

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 768

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

REPLY COMMENTS OF PETITIONERS

The Petitioners in this proceeding - The North America Freight Car Association, The Chlorine Institute, The National Grain and Feed Association, and The National Oilseed Processors Association¹ – hereby submit these comments briefly replying to points raised in the opening comments of other parties.

**I. THE BOARD HAS CLEAR STATUTORY AUTHORITY TO ADOPT
THE PROPOSED RULES**

Petitioners have already addressed the Board's clear authority, under 49 U.S.C §§ 11122(a) and 1321, to adopt the proposed rules submitted with their Petition for Rulemaking, and Petitioners have previously rebutted arguments by railroad parties that the Board lacks authority under §11122(a).² Petitioners will not repeat these prior arguments here. Other parties who have filed

¹ Petitioners provided information about their members and their interests in this proceeding, in their previous filings, and incorporate those filings by reference herein so as to avoid repetition.

² Petition at 14-17; Response to Replies of Railroad Parties at 4-6; Petitioners' Opening Comments at 12-13.

comments in support of the Petition and proposed rules, such as the U.S. Department of Agriculture (“USDA”); Western Coal Traffic League, Freight Rail Customer Alliance, and National Coal Transportation Association (collectively “Shipper Groups”); American Chemistry Council, Fertilizer Institute, and Corn Refiners Association (collectively “Coalition Associations”), and the Portland Cement Association, all filed opening comments which presented their additional views on why the Board has authority to adopt the proposed rules under §11122(a) and other statutory provisions. Petitioners commend the comments of these stakeholders to the Board, especially the Shipper Groups’ insightful rebuttal of railroad arguments about the purported import of previous versions of §11122(a),³ and the Coalition Associations’ demonstration of how the proposed regulations would further the statutory directive of §11122(a) to promote adequate railcar supply by encouraging efficient use of railcars.⁴ Also notable is the Portland Cement Association’s argument that such proposed rules would be consistent with various aspects of the Rail Transportation Policy, such as 49 U.S.C. § 10101 (8) (operate facilities equipment without detriment to public health and safety) and (9) (encouraging efficient management of railroads).⁵

The railroad parties who submitted opening Comments predictably attempt to undermine the Board’s authority to adopt the proposed rules, mostly repeating the flawed arguments first raised by the Association of American Railroads (“AAR”) in response to the Petition, namely that Petitioners are seeking rules under 49 U.S.C. § 11122(a) to directly regulate railroad transportation, rather than the efficient use of private railcars (*i.e.*, “car service” vs “transportation service”). Petitioners have previously shown the AAR’s argument is without merit in large part because it rests on a strained interpretation of two court opinions interpreting an entirely different statute that

³ Opening Comments of Shipper Groups at 13-15.

⁴ Opening Comments of Coalition Associations at 8-10.

⁵ Portland Cement Association Opening Comments at 6-7.

are otherwise easily distinguishable from the action the Petitioners are asking the Board to take in this proceeding.⁶ Petitioners plainly seek to have the Board simply adopt rules that will introduce incentives to encourage the efficient use of private railcars, not rules that directly regulate “transportation service.” Therefore, Petitioners’ proposal plainly fits within the Board’s explicit authority under § 11122(a)(2). Adoption of the railroads’ position would render § 11122(a)(2) a nullity, which of course the Board may not do.

The additional arguments advanced by Norfolk Southern Railway Company (“NS”) in its opening comments are also flawed. First, NS’s assertion that “there is no existing car supply problem that would be resolved by” Petitioners’ proposal⁷ is belied by the comments of literally thousands of rail shippers through their shipper associations participating in this rulemaking proceeding. Secondly, NS engages in semantics to attempt to argue that §11122(a) empowers the Board to act only the event of a “nationwide shortage of freight car ownership.”⁸ No provision of §11122(a) limits its application to only nationwide railcar shortages. Indeed, NS admits in the next breath that the legislative purpose of this statute was to encourage an “appropriate supply of cars” and “an adequate car fleet,” policy goals that do not require a nationwide railcar shortage, but rather are tailor made to the current railroad industry circumstances where inefficient use of the national Private Railcar fleet has resulted in oversized shipper railcar fleets assembled to try and counter railroad service failures, along with Private Railcar shortages to shippers or groups of shippers due to Class I carrier business decisions and the inefficient distribution of the Private Railcars that are in service. Petitioners’ proposal is a means for the Board to introduce incentives that will encourage an appropriate supply of Private Railcars, which should result in adequately

⁶ Petitioners’ Response to Replies of Railroad Parties at 4-6.

⁷ NS Opening Comments at 5.

⁸ *Id.* at 6-7.

sized individual Private Railcar fleets. But even if Private Railcar shortages were a prerequisite to the Board adopting regulations pursuant to §11122(a) (and they are not), Petitioners and other commenters (and many other parties in their testimony EP 770 and other dockets) have provided the Board with copious examples of how the current inefficient use of the national Private Railcar fleet by Class I railroads has in fact resulted in Private Railcar shortages, whether they are caused by the carriers themselves trying to alleviate their service deficiencies, or by some shippers being forced to maintain Private Railcar fleets that are far in excess of what is needed to serve their needs, which reduces the amount of Private Railcars available to other rail shippers.

