

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 334 (SUB-NO. 8A)

JOINT PETITION FOR EXEMPTION OF ARBITRATION RULE
FROM APPLICATION OF 49 U.S.C. § 10706 AND MOTION TO DISMISS

ENTERED
Office of Proceedings
May 24, 2024
Part of
Public Record

REPLY OF TTX COMPANY TO
RSI MOTION FOR LEAVE TO FILE SURREPLY

TTX Company (“TTX”) submits this reply in opposition to the Railway Supply Institute’s (“RSI’s”) Motion for Leave to File a Surreply, filed May 6, 2024. RSI acknowledges (at 2) that its proposed Surreply (the “Proposed Surreply”) is barred by the Board’s procedural rules, 49 C.F.R. 1104.13(c), and the content of RSI’s Motion shows why that rule exists and should be enforced in this case.

In the event the Board nonetheless accepts RSI’s Proposed Surreply into the record, it should allow TTX to respond to the new and belated arguments and purported evidence in RSI’s pleading.

I. THE BOARD SHOULD DENY RSI’S MOTION FOR LEAVE AND REJECT ITS PROPOSED SURREPLY

RSI makes no serious effort to justify its proposed violation of Board procedures by submitting a surreply. Its primary argument – that evidence submitted by TTX and others was “new” (Motion at 3, 4) – is ludicrous. Of course it was “new.” It was submitted in order to respond to the evidence and argument submitted in RSI’s Petition, which was TTX’s (and AAR’s) due process right. Were a surreply justified whenever a reply interposed “new” evidence or argument – or whenever adding something made a record “more complete” (Motion at 3) – a “reply to a reply” would always be justified, in contravention of the Board’s rule.

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RSI's lack of justification is even more clear in light of the nature of the evidence that RSI says it needs to respond to; namely, evidence bearing on whether there is an impending boxcar shortage. RSI could not have been surprised that TTX (and AAR) responded to RSI's assertions in this regard, and indeed much of the evidence TTX relied upon was placed into the record by RSI itself when it appended TTX's PowerPoint presentation to its Petition. RSI had every opportunity to put forward its best case for the supposed (but actually non-existent) boxcar cliff without the need for a surreply.

RSI's only other argument – that AAR “misapprehended” RSI's position, so RSI should be allowed to re-articulate its case for reopening this proceeding (Motion at 3, 4) – does an excellent job of demonstrating why the Board should enforce its rule against surreplies. RSI's Motion is claiming the right to present what it claims is a “clarified” (*id.* at 4) version of the position set forth in its Petition – in effect, a “do-over.” If the rule against surreplies means anything at all, it must prevent a party from revising its position in a procedural context where parties opposing the sought-after relief would not be entitled to file a response.

Further, RSI's Proposed Surreply is riddled with internal inconsistencies and misrepresented (and flatly erroneous) facts, and if allowed into the record would interfere with rather than assist the Board's thorough and fair consideration of the issues raised by RSI's Petition.

Accordingly, the Board should reject RSI's Motion and exclude the Proposed Surreply from the record.¹ If the Board nonetheless elects to accept that pleading into the record, fairness

¹ *Portland & Western R.R. – Petition for Declaratory Order – RK Storage & Warehousing, Inc.*, Finance Docket No. 35406 (STB served July 27, 2011) at 2 (denying requests for leave to submit surreplies where they would not “advance[]the record needed to determine the reasonable amount of demurrage”); *Canadian Pacific Ry. Ltd.*; *Canadian Pacific Ry. Co.*; *Soo Line R.R.*; *Central Maine &*

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and due process – not to mention the goal of a “more complete record” – demand that the Board also accept into the record TTX’s brief response, set forth in Section II below.

II. TTX’S RESPONSE TO RSI’S PROPOSED SURREPLY

Much of what RSI argues in its Proposed Surreply is already fully addressed and refuted in the Replies of TTX and AAR. TTX will briefly respond to the new material contained in RSI’s Proposed Surreply.

A. RSI’s Surreply Efforts to Shore Up Its Imagined “Boxcar Cliff”

1. RSI’s Efforts to Wave Away Recent Investments in Boxcars by Lessors, Railroads, and TTX (Proposed Surreply at 3-6)

RSI does not dispute that substantial investments in boxcars have been made in recent years, including by leasing companies. Instead, RSI strives to minimize the significance of those additions to the boxcar fleet, and falsely claims that there are no pending orders. RSI’s arguments both lack merit and underscore why the kinds of revisions to the car hire regime that RSI desires would be unwarranted and unwise.

