

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 677
COMMON CARRIER OBLIGATION OF RAILROADS

STATEMENT OF
NORTH AMERICA FREIGHT CAR ASSOCIATION

North America Freight Car Association (“NAFCA”) submits these comments in response to the Board’s Notice of February 22, 2008. NAFCA has not requested time to appear at the April 24, 2008 Public Hearing.

NAFCA is an organization formed to represent the interests of freight car manufacturers, lessors, and operators other than railroads. NAFCA members own or operate in excess of 500,000 private freight cars¹ and NAFCA members own an additional 175,000 cars that are leased to railroads, principally short lines. Of the 1.4 million total cars in service, 750,000 are private.

The Board’s Notice instituting this proceeding states that this case “seeks to highlight the importance of the common carrier obligation, to provide a better understanding

¹ Under rules established by the Association of American Railroads (“AAR”), a private car is denominated by the letter “X” at the end of the mark registration for the owning company.

of it, and to assist the Board in its monitoring and compliance work.” The Notice recites that the “common carrier obligation refers to the statutory duty of railroads [under 49 U.S.C. 11101(a)] to provide “transportation or service on reasonable request.... A Railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable [citation omitted]. The common carrier obligation however is not absolute ... and service requests must be reasonable.”

Obviously, no railroad can provide “transportation or service” without adequate car service and freight cars in which to transport freight. *National Grain and Feed Association v. U.S.*, 5 F.3d 306, 310 (8th Cir. 1993), (*“NGFA”*). Indeed, the common carrier obligation is more complex than a mere duty to provide “transportation or service on reasonable request,” and involves an interwoven series of obligations arising under different, but not unrelated, sections of the Interstate Commerce Commission Termination Act (“ICCTA”) and the Interstate Commerce Act (“ICA”) before it. *NGFA*. , Common carrier “transportation or service on reasonable request” cannot be provided unless there are applicable common carrier rates, and railroads are thus required to make such rates available upon reasonable request. See 49 U.S.C. § 11101(b). Transportation and service by rail cannot be made available unless there is a physical connection between a railroad and an industry that desires to use the railroad’s service. Thus, the statute requires railroads to establish switch connections on reasonable conditions with industries adjacent to their tracks where it is safe and practical to do so and the connection will furnish sufficient business for the railroad. See Section 11103(a).

Equally fundamental to the fulfillment of railroad common carrier obligations are freight cars, without which it is obviously impossible for any railroad to provide “trans-

portation or service.” Congress has required that “[a] rail carrier providing transportation subject to the jurisdiction of the Board ... shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service.” 49 U.S.C. § 11121(a)(1). This common carrier obligation has been recognized to be of equal importance to the Section 11101(a) obligation to provide “transportation or service on reasonable request.” *NGFA*.

NAFCA is participating in this proceeding to raise the Board’s awareness of the relationship between the railroads’ Section 11101(a) and 11121(a) common carrier obligations and the role of the private car fleet. As we shall demonstrate, railroads may be said to have either withdrawn from the common carrier supply of certain freight cars, or to have implemented strategies to require shippers to furnish private cars and related facilities normally provided by carriers in order to receive rail common carrier service. Whether these are lawful positions for a railroad to take we leave for discussion at a later point in time. In these comments, NAFCA seeks to demonstrate the evolution of freight car supply from the primary rail common carrier undertaking it once was to the private car undertaking it now has mainly become, and to urge the Board to recognize that it may be time for the Board’s policies toward private cars to reflect the reality that railroads cannot in most cases say they meet their common carrier obligations without private cars.

