

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
June 30, 2022
Part of
Public Record**

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

COMMENTS OF PORTLAND CEMENT ASSOCIATION

Introduction and Interest

The Portland Cement Association (PCA), which represents the majority of the nation's cement manufacturers, appreciates the opportunity to share our support for the Surface Transportation Board (Board) adopting reasonable rules enabling the users of private railcars to assess a private railcar delay charge if a Class I railroad delays these railcars beyond a reasonable period of time.

Portland cement is a manufactured powder that is the primary ingredient in concrete, which is an essential construction material. It is the most-utilized material next to water globally. Last year, approximately 92 million metric tons of cement were manufactured in the United States and 107 million metric tons of cement were consumed.¹ Cement is used to build transportation infrastructure, water and sewer pipes, commercial and residential buildings, dams, homes, and floors. Cement is used throughout our daily lives to shape the world around us. Literally nothing in the modern world can be built without it.

The cement industry is regional in nature. Most cement manufacturing plants are located near large limestone deposits, the principal ingredient used to manufacture cement. Most of the cement shipped in the United States is shipped by rail, making reliable rail service essential to the efficient and sustainable shipment of cement. Additionally, most cement manufacturing plants and terminals are captive to one Class I railroad. The average cement shipments by rail range between 250 and 500 miles. PCA's members have indicated that on average, shipping cement by truck is not economically viable beyond approximately 250 miles.

¹ <https://pubs.usgs.gov/periodicals/mcs2022/mcs2022-cement.pdf>

As explained below, PCA members have made significant investments and incur substantial ongoing costs in leasing and acquiring private railcars for their use to provide railroad freight service by the railroads. While there are stringent demurrage rules and tariffs in place penalizing shippers for their extended use of railcars, current regulations and policies lack sufficient reciprocal incentives for the railroads to use private railcars efficiently. PCA's members have a strong interest in ensuring that appropriate incentives and penalties are in place to ensure the efficient use of private railcars by the railroads.

Support for Rules Incentivizing Railroads' More Efficient Use of Private Railcars

Overall, PCA members have seen a decline in rail service that was exacerbated with the introduction of precision scheduled railroading ("PSR"), which has prioritized railroad cost-cutting over customer service, and resulted in transportation delays, held trains, missed switches, and inefficient handling of private railcars. A reasonable rule enabling shippers to assess a charge when a private railcar does not move for a specified period 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" is necessary to encourage efficient use of private railcars. The substantial deterioration in private railcar service over the past several years demonstrates the railroads do not currently have sufficient incentive to do this on their own. Instead, the railroads' use of private railcars is driven more by what is best for their bottom lines without taking into account how the delays in movement increase shipper costs and negatively impact the greater supply chain.

As the Petitioners' highlight, private railcars comprise most of the national fleet. Like a number of other commodities shipped by Class I railroads, none of the Class I railroads provide railcars to ship cement. This has been the case for over 30 years. Specifically, before a railcar used to ship cement can be used to ship a different commodity it must be thoroughly cleaned and out of service for between 30 and 60 days. This has led the Class I railroads to stop providing service railcars to cement shippers. This has led PCA members to either purchase railcars or lease railcars suitable for shipping cement, at considerable cost and expense. The Petitioners' make an excellent point about the cost increases associated with owning and maintaining private railcars. For example, the cleaning costs associated with a private railcar used to ship cement is approximately \$1,500 and ongoing maintenance costs are substantial.

Under the status quo rules, it is fundamentally unfair that cement and other shippers are subject to substantial demurrage and related railroad accessorial charges for railcars at the same time they are receiving poor rail service, yet the railroads are not subject to any similar assessments when they unfairly

detain shipper equipment. Clearly, mutuality in treatment, with rules applying equally to railroads and shippers are warranted and necessary under the circumstances, as well as to promote and incent overall transportation efficiency.

