51068 SERVICE DATE – APRIL 1, 2022
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 768

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

Digest:[1] The Board seeks public comment on a petition 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 and several specific related issues.

Decided: April 1, 2022

On July 26, 2021, the North America Freight Car Association (NAFCA), The National Grain and Feed Association (NGFA), The Chlorine Institute (CI), and The National Oilseed Processors Association (NOPA) (collectively, Petitioners) filed a joint petition for rulemaking proposing that the Board adopt regulations allowing private railcar providers[2] to assess a "private railcar delay charge" if railroads delay private freight cars beyond a specified period of time. (Pet. 18.)

Petitioners assert that the Board may adopt their proposed regulations pursuant to its authority under 49 U.S.C. § 11122(a)(2), which provides that the Board's car service regulations may include, in addition to the compensation to be paid, "the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person."

After receiving a number of replies and notices of intent to participate in response to the petition, the Board opened a proceeding in this docket on November 23, 2021.

[1] 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).

[2] 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.)

BACKGROUND

Petitioners' Proposed Regulations. The regulations that Petitioners propose would allow private railcar providers to assess a charge when a private freight car does not move for more than 72 hours at any point on a railroad's system 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."[3] (Pet. 24.) Petitioners propose that Car Location Message (CLM) Event Sighting Codes published by Railinc[4] would be used to measure time, and charges would be assessed when the "CLM location city of CLM Sighting Code has not changed for more than [72] hours." (Id. at 18.) Petitioners suggest that the amount of the charge would be equivalent to the greater of the carrier's applicable demurrage or storage charge. (Id. at 24.) Charges would be assessed unless "the rail carrier demonstrates that it was not a cause of the allowable transit idle time being exceeded despite exercising due diligence." (Id.) Furthermore, carriers would be able to dispute the amount of the charges in "an appropriate proceeding in which the rail carrier shall bear the burden of proof to demonstrate that the private railcar delay charge is unreasonable and inappropriate." (Id.) Petitioners also argue that the Board should explore monetary penalties for noncompliance. (Id. at 17, 24.)

Petitioners argue that their proposed regulations are necessary to encourage the efficient use of private freight cars because carriers do not presently have sufficient incentives to use private freight cars efficiently. (Id. at 8-10.) Petitioners assert that there are no Board regulations and few tariff provisions that provide such incentives. (Id. at 9-10.) Petitioners also contend that carriers "have little or no commercial incentive (other than revenue generation)" to use private freight cars efficiently because most private railcar providers do not have the necessary commercial strength to negotiate service-standard contract provisions. (Id. at 11.) Moreover, petitioners argue that the "lack of clarity and guidance as to the definition of the common carrier obligation, and the circumstances in which it is considered violated" deter private railcar providers from pursuing formal complaints. (Id.) Petitioners contend that their proposal uses "existing principles governing demurrage and accessorial charges" to incentivize carriers to use private freight cars more efficiently. (Id. at 2.)

Petitioners also argue that their proposed regulations are necessary to compensate private railcar providers for the costs they incur when carriers use private freight cars inefficiently. (Id. at 12-13.) Petitioners state that private freight cars comprise most of the national fleet and that the costs of owning and maintaining private freight cars have increased significantly over the past 10 years. (Id. at 5-7.) Although Petitioners acknowledge that private railcar providers receive compensation from carriers for the use of their private freight cars, they argue that carriers' inefficient use of private freight cars deprives them of the use of their assets and makes it harder for them to earn a reasonable return on their investment. (Id. at 2, 12-13, 20-21.)

[3] Constructive placement occurs when a railcar 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).

[4] Railinc, a subsidiary of the Association of American Railroads (AAR), provides rail data and messaging services to the freight rail industry.

Petitioners offer examples of carriers' inefficient use of private freight cars, including one in which a shipper's private freight cars were held by Class I carriers for periods of between eight and 61 days, as well as examples of the resulting harm to private railcar providers, including one in which a shipper incurred increased costs for trucks and special switches. (Id. at 13-14.)

Replies. The Board received replies to the petition from AAR; CSX Transportation, Inc. (CSXT); Union Pacific Railroad Company (UP); the Institute for Scrap Recycling Industries, Inc. (ISRI); a group of several 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 Freight Rail Customer Alliance (FRCA); and the Canadian Oilseed Processors Association (COPA), 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.