First, despite its acknowledgement that thousands of new boxcars have been added to the fleet in recent years, RSI asserts that “there are no orders on the books this year.” Proposed Surreply at 3. RSI should know that this statement is false. TTX alone has pending orders for hundreds of boxcars, which are currently under construction at one of RSI’s members. TTX is also aware that another car builder (also a member of RSI) is working on at least one significant order from a purchaser other than TTX. Confirming this, the data RSI cited for its statement

Quebec Ry. US Inc.; Dakota, Minnesota & Eastern R.R.; & Delaware & Hudson Ry. – Control – Kansas City Southern; The Kansas City Southern Ry.; Gateway Eastern Ry.; & The Texas Mexican Ry., Finance Docket No. 36500 (STB Decision No. 28, served Sept. 27, 2022) at 3 (denying motion to file surreply); *cf. Canadian National Ry. & Grand Trunk Corp. – Control – Iowa Northern Ry.*, Finance Docket No. 36744 (STB Decision No. 2 served Mar. 29, 2024) at 12 (concurring statement of Members Fuchs and Schultz “writ[ing] separately to emphasize the importance of following the Board’s procedural requirements and promoting a fair and efficient process”).

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about orders shows that, as of March 31, 2023, there were 1,951 pending boxcar orders (what the report refers to as “backlog”) – 1,178 for 60-foot cars and 433 for 50-foot cars and others shorter than 60-feet in length.²

Second, RSI seeks to minimize the significance of its own members’ recent investments in boxcars. In what appears to be a kind of Freudian slip, RSI argues that the investments in boxcars by leasing companies – *i.e.*, RSI members like GATX – in the 2016-2020 period were *not driven by market demand* for boxcars but by the happenstance that lessors could “avoid losses” by shifting into boxcars orders they had already placed for other car types. Proposed Surreply at 5. This argument should give the Board great pause for what it reveals about the motivations of the railcar leasing companies behind RSI’s Petition. Those entities do not really want a regime that calibrates supply with market demand – they want opportunities to earn risk-free returns on investments in railcars.

RSI’s effort to explain lessors’ recent boxcar purchasing activity underscores how the kinds of alterations to the Arbitration Rule and Car Hire regime that RSI and its members seek could upend today’s well-functioning marketplace. Undoing the current regime would support opportunistic behavior by leasing companies that are (fairly transparently) pursuing artificially-propped-up returns from railcar investments that are *not supported by real demand*. The sad history of railroad car supply in the 1980s shows that the risks of car surpluses and the attendant

² RSI’s Proposed Surreply cites “ARCI 2024 – 1st Quarter Reporting Statistics, Report of Orders, Deliveries and Backlog (Mar. 31, 2024),” the public version of which does not contain boxcar-specific information. Proposed Surreply at 3 n.5. TTX counsel obtained the underlying detail from RSI’s counsel, which is excerpted as Exhibit A hereto.

The fact that no new orders were placed in the first quarter of 2024 reflects many factors, including the large number of orders filled in 2023 and the first part of 2024, the pending backlog of orders, the large number of boxcars in storage, and the overall improvement in rail cycle times, which allows the same volume of freight to be moved with fewer active cars. TTX anticipates placing more boxcar orders later in the year.

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harms to network fluidity and demand-based investment incentives cannot be understated. *See* TTX Reply at 3, 8-9.

More fundamentally, RSI's parochial perspective asks the Board to ignore additions to the fleet by any parties other than the lessors, as if only boxcars purchased by lessors represent legitimate additions to the fleet. But car hire policy is not about ensuring that financial investors can earn positive returns, much less that they can do so solely from car hire payments. It is about a set of rules that facilitate market-based compensation capable of matching overall supply with overall demand, taking into account all of the sources of revenue – including transportation revenues – that might support investment in railcars. The fact that RSI's members may prefer a different compensation regime that supports profitable returns regardless of market demand does not mean that such a regime would be in the public's interest.³

Third, RSI brushes aside the considerable investments by Class 1 railroads in recent years by suggesting – without evidentiary support – that boxcars acquired by Class 1s are used only for intraline movements and are not generally available across the entire network. Proposed Surreply at 6. RSI's contention, however, is both unsupported and untrue. TTX is aware, for