Finally, NS attempts to argue that one aspect of legislative history of §11122(a), as opposed to its unambiguous terms,⁹ should control its interpretation. Specifically, NS attempts to demonstrate that the namesake of the Esch Car Service Act sought in 1917 to cut off the Board's ability in 2022 to consider Petitioners' proposal through a colloquy in the Congressional Record concerning so-called "reciprocal demurrage."¹⁰ However, to the extent such statements even control the express statutory language (and Petitioners note that §11122(a) was amended at least three times after 1917), this colloquy had nothing to do with the Interstate Commerce Commission, and now STB having authority under §11122(a) to promulgate rules that create incentives for railroads to use Private Cars more efficiently throughout their systems. Rather, the point of the exchange was to address whether a railroad would owe a shipper demurrage if the railroad failed to bring railroad-owned cars to the shipper "within the time they were required for the shipment

⁹ Where the language of a statute is clear, that language reflects Congressional intent, and is the end of the matter, for the agency and the courts are required to uphold Congressional intent in interpreting statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). As demonstrated in text, the language of §11122(a) is clear and provides the Board with ample authority to adopt the proposed rules.

¹⁰ *Id.* at 8.

of the goods.”¹¹ This is a far cry from the rules proposed by Petitioners, which seek to incentivize Class I railroads to use Private Cars more efficiently throughout their entire systems.

II. OBVIOUSLY, THE RAILROADS DO NOT HAVE SUFFICIENT INCENTIVES TO MOVE PRIVATE RAILCARS EFFICIENTLY

Petitioners submitted with their Opening Comments a verified statement of their expert witness, Mathew R. Johnson, Vice President of Technology and Information Services of AllTranstek, which summarized his analysis of Car Location Message data for over 900,000 Private Railcar movements. Mr. Johnson’s analysis documented the substantial delays that are occurring for Private Railcars in the national rail network today. Several shipper associations and the USDA filed opening comments which contained detailed additional information explaining the overwhelming need for rules encouraging the efficient use of Private Railcars by Class I railroads. While some of those parties believe that it would be appropriate to have the railroads incur penalties even earlier than the 72-hour period proposed by Petitioners, all such filings demonstrate the clear need for the proposed rules.

In contrast, the AAR and various individual Class I railroads argue that there is no need for the proposed rules, contending generally that they have sufficient incentives to handle private railcars efficiently. Frankly, these railroad arguments in opposition to the Petition are absurd, not only in light of the overwhelming support for the proposed rules by parties who collectively invest *billions* of dollars to supply Private Railcars to railroads in order to receive rail service, but also because of the current state of the railroad industry, in which railroad service may be at its worst level in the entire history of railroad transportation in the United States. If the current circumstances are not sufficient justification for the proposed rules, there never will be any

¹¹ *Id.*

circumstances that justify such rules. The fact that thousands of rail shippers, as reflected in the filings of their trade associations, uniformly support the adoption of proposed rules to encourage efficient use of Private Railcars, is conclusive evidence of the need for such rules, especially given that approximately 73 percent of the National railcar fleet today is composed of Private Railcars.

Finally, in its opening comments NS advanced the now common Class I refrain in response to any proposed change to the *status quo* that the Board should leave the use of Private Railcars by Class I railroads to undefined “market forces.”¹² NS does not elaborate on what those current “market forces” might be, because to do so would require NS acknowledge that the current level of Class I railroad market power leaves parties who provide Private Railcars with virtually no commercial ability to incentivize the railroad to use them efficiently. As the Board has become educated about over the past year, the lack of such incentives has contributed greatly to the widespread service failures that have adversely affected the entire United States economy. For this reason, NS’s statement that to adopt Petitioners’ proposed rules would insulate Private Car providers from “the risks of transportation service delays—a ‘normal market force[]’ that private railcar owners are well aware of when they decide to invest in their railcars,”¹³ is, frankly, shocking.

That being said, Petitioners maintain that a properly balanced regulatory regime that creates appropriate incentives for Class I railroads to use Private Railcars more efficiently would ideally result in “market forces” that produced mutually agreeable arrangements between railroads and shippers leading to an adequate and appropriately sized national railcar fleet (of *both* railroad-owned and Private Railcars). Such a “market” would be much preferable to a regime that requires

¹² NS Opening Comments at 11-12.

¹³ *Id.* at 12.

individual shippers to seek prescriptive orders from the Board with respect to particular shipments involving Private Railcars. In short, Petitioners believe that the Board should be persuaded that a market-based solution resulting from an effective regulatory backstop of rules that appropriately incentivize the efficient use of Private Railcars, rather than prescriptive orders of the Board on a case-by-case basis, is the right approach. Failure to adopt such rules will simply perpetuate the current inefficiencies and resulting railroad service failures.

III. CONCLUSION

For the reasons set forth herein, as well as in Petitioners' Petition, Supplemental Reply, and Opening Comments, and also in the filings of the USDA and the 15 shipper associations who have filing in support of the Petition, Petitioners urge the Board to issue a Notice of Proposed Rulemaking and adopt rules for the efficient use of Private Railcars as set forth in the Petition.

Respectfully submitted,

/ss/ Thomas W. Wilcox
THOMAS W. WILCOX
Law Office of Thomas W. Wilcox, LLC
1629 K Street NW, Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

*Attorney for the North America Freight Car Assn,
The National Grain and Feed Assn, and The
National Oilseed Processors Assn*

/ss/ Michael F. McBride
MICHAEL F. McBRIDE
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW, Suite 700
Washington, D.C. 20007
(202) 298-1800
mfm@vnf.com

Attorney for The Chlorine Institute