PCA supports structuring a private railcar delay charge as the equivalent of the greater of the Class I railroad's applicable demurrage or storage charge. It is imminently fair and necessary to establish rules and fees on railroads who unfairly detain and delay shipper railcars comparable to those facing shippers who do not have railcars ready for a Class I railroad to move. Finally, if a private railcar delay charge is structured in such a way that if a Class I railroad can demonstrate it was not the cause of the transit idle times that they would not be held responsible for an assessment, such a structure would help ensure a charge would only be assessed for cause.

The New Rules Should Apply to Exempt Commodity Shippers

In Ex Parte No. 760, *Exclusion of Demurrage Regulation from Certain Class Exemptions*, (STB served Feb. 28, 2020), the Board revised its rules to state clearly, consistent with longstanding court and agency precedent, that the miscellaneous commodities and boxcar transportation exemptions do not apply to the regulation of demurrage. See 49 C.F.R. § 1039.11. The Board did so to address the new and increasing demurrage charges related to the transportation of these exempt commodities, and the potential for those charges to negatively affect exempt commodity shippers, including hydraulic cement shippers.

Additionally, the Board's April 2020 Ex Parte No. 757, *Policy Statement on Demurrage and Accessorial Rules and Charges* (STB served Apr. 30, 2020), makes clear the Board's Policy Statement applies to exempt commodities like hydraulic cement. PCA strongly urges the Board to apply the same policy to any new "reverse demurrage" or similar rules, in order to help incentivize the efficient use of private railcars for **all** shippers. Exempt commodity shippers, including hydraulic cement shippers, should be covered by any new rules, and treated the same as non-exempt shippers. It would be fundamentally unfair to deprive them of the benefit of new rules. Therefore, any such new rules should explicitly make clear that exempt commodities, including hydraulic cement, are covered. The rules should not be promulgated or construed to deny applicability to the miscellaneous commodities and other transportation exemptions. Such clarification is especially necessary now, as the Board continues to work on Ex Parte 704, *Review of Commodity Box Car, TOFC/COFC Exemptions* in order to help incentivize the efficient use of private railcars for **all** shippers.

Use of Private Freight Cars

Below are responses to the Board's series of questions related to the frequency that Class I railroads hold private railcars for more than 72 hours, the reasons the railroads point to why this happens, locations where private railcars are held, how the frequency of private railcars being held has increased with the implementation of operating changes by Class I railroads, and how rail users' operations, facilities, production and finances are impacted by the holding of private railcars that reflect the experiences of PCA members.

In terms of the frequency that carriers hold PCA members private railcars for more than 72 hours, PCA has anecdotal evidence that this happens to PCA members on a weekly basis, and sometimes more frequently, especially during the current railroad service crisis. Additionally, one member highlighted that one Class I railroad essentially dictates the days the railroad will serve them, without consideration of the customer's needs or requirements. As part of this, a cement manufacturer highlighted that the Class I railroad does not consider seasonal shipping fluctuations or truly recognize the shipping needs of different customers and commodities.

PCA members highlight a range of examples of inefficient use of private railcars on the part of the Class I railroads with very little recourse to address the poor service. For example, several PCA members cited Class I railroads essentially waiting until they had the "right" number of railcars to collect at a cement plant or terminal over the course of a week prior to moving the private railcars. This in turn leads to greater bunching of railcars, which leads to increased demurrage fees for PCA members. Ironically, this is in direct contradiction of the stated goals of PSR that promised focused, reliable, consistent, and constant daily service that meets the service needs of customers and minimizes car dwell. These demurrage fees are truly unfair considering the Class I railroads are often the cause of the delay. This example demonstrates the need for new reasonable private railcar delay rules to be applied on railroads in appropriate circumstances.