³ *See, e.g., Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 747, 761 (1983) (“*Boxcar I*”) (exempting box cars from prescribed car hire and noting that, following the removal of the 1970s-era “incentive” element of car hire compensation for boxcars, “[i]t should now be clear ... that the Commission will no longer give boxcar investors any semblance of a future guarantee concerning car compensation or the return on their investment. That return must be dictated by forces of supply and demand. To do otherwise, as some of the exemption opponents argue, would be counterproductive, reducing efficiency, competitiveness and profitability of boxcar service, and it is contrary to the goals of the rail transportation policy enacted by Congress as 49 U.S.C. 10101a.”); *see also id.* at 756 (noting that a “defect of prescribed car hire is that it creates at least the illusion of a guaranteed return on investment, encouraging investors to acquire cars without regard to the adequacy of the existing car fleet”); *Exemption from Regulation – Boxcar Traffic* 367 I.C.C. 425, 453 (1983) (“*Boxcar II*”) (observing that a regime of bilateral negotiation “probably will not provide the steady flow of income that may be desired by individuals who invest in boxcars as tax shelters, using short-line railroads as a medium to place their cars on the Nation's rail system. To the extent that the interests of these investors require the preservation of inefficient and costly mechanisms of car compensation, we must subordinate them to the broader interests of the Nation's railroads and their shippers”).

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example, that large numbers of boxcars acquired by Class 1s in recent years have been contributed by those railroads to the North American Boxcar Pool (which is separate from TTX's Railbox Pool),⁴ where they operate in pooled service across the entire rail network for the benefit of shippers served by large and small railroads alike. In addition, even if some new Class 1 boxcars were being added to meet "local" demand on the Class 1's network, their availability would nonetheless free other cars – *e.g.*, TTX or NABP cars – to meet demand across the entire network. The data submitted with TTX's Reply showing the extent to which shipments in TTX-owned boxcars support traffic originated or terminated by shortline railroads is instructive in this regard. *See* TTX Reply at 5-6 & Fig. 2.

Fourth, regarding TTX's substantial and ongoing investments in boxcars, RSI wrongly treats these investments as part of the problem rather than part of the solution. Contrary to RSI's rhetoric, there is nothing whatsoever "anticompetitive" about TTX adding to the fleet of boxcars. Boxcars acquired by TTX are available to big railroads and small railroads alike, they move efficiently in pooled service, and TTX plays no role in any of the commercial decisions by railroads about how those cars are used to support competitive rail transportation offers. Nor does TTX compel (or influence in any way) any other buyers of railcars regarding the types or configurations of cars that they purchase, contrary to RSI's claims. Proposed Surreply at 13.⁵

Finally, given all of the other sources of investment in boxcars, and the lack of any looming cliff, it is no surprise that (according to RSI, *see id.*) RSI's lessor-members may face challenges finding other railroads eager to bear the risk of *fixed rate leases*, under which the flow

⁴ TTX currently serves solely as the administrator of the NABP pool on behalf, but in that capacity it implements policy and rules established by NABP's Executive Committee and does not itself make those policies or rules.

⁵ *See* discussion below at page 10.

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of funds to the car owner is supported both by the transportation revenues the cars can earn and also by the stream of car hire payments – rather than by car hire alone. Ironically, RSI’s admission that railroads would need to be forced to enter into such leases in the current environment through the exercise of “market power” (*id.*) may be the best reflection that market conditions reflect no shortage of boxcars today or in the future.

2. RSI’s Contentions Regarding Cars in Storage (Proposed Surreply at 6-7)

RSI’s arguments about the large numbers of boxcars “in storage” misunderstands why this fact matters. RSI vigorously disputes that the stored cars can play a part in meeting demand, because they are “unusable” or “functionally obsolete.” Proposed Surreply at 6. To the extent this is true about some of the stored boxcars, it makes TTX’s point: the retirement of these cars will not affect the ability of the fleet to meet demand. In other words, the active fleet is already effectively smaller than RSI claims, yet demand is being met.

3. RSI’s Own New Evidence Undercuts Its Effort to Refute the Supply Benefits of Higher-Capacity Modern Boxcars (Proposed Surreply at 7-9)

RSI contends (again without evidentiary support) that new, higher-capacity 60-foot boxcars being added to the fleet are affirmatively unwelcome by many boxcar shippers, and that much of the added capacity will therefore go “unused.” Proposed Surreply at 7-9. This assertion is misguided on a number of levels.