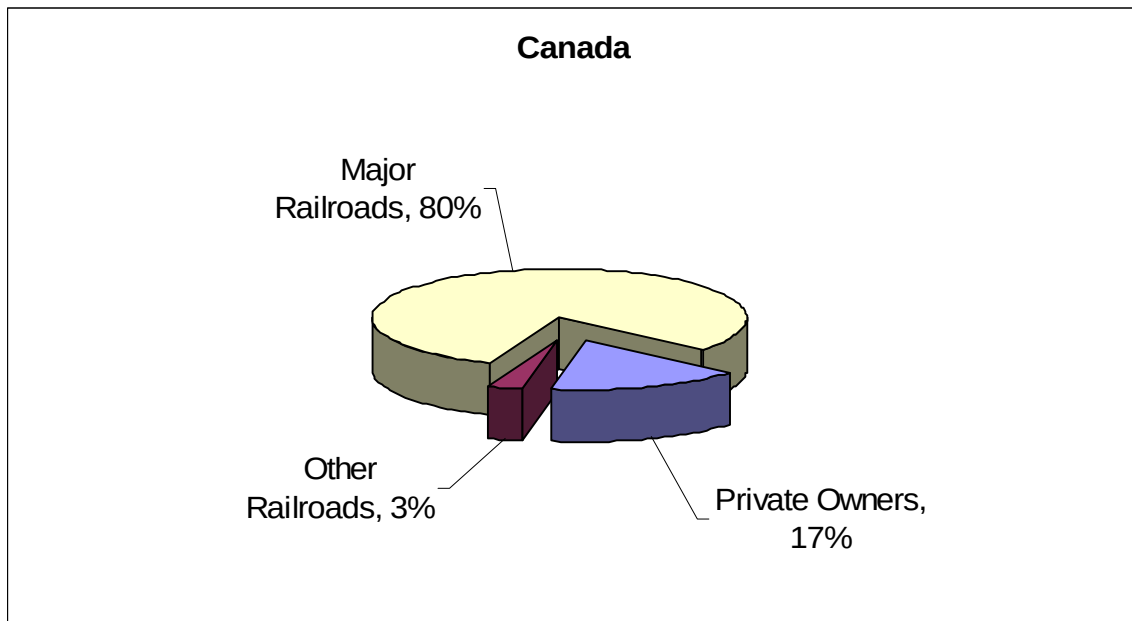
History of Railroad Car Supply

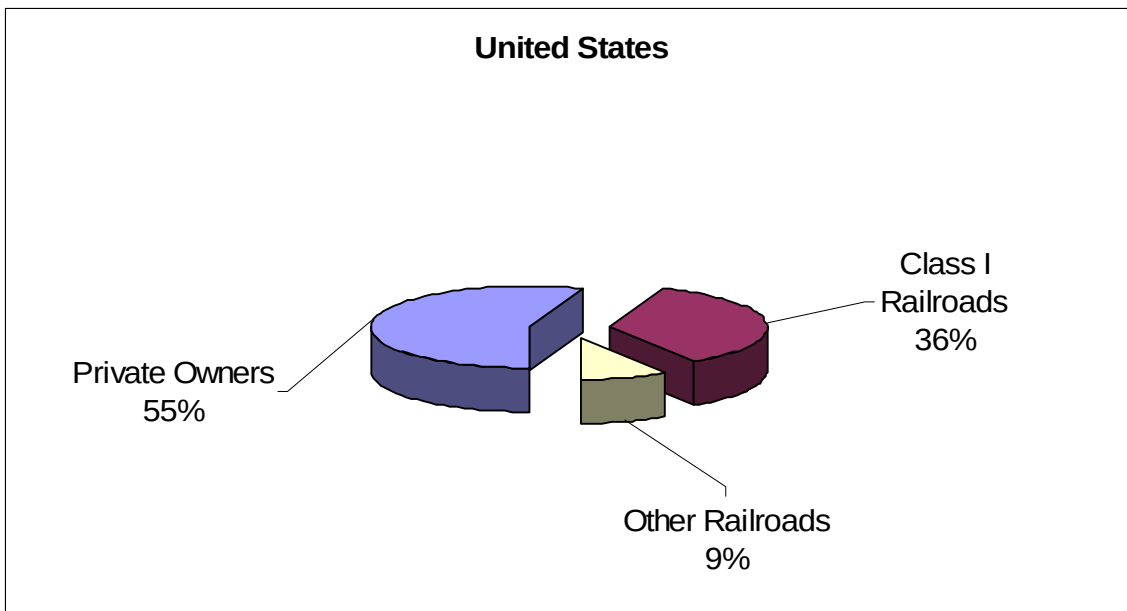
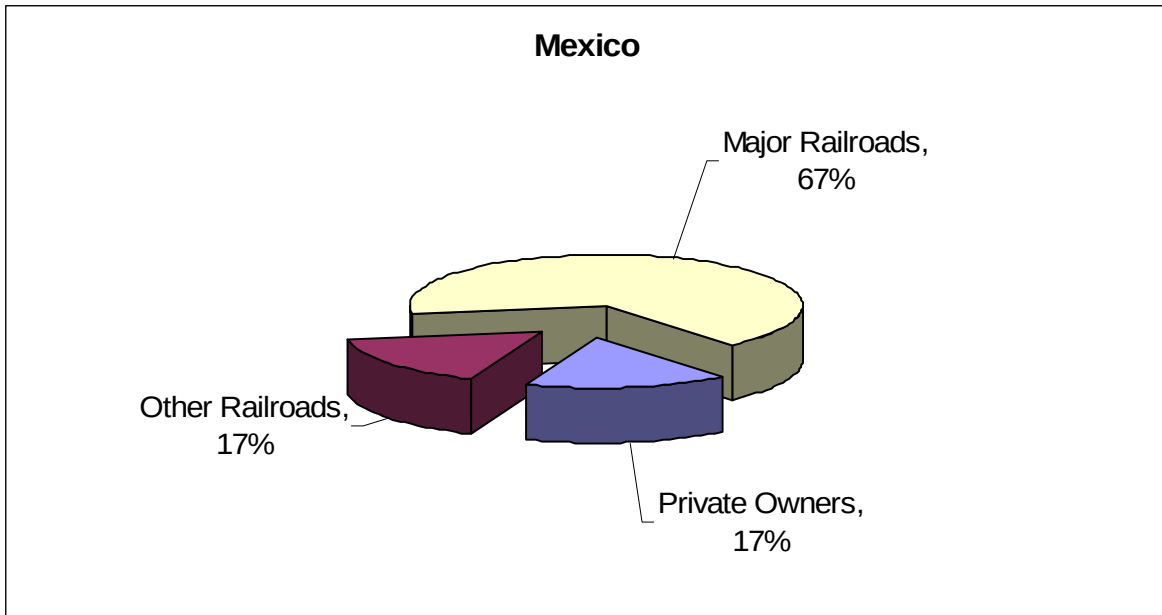
In their early, regulated years, railroads relied mainly on their own cars to meet customer needs, and on private cars to a far lesser extent. *In the Matter of Private Cars*, 50 I.C.C. 652 (1918). One exception to that rule was tank cars. In 1913, shippers supplied 77 percent of the tank cars and 23 percent were supplied by railroads. *Ibid* at 659.

Over the years, the source of freight car supply evolved steadily from railroad to private sources, particularly after enactment of the Staggers Act in 1980. Following are some data depicting the balance between the major sources of car supply; Class I carriers, small railroads, and private car owners. We begin with an overview graph of the North American car fleet.

Figure 1

Freight Car Ownership By Country and Type of Owner – January 1, 2007





Source: Railroad Equipment Report 2007, Association of American Railroads

As Figure 1 shows, in the United States, 55 percent of all freight cars now are supplied by private interests, a percentage that continues to grow. Class I carriers supply only 36 percent of the U.S. fleet, even though they account for over 90 percent of the

mileage and revenue. In Canada and Mexico, major railroads supply the vast majority of the freight cars and private cars account for only 17 percent of the fleet.