UP and AAR claim that the Board lacks the statutory authority under § 11122(a)(2) to adopt Petitioners' proposed regulations.[5] (UP Reply 2-3, Aug. 30, 2021; AAR Reply 3-6, Aug. 30, 2021.) UP argues that the Board must "disregard the reference to 'freight cars'" in the current version of § 11122(a)(2) because, prior to 1978, the relevant part of this paragraph (allowing the agency to regulate "the other terms" of arrangements) did not reference freight cars specifically but rather only locomotives and other vehicles.[6] (UP Reply 2-3, Aug. 30, 2021.) UP contends that although the current language of § 11122(a)(2) may suggest a broader authority to

[5] CSXT states that it joins AAR's comments. (CSXT Reply 2.)

[6] The predecessor to § 11122(a) stated, in relevant part:

> It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, § 1(14)(a), 90 Stat. 31, 46-47. In 1978, Congress recodified the Interstate Commerce Act, enacting it as Title 49 of the U.S. Code, and stated that the agency's car service regulations may include "the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 11122(a)(2), 92 Stat. 1337, 1421-22 (1978 Recodification).

regulate arrangements for railroads' use of freight cars, substantive differences between the two versions of the provision must be resolved in favor of the pre-1978 Recodification statute because Congress expressly indicated that the 1978 Recodification may not be construed as making a substantive change to the existing laws. (UP Reply 3, Aug. 30, 2021 (citing N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144, slip op. at 5 (STB served Mar. 22, 2021).)

AAR argues that the Board does not have the authority to adopt Petitioners' proposed regulations under § 11122(a)(2) because the Board's authority to regulate car service does not extend to the regulation of the transportation services railroads provide. (AAR Reply 4, Aug. 30, 2021.) In support, AAR cites to Peoria & Pekin Union Railway v. United States, 263 U.S. 528 (1923), and Atchison, Topeka & Santa Fe Railway v. ICC, 607 F.2d 1199 (7th Cir. 1979). (AAR Reply 4-5, Aug. 30, 2021.) In Peoria, the Supreme Court found that the ICC could not use its car service authority to require switching because the term "car service" means "the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." Peoria, 263 U.S. at 533-35. Pursuant to this definition, the court in Atchison determined that the ICC could not require tariff publication of operating schedules under its car service authority because tariff operating schedules were "directly related to transportation service and do not fall within the definition of car service." Atchison, 607 F.2d at 1205. According to AAR, Petitioners' proposal would regulate transportation service because it would "establish rigid standards relating to the details of how railroads provide transportation during the course of a car's movement across the network" and essentially establish "transportation service guarantees under another name." (AAR Reply 3-4, Aug. 30, 2021.) Moreover, AAR contends that, although the Board may establish regulations to ensure an adequate supply of freight cars, Petitioners have not demonstrated that a freight car shortage exists. (Id. at 5.)

AAR, CSXT, and UP additionally contend that Petitioners' proposed regulations are unnecessary because (1) carriers already have ample incentives to move private freight cars efficiently, as delays hinder operations and reduce revenue, (CSXT Reply 3-4; UP Reply 7-8, Aug. 30, 2021; AAR Reply 8-9, Aug. 30, 2021); (2) a significant portion of traffic moves under contract and would not be covered by Petitioners' proposed regulations, (CSXT Reply 7); (3) no freight car shortage exists justifying Board intervention, (UP Reply 4-6, Aug. 30, 2021; AAR Reply 5, Aug. 30, 2021); (4) private railcar providers have other avenues to pursue relief, such as through specific service commitments in contracts and the complaint process, (UP Reply 10-11, Aug. 30, 2021); and (5) private freight car ownership already conveys benefits, such as greater control over equipment and economic compensation from carriers, (AAR Reply 7, 10, Aug. 30, 2021). They also argue that Petitioners' proposed regulations will have a negative impact on the efficiency of the rail network by incentivizing carriers to move 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.)

Several respondents indicate that they support the petition because Petitioners' proposed regulations would provide appropriate financial incentives for Class I carriers to use private freight cars more efficiently, (see, e.g., NCTA Comments 1-2; PRFBA Comments 1; FRCA Comments 1), and offer reciprocity for demurrage charges (see, e.g., NACD Comments 1; AFPM Comments 2; COPA Comments 1-2). ISRI contends that carriers have essentially forced scrap metal companies to lease or own private freight cars after carriers reduced the number of

system cars available to scrap steel shippers and shifted those available system cars to more profitable products. (ISRI Reply 5.) Joint Shippers ask the Board to solicit comments on ways to achieve greater reciprocity for the treatment of private freight cars during first-mile and last-mile service,[7] and on how Petitioners' proposed regulations would be implemented, including whether carriers would be responsible for monitoring railcar delays and crediting amounts owed under the proposed regulations against their demurrage invoices. (Joint Shippers Reply 3, 5.)