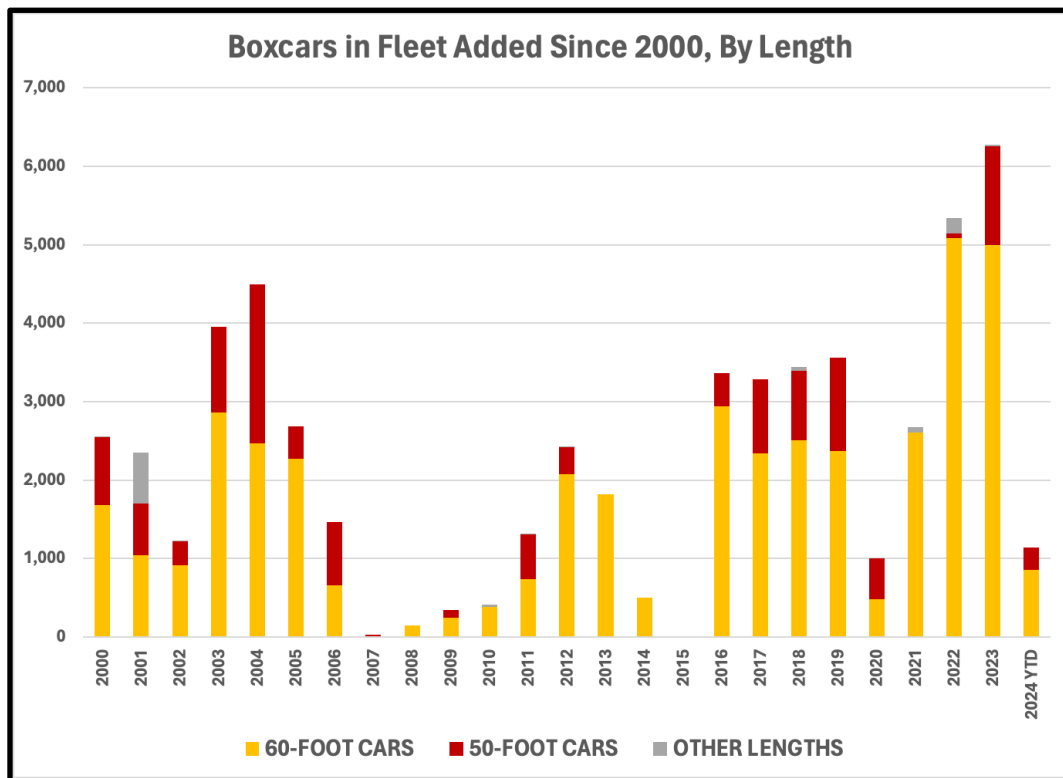
First, RSI is wrong in asserting that upcoming retirements will leave shippers without access to 50-foot cars. As shown in Figure 1 below, large numbers of 50-foot boxcars – more than 12,000 in total – have been added to the fleet since 2000,⁶ and none of these will be retiring

⁶ Figure 1 shows additions only through April 10, 2024.

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anytime soon. In fact, even with the upcoming retirement (during 2025-2030) of the remaining 1970s-era cars, more than 19,500 50-foot boxcars would still be in the fleet in 2030, accounting for close to a quarter of the fleet, even if one assumed (counterfactually given additions already in 2024) that no new ones would be added to the fleet in coming years.

FIGURE 1
BOXCARS ADDED SINCE 2000, BY LENGTH



Second, given RSI’s avowed concern about the implications of investments in 60-foot cars, it is ironic that RSI’s own witness – GATX – appears to have limited its own investments to cars of that length. According to Mr. Titterton of GATX, the boxcars that GATX ordered in 2020 and 2021 were all “high-capacity 60-foot boxcars,” even though conditions at the time supposedly had created a “perfect storm” (Proposed Surreply at 3) supporting boxcar investments. GATX’s choices no doubt reflect some appraisal of the relative demand for

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boxcars of different lengths, but certainly do not support the notion that there is vast unmet demand for 50-foot cars.

Third, RSI claims that TTX's purchasing decisions are somehow influencing other investors in boxcars to buy only 60-foot cars. Specifically, RSI asserts that TTX "forces railcar lessors to invest in TTX's chosen standardized car types for fear that investments in other car types will become obsolete." *Id.* This is nonsense, as the continued investment in 50-foot cars (as recently as this year) establishes. TTX itself owns numerous 50-foot cars itself, {{ [REDACTED] [REDACTED] }} of which will remain in TTX's fleet beyond 2020. If there is demand for such cars as RSI asserts, they will not become "obsolete."