The picture of freight car supply on January 1, 2007 shown in Figure 1 is not an abnormality. The Class I share of U.S. car supply has been dwindling steadily and private car ownership has been rising correspondingly, as shown in the following table.

Table 1

(ooo)

U.S. Railroad and Private Car Supply, 1929-2006

<u>Year</u>	<u>Total Cars</u>	<u>Class I Cars</u>	<u>Class I %</u>	<u>Private Cars</u>	<u>Private %</u>
1929	2,611	2,278	87	287	11
1960	1,966	1,658	84	273	14
1980	1,711	1,168	68	441	26
1985	1,422	867	61	444	31
1990	1,212	659	54	450	37
1995	1,219	584	48	581	45
2000	1,381	560	40	688	50
2001	1,314	500	38	689	52
2002	1,300	478	37	691	53
2003	1,279	467	37	687	54
2004	1,288	474	37	694	54
2005	1,312	475	36	717	55
2006	1,347	475	35	750	56

Source: Railroad Equipment Report 2007, AAR; Railroad Facts 2007, AAR

Although private car supply plays a role in almost every car type, two types of cars are dominated by private car supply: tank cars and covered hopper cars. The following table illustrates the percentage of those two types of cars supplied by Class I carriers in 1929 (the first year for which we could locate such data) and 2006.

Table 2

Tank Car and Covered Hopper U.S. Car Supply, 1929 and 2006

<u>Tank Cars</u>					
	<u>Total</u>	<u>Class I</u>	<u>Class I %</u>	<u>Private</u>	<u>Private %</u>
1929	181,000	5,000	.03	176,000	97
2006	225,000	1,053	.005	254,000	99+
<u>Covered Hopper</u>					
1929	161,000	126,000	78	34,000	21
2006	394,000	113,000	29	261,000	66

Source: Railroad Equipment Report 2007, AAR
Railroad Facts, 1970, AAR

Open hopper cars, used largely for coal, ore, and construction materials, and gondolas, used extensively for scrap metal shipments, reflect at least one-third private ownership.²

The private car fleet represents a huge infrastructure investment by private car interests. NAFCAs members who are car builders or lessors estimate that the average 2006 replacement value of a freight car is \$82,000.³ Using that number, the private car fleet of 750,000 cars has a 2006 value of \$61.5 billion. The private tank car and covered hopper car fleets by themselves have a 2006 replacement value of \$ 40 billion, assuming that a covered hopper car cost approximately \$65,000 and a tank car approximately

² Differences in Tables 1 and 2 between total car ownership, on the one hand, and Class I plus private ownership, on the other, reflect cars supplied through smaller railroads. The main source of car supply for the smaller railroads are the lessors who also are the primary source of private cars that shippers do not own outright.

³ The STB maintains that replacement value is the most appropriate measure of asset evaluation. *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803, 820 (1981).

\$90,000 in 2006. Private cars manifestly have saved the railroads tens of billions of dollars in infrastructure outlays.

Reasons for Increased Private Car Supply and Decreasing Class I Car Supply

Although railroads frequently have advanced the argument that shippers supply their own cars to meet seasonal demands that are economically foolish for railroads to meet or because of shipper operating preferences such as car cleanliness, in the last analysis, when railroads do not supply freight cars, it is because the carriers have concluded to disengage from car supply. The Board and its predecessors have held that railroads have a common carrier obligation to supply cars, but may elect whether to meet that obligation by using cars of their own or cars supplied by shippers. *Shippers Committee OT-5 v. The Ann Arbor R.R., et al.*, 5 I.C.C. 2d 856, 859 (1989) (“OT-5”), *affirmed*, *Shippers Committee OT-5 v. ICC*, 298 F.2d 75 (D.C. Cir. 1992). Any time a railroad has a car of its own available, it can insist upon the use of that car to the exclusion of a private car. *Ibid.* Railroads thus can discourage in full the will of shippers to acquire private cars simply by electing to supply railroad-owned cars, regardless of whatever merit shippers might otherwise see in maintaining their own cars.