PCA members indicate that the Class I railroads cite shortages of locomotives and crews as well as general rail congestion for why private railcars are held for more than 72 consecutive hours. One PCA member indicated when a railroad crews' daily work hours are met, the workers depart without a clear indication when the next crew will return to the cement terminal to complete the unfinished work of the previous crew. This leaves the PCA member scrambling to figure out what to do with the cement that was to be received or shipped, and how to orderly plan its operations. Ultimately, the PCA member is forced

to tell its customer that the delivery of their product will be delayed and without any clear indication of when the customer can expect to receive the shipment.

PCA members point to private railcars carrying cement being held for extended periods of time at the Class I rail yards and terminals. Additionally, PCA members cite private railcars being held for more than 72 hours at switch yards waiting for interchange or to be delivered to their end location because of the separation between service days or for other reasons. Finally, PCA members cite private railcar delays being caused by the misrouting of railcars.

In response to the Board's question related to how rail users' operations are impacted by the increase in the inefficient movement of private railcars, PCA members highlight the negative impact it has on meeting customer orders and making it close to impossible to orderly plan and expand their operations. This is at the same time that PCA anticipates the demand for cement to continue to increase as communities build infrastructure projects funded in part by the Infrastructure Investment and Jobs Act. Finally, PCA members raised safety concerns about the impact of the inefficient movement of private railcars. PCA members highlight the undue strain and safety risks to their workers who are forced to work overtime to unload bunched railcars as they work to meet customer demands and minimize demurrage fees due to the railroads' service disruptions and delays.

PCA members also highlighted that the inefficient movement of private railcars is not only impacting their operations in terms of shipping hydraulic cement to market but also delaying the shipment of inbound commodity inputs to their plants that are essential to manufacturing cement. Hydraulic cement is manufactured through a tightly controlled process of chemical and physical transformations of a range of elements. One component of the manufacturing process involves heating the elements to temperatures reaching more than 2700 degrees Fahrenheit or higher until they start to liquify before they become clinker. Once the clinker is cooled, gypsum, and increasingly more frequently, limestone and other materials are added, and the product is ground into a fine powder that becomes portland cement. Hydraulic cement manufacturing plants run continuously, typically 24 hours a day, seven days a week. There are a limited number of materials that can be used to generate and maintain the high temperatures required to run a cement kiln. Our members have cited delays in the shipment of these goods can potentially impact the energy efficiency of a cement manufacturing plant.

Regarding how the frequency and severity of the poor movement of private railcars has changed with the implementation of PSR by the Class I railroads, PCA members cite this as the start of the decline in the

movement of private railcars. Over this time, PCA members cite an increase in both missed switches and bunching of railcars. Each of these have larger impacts on the overall operation and management of cement plants and terminals and in turn impact the ability to meet customers' demands.

Service Commitments in Contracts

We disagree with Union Pacific Railroad Company's (UP's) assertion that the Petitioners' proposed rules are unnecessary because private railcar providers have other avenues to pursue relief, such as through specific service commitments in contracts. While the majority of cement in the United States is shipped by rail it is important to recognize that when compared to other commodities shipped by rail, cement makes up a small portion of any Class I railroad's annual volume. Even large volume cement shippers have very little leverage in negotiations, and for those that have contracts for service almost none are able to obtain any specific railroad service assurances, including any transit or cycle time performance commitments. Union Pacific's claims with respect to contracts are simply untrue, at least with respect to cement shippers.

Car Service

A rule enabling the users of private railcars to assess a private railcar delay charge if a Class I railroad delays these railcars beyond a reasonable period of time would encourage and advance more efficient car service. Additionally, 49 U.S.C. § 11122(a) states that the Board's rules on car service "shall encourage the purchase, acquisition, and efficient use of freight cars." That provision also provides that the Board's car service rules may include compensation to be paid for the use of a freight car, terms for use, and "sanctions for nonobservance" of the rules. This includes the use of private railcars. As such, the statute supports the promulgation of new rules compensating shippers when a private railcar is held for an unreasonable amount of time by a Class I railroad that adversely impacts the shipment or delivery of the commodity being shipped. Additionally, the railroads have a fundamental common carrier obligation to provide service on reasonable request (49 U.S.C. § 11101), and such failures are subject to actions under 49 U.S.C. § 11704(b) and (c). The Board has broad authority under 49 U.S.C. § 1321, 5 U.S.C. § 553, and 49 C.F.R. Pt. 1100 to promulgate these rules.

