given the agency's lack of authority to regulate transportation services provided by railroads under the guise of "car service" rules.

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Respectfully submitted,



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165 (1977) ("our statutory authority to regulate the transportation of perishable commodities ... [is] set forth in considerable detail in the prior report. ... We, therefore, will not consider these matters further.").

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply to Motion for Leave to File to be served electronically or by first class mail, postage pre- paid, on all parties of record in this proceeding.


David L. Meyer

September 23, 2021