One might argue that privately-owned tank cars would be advantageous to shippers even if there also were railroad-owned tank cars available because proprietary shipper control of tank cars provides assurance that contaminants from prior loads will not be commingled with new shipments. While it is true that tank car cleanliness is important in some cases, it is also true that, were railroads to supply tank cars, they would have to take steps to have the cars cleaned before placement with a customer in order to meet their

obligation to provide equipment suitable for its intended loading purpose. It is not necessary for shippers to supply tank cars in order to maintain car integrity.

But the question of whether there are advantages to shippers in some cases arising from private tank car supply is moot because railroads have determined under the prerogatives found in the case law cited above not to supply tank cars at all. Consequently, any shipper in need of making a bulk liquid shipment by rail must furnish its own car. Interestingly, as more tank cars are added to the national private fleet to meet the growing demand for ethanol, the car purity issue recedes in importance for that traffic inasmuch as ethanol is basically fungible and could easily be loaded by a series of different ethanol shippers, very much the way grain cars are loaded by a series of different grain shippers. Despite that fact, railroads have chosen to make the supply of tank cars for ethanol shipments the business of their customers.

Even where carriers appear to have a stake in the supply of a type of car, it is not always true that shippers can use that car for any and all transportation purposes. For example, certain major railroads will not permit their covered hopper cars to be used for the transportation of dried distillers grain (“DDG”), which is a significant byproduct of ethanol production and moves in substantial quantities to animal feed blenders. The only rates some carriers publish for DDG are applicable in private covered hopper cars. Salt is another commodity banned from some carrier cars. Similarly, where specially equipped covered hopper cars are required, they are generally not supplied by railroads. Thus, flour, certain corn products, and certain petrochemical products that move in equipped covered hopper cars are transported almost entirely in private cars.

The small proportion of covered hopper cars owned by railroads suggests that the rail-owned covered hopper car fleet plainly is inadequate to meet even year-round “average” demand for covered hopper car shipments.⁴ That conclusion is compelled in those instances where railroads supply no cars of a particular type, such as tank cars, cars for DDG, flour, various grain products and plastics. Even the Class I share of 29 percent of covered hopper cars hardly lends itself to meeting “average” demand for that type of car.

Private cars not only replace the railroads to meet their common carrier obligations, but furnish them with substantial revenues. The carriers say those revenues are necessary for them to add infrastructure that is critical to their ability to meet future demands for their common carrier services, especially as those demands are predicted to grow. There should be no question but that private cars have been used by railroads to meet their common carrier obligations.

Conditions Are Changing

It is not only true that statistics show that the rail industry is imposing car supply on private sources, but other changes also are taking place that may bear on whether this shift is in keeping with the carriers’ common carrier obligations.

For example, although shippers long have supplied most, if not all, tank cars, those circumstances initially were the result of a mutually agreed arrangement whereby carriers would discharge their common carrier obligation through the agency of shipper car supply. Pursuant to a statutory provision, the present version of which is 49 U.S.C. § 10745, persons who furnished private tank cars were fully compensated by the carriers for the ownership, maintenance, and operating costs of the tank cars pursuant to an ICC

⁴ See *NGFA*, where the court upheld the ICC’s view that a carrier meets its common carrier car supply obligation when it furnishes cars sufficient to meet “average demand.” 5 F.3d at 311.

prescription of allowances. See Ex Parte No. 328, *Investigation of Tank Car Allowance System*, 3 I.C.C. 2d 196 (1986) (“*Ex Parte No. 328*”). Additionally, carriers treated privately owned cars as if they were railroad equipment by holding them empty on carrier tracks until ordered by the shipper for the next load. In other words, when railroads exercised their prerogative to supply tank cars through private, rather than railroad, sources, the carriers incurred basically the same costs as if the carriers owned and supplied the cars, and the shippers were relieved of basically all costs for acquiring and operating the cars. In a real sense, therefore, it could in those circumstances be said that carriers were fulfilling their common carrier obligation to supply tank cars by hiring shippers to fulfill the car supply duty.