On September 10, 2021, Petitioners submitted a surreply to the replies, along with a motion for leave to file. Petitioners argue that the cases cited by AAR cannot be analogized to their proposal because Petitioners do not "ask the Board to directly order the Railroads to take any action regarding their provision of transportation services." (Petitioners Surreply 4.) Furthermore, Petitioners assert that UP's argument contravenes the language of the 4R Act § 1(14)(a), 90 Stat. at 46, in which Congress expressed the clear intent to "encourage the purchase, acquisition, and efficient utilization of freight cars" and, "[i]n order to carry out such intent," authorized the agency to "establish reasonable rules, regulations, and practices with respect to car service." (Petitioners Surreply 5.) Petitioners also contend that prior agency decisions have construed § 11122(a) as authorizing the regulation of the terms of railroads' use of freight cars. (Pet. 15-17 (citing Shippers Comm., OT-5 v. Ann Arbor R.R., 5 I.C.C. 2d 856, 863-64 (1989) (determining, pursuant to § 11122(a), that carriers may not restrict the access of private freight cars except under exceptional circumstances), aff'd sub nom. Shippers Comm., OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992); Petitioners Surreply 6.)

On September 23, 2021, AAR and UP submitted replies to Petitioners' motion for leave. AAR contends that Petitioners' efforts to distinguish Peoria and Atchison are unavailing since "the proposed Board action would dictate how railroads perform transportation services, namely switching services." (AAR Reply 1-2, Sept. 23, 2021.) UP argues that the Board should reject Petitioners' claim that the agency has construed § 11122(a) as allowing it to regulate the terms of railroads' use of freight cars. (UP Reply 1, Sept. 23, 2021.)

On November 23, 2021, the Board granted Petitioners' motion for leave to file a surreply, opened a proceeding to consider Petitioners' proposal, and stated that it would establish procedures for public comment in a subsequent decision.

REQUEST FOR COMMENTS

The Board invites comment on the issues raised in the petition generally as well as on the following specific questions:

1. Petitioners assert that the Board's current regulations and policies do not create sufficient incentives for Class I carriers to use private freight cars efficiently. (Pet. 2.) The Board invites commenters to provide detailed, concrete examples of carriers' inefficient use of private freight cars (i.e., the carriers and car owners involved, relevant dates and times,

[7] ISRI states that it supports Joint Shippers' request for comments on first-mile and last-mile service. (ISRI Comments 3.)

etc.). They may also wish to provide context for their comments by including information about the quantity of private freight cars owned or leased, volume of traffic shipped, storage capacity, and seasonality of shipments (if any). If requested, a protective order may be issued that would allow sensitive information to be filed under seal. In particular, the Board asks commenters to address the following:

a. How frequently do carriers hold private freight cars for more than 72 consecutive hours? The Board requests that commenters provide supporting data on the frequency of this occurrence, where available.
b. To the extent known by the commenter, why do carriers hold private freight cars for more than 72 consecutive hours?
c. To the extent known by the commenter, at which location(s) on the rail system are private freight cars held for more than 72 consecutive hours?
d. How are rail users' operations, facilities, production, and/or finances affected?
e. Has the frequency and severity of the issue changed with the implementation of operating changes by Class I railroads?

2. UP asserts that Petitioners' proposed regulations are unnecessary because private railcar providers have other avenues to pursue relief, such as through specific service commitments in contracts. (UP Reply 10-11, Aug. 30, 2021.) Do such contract service commitments include similar terms to the regulations proposed by Petitioners?

3. How, if at all, would Petitioners' proposal regulate "car service" within the meaning of 49 U.S.C. § 11122(a) by "encourag[ing] the purchase, acquisition, and efficient use of freight cars"?
    a. The Board invites commenters to address AAR's argument that Petitioners' proposal would regulate the "transportation services" that railroads provide, rather than "car service" within the meaning of § 11122(a). (See AAR Reply 3-6, Aug. 30, 2021.)
    b. To what extent is a finding of inadequate car supply a prerequisite for the Board to adopt Petitioners' proposed regulations?
    c. Do rail users currently lack access to an adequate supply of freight cars or anticipate a future freight car shortage?
        i. If so, how would the proposed regulations help solve or mitigate the issue? The Board requests that commenters provide supporting data on any claim of a current or future inadequacy of car supply, where available.
    d. Petitioners contend that their proposed regulations would "result in the national railcar fleet being of a more rational size to utilize existing rail system capacity and meet demand." (Pet. 2.)
        i. How would the proposed regulations lead to a more rationally sized freight car fleet?
        ii. How, if at all, would a more rationally sized freight car fleet ensure an adequate supply of freight cars?

