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SERVICE DATE – NOVEMBER 23, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 768

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

Digest:<sup>1</sup> The Board opens a proceeding to consider a proposal 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.

Decided: November 22, 2021

On July 26, 2021, the North America Freight Car Association, The National Grain and Feed Association (NGFA), The Chlorine Institute, and The National Oilseed Processors Association (collectively, Petitioners) filed a petition for rulemaking proposing that the Board adopt regulations, pursuant to its car service authority under 49 U.S.C. § 11122(a)(2), that would allow private railcar providers<sup>2</sup> to assess a “private railcar delay charge” when a private freight car does not move for more than 72 consecutive hours at any point 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.” (Pet. 1, 23-24.)<sup>3</sup>

The Board received replies to the petition from the Association of American Railroads (AAR), CSX Transportation, Inc. (CSXT), Union Pacific Railroad Company (UP), the Institute for Scrap Recycling Industries, Inc. (ISRI), a group of shipper associations including the American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Shippers), the National Association of Chemical Distributors (NACD), the National Coal Transportation Association (NCTA), the Private Railcar Food and Beverage Association (PRFBA), American Fuel & Petrochemical Manufacturers (AFPM), the

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Petitioners define a “private railcar provider” as “a shipper, receiver, or other party who owns or leases a private railcar and provides it to a railroad for transportation.” (Pet. 23.)

<sup>3</sup> Constructive placement occurs when a rail car is available for delivery but cannot actually be placed at the receiver’s destination because of a condition attributable to the receiver, such as lack of room on the tracks in the receiver’s facility. See Pol’y Statement on Demurrage & Accessorial Rules & Charges, EP 757, slip op. at 8 n.22 (STB served Apr. 30, 2020).

Freight Rail Customer Alliance (FRCA), and the Canadian Oilseed Processors Association (COPA),<sup>4</sup> as well as notices of intent to participate from NGFA and the American Short Line and Regional Railroad Association. AAR, CSXT, and UP oppose the petition, while ISRI, Joint Shippers, NACD, NCTA, PRFBA, AFPM, FRCA, and COPA support it.

On September 10, 2021, Petitioners submitted a surreply to the replies, along with a motion for leave to file. On September 23, 2021, AAR and UP submitted replies to Petitioners' motion for leave to file. AAR states that it does not object to the Board accepting Petitioners' surreply into the record, as long as it also accepts AAR's "brief rejoinder," (AAR Reply 1, Sept. 23, 2021), and UP states that it takes no position on Petitioners' motion for leave but asks the Board to reject certain claims Petitioners made in their surreply, (UP Reply 1, Sept. 23, 2021).<sup>5</sup>

Petitioners contend that the proposed regulations are necessary to encourage the efficient use of private freight cars, (Pet. 8-10), and to compensate private railcar providers for the costs they incur when carriers use private freight cars inefficiently, (*id.* at 12-13). In response, UP and AAR claim that the Board lacks the statutory authority under § 11122(a)(2) to adopt the proposed regulations. (UP Reply 2-3; AAR Reply 3-6.)<sup>6</sup> AAR, CSXT, and UP contend, moreover, that the proposed regulations are unnecessary because carriers have sufficient incentives to move cars efficiently, as delayed cars hinder operations and reduce revenue. (CSXT Reply 3-4; UP Reply 7-8, Aug. 30, 2021; AAR Reply 8-9, Aug. 30, 2021.) They also argue that the proposed regulations will have a negative impact on the overall efficiency of the rail network by incentivizing carriers to move private freight cars inefficiently to avoid the charges and by reducing cooperation between carriers during periods of network stress. (CSXT Reply 6; UP Reply 9, Aug. 30, 2021; AAR Reply 16, Aug. 30, 2021.) Other respondents contend that the proposed regulations would provide appropriate financial incentives for Class I carriers to use private freight cars more efficiently, (NCTA Reply 1-2; PRFBA Reply 1; FRCA Reply 1), and offer reciprocity for demurrage charges (ISRI Reply 4; NACD Reply 1; AFPM Reply 2; COPA Reply 1-2). Furthermore, Joint Shippers ask the Board to solicit comments on how the proposed regulations would be implemented, including whether carriers would be responsible for monitoring private freight car delays and crediting amounts owed under the proposed regulations against their demurrage invoices. (Joint Shippers Reply 5.)

Petitioners' proposal and the responses to date raise important issues of interest to the Board. Therefore, to further consider Petitioners' proposal and the responses, the Board will

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<sup>4</sup> Replies to the petition were due by August 30, 2021, and COPA's reply was filed after that date. In the interest of having a more complete record, however, COPA's reply will be accepted into the record.

<sup>5</sup> Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant Petitioners' motion for leave. See City of Alexandria—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

<sup>6</sup> Additionally, CSXT states that it joins AAR's comments. (CSXT Reply 2.)

open a proceeding. Procedures for further public comment will be established in a subsequent decision.

It is ordered:

1. Petitioners' motion for leave to file a surreply is granted.
2. Petitioners' petition is granted to the extent that it requests that the Board open a proceeding.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.