Those conditions have now changed. For one thing, even though tank car allowances remain prescribed in *Ex Parte No. 328*, they are seldom paid to tank car owners, directly or indirectly. Under AAR Rules, a car allowance is paid to the “owner” of the car. The “owner” as recorded in AAR records very often is the company that leases the car to shippers for operation, although some shippers own their own tank cars outright. Because many members of NAFCA are lessors and owners of tank cars, NAFCA is highly knowledgeable regarding the extent to which railroads pay allowances for privately owned tank cars.

It is the experience of NAFCA members that tank car allowances are paid these days only for about 20 percent of the tank car movements (and those mainly are concentrated in the clay industry). Many common carrier tank car rates have emerged which are expressly not subject to the payment of mileage allowances or other forms of compensation.

Allowances were also paid to the owners of private covered hopper cars, generally on a per loaded mile basis. In 1980, railroads and private covered hopper car owners reached agreement on a mileage allowance system, but that agreement broke down two years later as railroads began to place upper limits on the amount of the allowance payment, which until then had essentially been a function of car cost and age. In *LO-Shippers v. Aberdeen & Rockfish Ry. Co., et al.*, 4 I.C.C. 2d 1 (1987), (“LOSAC”), *aff’d*. *LO-Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), the ICC declined to prescribe fixed mileage-based allowance compensation for the use of privately-owned covered hopper cars, concluding that allowances are payable but should best be set by market conditions, which were left undefined. The agency also held that compensation for the use of private cars did not have to be in the form of a cash payment, but could be reflected in the differences between a freight rate applicable in private cars and a freight rate for the same movement applicable in railroad-owned equipment.

Essentially, mileage allowance payments and freight rate differentials no longer cover the shippers’ costs of owning and maintaining tank cars or covered hopper cars or the market value of the cars. Car operating costs are increasing rapidly, making it more difficult to justify investments in private cars. Where carriers no longer pay mileage allowances for tank cars, shippers receive no discernable compensation for operating those cars. The regime of dual rates – one rate applicable in railroad equipment and a lower rate applicable in private equipment – approved in *LOSAC* as a permissible method of private car compensation is inapplicable where tank cars are concerned because railroads own and supply no such cars and have no rates available for shipments in railroad-owned tank cars.

With respect to covered hopper cars, when carriers refuse to permit or do not supply their equipment to be used for the transportation of certain commodities, any regime of dual shipper/carrier rates as a measure of private car compensation is meaningless because the shipper has no effective choice to select a carrier car. Where carriers continue to publish covered hopper car rates subject to mileage allowances, their compensation to shippers generally is unrelated to market conditions and well below market value. One carrier, for example, has published a \$.24 per loaded mile covered hopper car allowance for the past 10 years, during which the costs of purchasing or leasing a covered hopper car has increased by at least 50 percent, and the market value of a covered hopper car has varied widely. That carrier's mileage allowance was the same in 2007, when a covered grain hopper car cost approximately \$76,000, as it was in 1998, when the car cost somewhere around \$55,000. Given that there has been no continuous surplus of covered hopper cars, it is evident that market conditions are not controlling mileage allowance payments and that shippers who furnish covered hopper cars are subsidizing the railroads that earn freight revenues from those cars.

The railroads apparently theorize that, by not paying mileage allowances, they are able to offer "lower" rates, but there is no way for a shipper to determine if the freight rate published – supposedly a market-based rate – actually is lower than it otherwise would have been had an allowance been paid, or to quantify that difference. Railroads are moving away from contract rates, and shippers are seeing more and more common carrier rates applicable in private cars without allowance payments.