4. How would Petitioners' proposed regulations affect rail users that do not use private freight cars? For example, CSXT, UP, and AAR argue that Petitioners' proposed regulations would create incentives for carriers to prioritize private freight cars to the

disadvantage of rail users that use railroad-owned freight cars. (CSXT Reply 2; UP Reply 8 n.26, Aug. 30, 2021; AAR Reply 16, Aug. 30, 2021.)

5. Petitioners propose that charges would be assessed unless "the rail carrier demonstrates that it was not a cause of the [72 hours] being exceeded despite exercising due diligence." (Pet. 24.)
    a. In what kinds of circumstances should carriers be able to show that they were not "a cause" of the 72 hours being exceeded?
    b. What kind of actions should constitute "due diligence"?
    c. How would this standard account for the possibility raised by AAR that carriers may hold private freight cars longer than 72 consecutive hours to improve the overall efficiency of the rail network (i.e., to prevent congestion at terminals during times of peak demand or to recover from network disruptions caused by weather events)? (See AAR Reply 16, Aug. 30, 2021.)
    d. How would this standard account for rail users' own car supply decisions? For example, UP argues that Petitioners' proposed regulations would "incentivize shippers to acquire additional freight cars and deploy them during service disruptions, despite their potential to contribute to congestion problems." (UP Reply 13-14, Aug. 30, 2021.)

6. How would rail network efficiency be affected by the proposal?
    a. The Board requests that commenters provide data, where available, to support claims that the rail network would be more (or less) efficient as a result of Petitioners' proposed rule.
    b. Under Petitioners' approach, to what extent would carriers have incentives to make potentially inefficient movements solely to avoid charges? (See CSXT Reply 6; AAR Reply 16, Aug. 30, 2021; UP Reply 9, Aug. 30, 2021.)

7. Under Petitioners' proposed regulations, private railcar providers would be able to assess charges if the "CLM location city of CLM Sighting Code" of a private freight car has not changed for more than 72 consecutive hours. (Pet. 18.)
    a. Why is 72 hours an appropriate timeframe and not, for example, 48 hours or 96 hours?
    b. Why should charges be based on when cars are idle for more than 72 consecutive hours, as opposed to, for example, overall transit idle times for the entire trip or when the placement of private freight cars exceeds projected transit times?
    c. Are CLM Event Sighting Codes a practical way to measure idle time?
        i. If not, what metric, if any, would be more useful as the basis for assessing delay charges?
    d. At what point should the timeframe begin (i.e., as soon as a rail user releases a private freight car, when the carrier picks up the private freight car, or some other point)?
        i. And if the 72-hour timeframe begins when private freight cars are released, how would this timeframe apply to rail users that receive service only once or twice per week?

8. Petitioners' proposal contemplates that the amount of the "private railcar delay charge" would correspond to the carrier's applicable demurrage or storage charge unless the carrier could demonstrate that such a charge would be "unreasonable and inappropriate" in a particular situation. (Pet. 24.)
    a. Is it appropriate for the Board to equate the amount of the "private railcar delay charge" to a demurrage or storage charge in most cases?
    b. To what extent are there practical alternatives to equating Petitioners' proposed "private railcar delay charge" to a demurrage or storage charge and what are the merits of those alternatives?

9. Commenters should address the following questions about how the regulations proposed by Petitioners would be implemented:
    a. Which party would be responsible for tracking the CLM Event Sighting Codes for private freight cars and invoicing in accordance with the proposed regulations?
    b. Joint Shippers suggest that the Board could require carriers to credit charges against their demurrage invoices. (Joint Shippers Reply 5.) How would compensation be handled under this proposal for rail users that do not incur demurrage charges or incur fewer charges than would be owed pursuant to the proposed regulations?

10. Petitioners suggest that the proposed regulations should apply only to Class I carriers. (Pet. 1-2.) How, if at all, would Class II and Class III carriers be impacted by the proposed regulations, if limited to Class I carriers?

Interested persons may file comments by June 30, 2022. Replies will be due by August 1, 2022.

It is ordered:

1. Comments are due by June 30, 2022; replies are due by August 1, 2022.

2. Notice of this decision will be published in the Federal Register.

3. This decision is effective on its service date.

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