The Petitioners' proposed rule seeks to ensure efficient car service, for private railcars. As a result, PCA disagrees with the Association of American Railroads (AAR) that the Petitioners' proposal would regulate transportation services, rather than car service. Such rules also promote the rail transportation policy goals to "operate transportation facilities and equipment without detriment to the public health and

safety,” and “to encourage honest and efficient management of railroads.” 49 U.S.C. § 10101(8) and 10101(9).

In response to the Board’s questions related to how the ability to assess the impact of a private railcar delay charge on railcar supply, PCA does not believe a finding of inadequate car supply is a prerequisite for the Board to adopt the Petitioners’ proposed rules. The issue is whether the railroads are unduly detaining private railcars, and whether the new rules will properly incent and encourage the **railroads** to efficiently use private freight cars. PCA strongly believes that the proposed new rules will properly promote the efficient use of railcars and incent the railroads to better value the shippers’ substantial investments in railcars. The level of railcars supplied by customers is not the issue, although many shippers have been forced to consider acquiring additional railcars to make up for the railroads’ transit and cycle time service failures, to the extent such freight cars are available. As such, railcar supply issues are not informing the railroads’ poor private railcar car service. Instead, the poor railroad service is being informed by operating changes implemented by the Class I railroads aimed at cutting costs and reducing transportation supply.

PCA members agree with the Petitioners that if new rules were put in place to require more efficient use of private railcars, their current fleets could be reduced and “right sized” to the benefit of both railroads and their customers generally, and to system fluidity. Additionally, due to the holding of private railcars by the railroads, PCA members cite concerns regarding the adequate supply of railcars for cement service. Finally, some PCA members who lease private railcars to ship cement indicate that supply shortages tend to be cyclical and result in private railcar companies reacting by increasing the leasing prices.

Impact of Proposed Rules on Railroad-Provided Freight Cars

PCA disagrees with CSX Transportation Company, UP, and AAR that the Petitioners’ proposed rules would create incentives for carriers to prioritize private freight cars to the disadvantage of rail users that use railcars provided by a Class I railroad. In the case of cement, as we have highlighted, all traffic moves in customer-provided, private railcars. The railroads already are not offering cement shippers service in railroad-provided freight cars. As a result, PCA members would not be incentivized to move away from railroad-provided freight cars by a rule governing private railcar use by the Class I railroads.

Time When a Private Railcar Would be Able to Assess Charges

In response to the Board’s questions related to the timeframe for an idle private railcar before which a charge can be assessed and what this should be based on, PCA members generally support a charge that

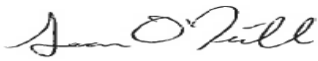
would be based on overall idle time over the course of a shipment. A private railcar delay charge based on overall idle time would more accurately reflect the delay in car service of the private railcar. For example, if a private railcar was delayed at three different points throughout the trip, no one of those delays may add up to 72 hours but collectively they may exceed 72 hours.

If a private railcar delay charge were alternatively based on consecutive hours of delay, PCA would support decreasing this time to 24 hours consecutive hours versus 72 consecutive hours. Shippers are often subject to demurrage after 24 hours, and as such, basic fairness requires the thresholds to be comparable and reciprocal in nature.

Conclusion

For the reasons outlined above PCA supports the Board moving forward with new rules enabling the users of private railcars to assess a private railcar delay charge if a Class I railroad delays these railcars beyond a reasonable period of time.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sean O'Neill".

Sean O'Neill
Senior Vice President, Government Affairs
Portland Cement Association