Equally important, TTX's own decisions to standardize its more-recent boxcar acquisitions around 60-foot high capacity cars – as contemplated by its Board approved Pooling Agreement (*see* Railbox Pooling Agreement at Article 5.2(a) (parties will, through TTX, "seek standardization of box car types of improved utility and economy")) – do not deprive other boxcar investors who might wish to avail themselves of the benefits of pooling for 50-foot cars. The NABP pool includes two sub-pools for 50-foot equipment: one for 50-foot Plate C cars equipped with a single sliding door, and another for 50-foot Plate F cars equipped with a single plug door.⁷ Owners of 50-foot boxcars thus have opportunities to take advantage of pooling efficiencies to improve the utilization – and thus financial returns – on those cars.

⁷ NABP's configuration guidelines were created by the NABP Executive Committee to reflect the configurations and securement systems that appeal to the widest cross section of shippers such that an emptied boxcar is useful to another nearby shipper thus reducing empty miles/time and thereby creating capacity while lowering costs.

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4. RSI's Contentions Regarding Projected Future Demand (Proposed Surreply at 9-10)

Finally, RSI has essentially nothing to say to refute the fact that demand for boxcars is not anticipated to increase in the future, reducing the need for any expansion in the fleet's capacity. What RSI does say, however, should concern the Board. RSI advocates for change in the car hire regime so as to support growth in demand. Proposed Surreply at 9. Essentially RSI is saying: "Build them and demand will come." Far from reflecting a desire for market-based car hire compensation, this view is precisely the kind of thinking that led to the subsidization of boxcar investments and the resulting glut of unneeded cars in the 1970s and 1980s. *See* TTX Reply at 3, 8-9.

B. RSI's Assertions that Its Position Was "Misconstrued" or "Misapprehended" Disprove Themselves (Proposed Surreply at 10-13)

TTX does not purport to speak for AAR in response to RSI's suggestion that AAR "misconstrue[ed]" or "misapprehend[ed]" RSI's Petition. Proposed Surreply at 10. However, TTX notes that RSI's new characterization of its position as merely seeking a "level playing field" is not credible. There is no doubt that RSI is seeking not just a level playing field but some form of guaranteed level of compensation for boxcars owned by its members. This conclusion is unavoidable when one inspects RSI's complaints about the Arbitration Rule.

- First, RSI makes clear that it believes that the dispersion of boxcar use across many railroads means that any default rate set at a level below the "market rate" will pressure lessors to agree to a below-market rates. *Id.*
- Second, RSI also makes clear that it believes – again without foundation – that arbitrators cannot be relied upon to select "rate offer[s] that most closely approximate a market rate." *Id.* at 11.

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Although RSI never comes clean regarding what actual changes to the Arbitration Rule it will propose, given the nature of RSI's complaints, the only path that would serve the interests of RSI's leasing company members (as RSI describes those interests) would be to prop up the default rate so that lessors can be guaranteed adequate returns *without* having to reach agreement with railroads starting from a low default rate and *without* having to arbitrate. Any revision to the car hire regime that proceeded down this path would mark an unwise and dangerous return to "prescribed car hire" by any other name. And, to make matters worse, RSI proposes to upend the entire car hire regime – with sweeping effect on all car types – without having even attempted to demonstrate any issue or concern outside the realm of boxcars.

CONCLUSION

The Board should reject RSI's Motion to File Surreply. In the event it grants that Motion, it should accept into the record the evidence and argument set forth in Section II of this Reply.

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Respectfully submitted,



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May 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing TTX Reply to RSI's Motion for Leave to File Surreply to be served electronically or by first class mail, postage pre-paid, on

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and all other parties of record in this proceeding.

/s/ Michael L. Rosenthal

Michael L. Rosenthal

May 24, 2024

VERIFICATION

I, William J. Sheehan, TTX's Vice President of Fleet Management, declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to provide this verification.

Executed on May 23, 2024

A handwritten signature in black ink that reads "William J. Sheehan". The signature is written in a cursive style and is positioned above a horizontal line.

William J. Sheehan
TTX Vice President of Fleet Management

EXHIBIT A

RSI DATA CITED IN RSI PROPOSED SURREPLY AND PROVIDED BY RSI COUNSEL

Railway Supply Institute, Inc.
ARCI 2024 - 1st Quarter Reporting Statistics
Report of Orders, Deliveries and Backlog
3/31/2024



RSI Consolidated

	ORDERS	DELIVERIES	BACKLOG	YTD ORDERS	YTD DELIVERIES
BOX CARS	0	1197	1951	0	1197
60' and longer	0	790	1178	0	790
Less than 60'	0	389	433	0	389
Mechanical/Insulated	0	18	340	0	18