Similarly, railroads are subjecting empty private cars of all types to new storage and demurrage charges if held on railroad track prior to loading. Previously, railroads

provided such track space free of charge, just as they do for their own cars. In 2001, BNSF instituted demurrage and storage charges for holding empty private cars prior to loading, and some other carriers followed suit. See *North America Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (January 24, 2007), (“NAFCA”), where the Board approved such charges.⁵

The outlook of the ICC and the Board toward private cars – or at least toward covered hopper cars, which are two-third privately supplied – was developed at a time when railroads were seen as the primary source of car supply. See, e.g., *Allied Corporation v. Union Pacific Railroad Company*, 1 I.C.C. 2d 480, 489 (1985) (“Railroads have always been and will likely continue to be the principal source of rail cars for the shipping public.”). Railroads no longer are the principal source of car supply for the shipping public, and the statistics set forth earlier in this pleading strongly suggest that railroads are not reversing that trend. The fact is that railroads have insufficient tank cars and covered hopper cars to meet their obligation to provide transportation, service, or cars on reasonable request, and that it no longer can be said that private cars are a surrogate for railroad equipment due to the fact that railroads no longer pay anything approaching the costs to shippers of supplying the private cars necessary for them to use rail service.

⁵ Pending on appeal in the United States Court of Appeals for the District of Columbia Circuit, *North America Freight Car Association v. STB*, Case No. 07-1070. In *NAFCA*, the Board found that BNSF allowed an average of two days free time for empty private cars to be held on BNSF track before demurrage charges began to accrue, and charges for holding empty tank cars ranged only between \$10 and \$25 per day. Within the past year, BNSF has charged as much as \$100 per day for holding empty private cars, although it reduced that fee to \$50 per day at present, and free time has been eliminated altogether. That is, if an empty private car arrives at a shipper’s loading point anytime today, the first demurrage chargeable day would commence at 12:01 a.m. tomorrow. Thus, the costs of operating private cars have been increased substantially.

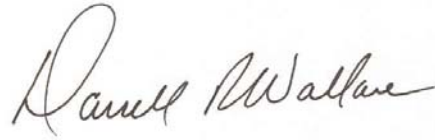
Conclusion

Private car interests have been more than willing to work cooperatively with railroads and address issues that are of concern to the carriers and private car suppliers alike. Unfortunately, the Board's outlook toward private cars appears to be driven by considerations recognized 20 or more years ago, when the Board assumed that "railroads have always been and will likely continue to be the principal source of rail cars for the shipping public." *Allied, supra*. As a result of that outlook, private cars have been treated by the Board largely as a superfluous hindrance to railroad operations.

As the Board stated in *NAFCA*, conditions in the railroad industry have changed substantially in the past 10 years. Among the changes that have taken place is that it no longer can be said that railroads are, or can be expected to be, the principal source of car supply, tank cars and covered hopper cars in particular. If railroads are going to continue to default in the supply of an adequate number of cars to handle the freight tendered to them, and thereby force shippers to provide the majority of the freight car fleet without full or adequate compensation in many respects, then there is a sound argument for the proposition that railroads are no longer fulfilling their common carrier obligation insofar as that obligation involves the supply of freight cars. As the Board reviews the common carrier obligation in this proceeding, *NAFCA* urges that the Board give full consideration

to the documented changes that have taken place in car supply and reevaluate its outlook toward the role of private cars in the furnishing of transportation on reasonable request.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Darrell R. Wallace". The signature is fluid and cursive, with the first name "Darrell" being more prominent than the last name "Wallace".

Darrell R. Wallace
President
North America Freight Car Association
11720 Borman Drive
St. Louis, MO 63146-1000

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, PC
2175 K Street, NW., Suite 600
Washington, DC 20037
(202) 775-5560
apg@mshpc.com

Attorney for
North America Freight Car Association

Dated: April 17, 2008