BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 768

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

REPLY OF
THE INSTITUTE FOR SCRAP RECYCLING INDUSTRIES, INC.

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The Institute of Scrap Recycling Industries, Inc. ("ISRI") respectfully submits these comments in full support of the joint petition for rulemaking submitted to the Surface Transportation Board ("STB" or the "Board") on July 26, 2021 ("Petition") by 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") (together "Petitioners").[1] The Petition asks the Board to establish rules that would incentivize the efficient use of private cars supplied by non-railroad parties to Class I railroads when railroads hold private cars beyond a reasonable period. Developing rules that hold railroads accountable when they cause inefficiencies in their use of private cars, just as rail customers are held accountable for the efficient use of railroad supplied cars, would properly recognize the need for reciprocal

[1] Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads, STB Docket No. EP 768 (July 26, 2021).

incentives. This is especially appropriate given that the majority of cars moving across the national network are private cars.

ISRI also supports the joint comments filed by the American Chemistry Council, the Fertilizer Institute and the National Industrial Transportation League which asks the Board to broaden the requested rulemaking to address first mile/last mile service issues. These comments are filed timely.[2]

I. STATEMENT OF INTEREST

ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated $117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating $13.2 billion in federal, state, and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over $16.5 billion annually to over 155 nations. ISRI members not only supply domestic manufacturers, including the U.S. steel industry, but the export operations of ISRI members requires an integrated transportation network vital to the global manufacturing supply chain.

[2] *See* the Board's decision in EP 768 (Aug. 5, 2021) (extending the deadline for reply comments to August 30, 2021).

Rail transportation is a critical mode for shipments of the U.S. scrap recycling industry, especially for ferrous and non-ferrous scrap metal shipments. Many of ISRI members are captive customers who are served by only one Class I rail carrier. Due to the unique nature of shipping bulk scrap metal, there are many situations where rail is the only mode shipping this material. ISRI's rail shippers are subject to the railroads' demurrage and accessorial tariffs and have actively participated in the Board's recent proceedings to express their concerns over the reasonableness of existing demurrage and accessorial rules and charges. ISRI members also collectively own or lease thousands of private cars that are supplied to the Class-I railroads to receive rail service.

II. THE STB SHOULD OPEN A RULEMAKING TO DEVELOP RULES GOVERNING THE EFFICIENT USE OF PRIVATE RAILCARS

ISRI urges the Board to institute a rulemaking proceeding as requested in the Petition pursuant to 49 C.F.R. §1110.3. The "Private Railcar Delay Charge" proposed in the Petition is reasonable and necessary and comports with the Board's statutory goal set forth in 49 U.S.C. §11122(a). It also aligns with the reciprocity principle for private railcar use that the Board explored in its recent proceedings on reasonable demurrage rules and practices.[3]

In stark contrast to rail service provided prior to deregulation of the rail industry in 1980, a significant portion, indeed the vast majority, of railcars in service today are owned or leased by non-railroad entities.[4] Railcars in service that are owned or operated by Class-I railroads make up less than 20% of the railcars in service nationwide.[5] This shift in the industry happened, in large part, because the railroads failed to make sufficient investments in the cars needed to

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[3] STB EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges,* 85 Fed. Reg. 26866 (May 6, 2020) ("*Demurrage Policy Statement*").
[4] Petition at 5 ("Petitioners estimate that there are around 1.6 million railcars in service in the Nation's railcar fleet and approximately 1.2 million of them are Private Railcars.").
[5] Id. 5-6.

service their customers and started encouraging shippers to provide their own railcars to meet their service needs. The implementation of Precision Scheduled Railroading ("PSR") by Class-I railroads over the last few years has only accelerated this shift to private cars because, among other things, railroads have downsized their car fleets by "returning their leased cars and disposing of their owned cars."[6] Thus, PSR has further reduced the number of railroad-owned cars used to satisfy shippers' car supply needs, which supports increased accountability in how railroads use private cars.

ISRI members are not insulated from this market shift. As Mr. Ben Abrams of Consolidated Scrap Resources, Inc. ("CSR") explained in his testimony during the May 2019 oversight hearing on demurrage and accessorial charges, since 2012, but particularly after 2014, railroads, in essence, forced scrap metal companies to lease or own their own gondolas because railroads were "both reducing the number of system cars available for use in general, and in particular to scrap steel shippers,"[7] and shifting their gondolas for use in "more profitable products."[8] ISRI members have made significant investments in these private gondolas throughout the years largely because they were forced to do so to obtain sufficient rail service.

Although the STB has recognized the need to support the railroads' investments in car supply by sanctioning demurrage charges to both compensate the railroads for use and incentivize efficient turns of the assets, current STB regulations do not adequately protect the

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[6] *See e.g., PSR and the rail car: Commentary by Richard Kloster* (Feb. 2019) (explaining the effects of PSR on railroad car supply and that "shippers are responding by securing their own car supply, increasing their fleets by adding leased equipment, both existing and new cars.") available at https://www.progressiverailroading.com/mechanical/article/PSR-and-the-rail-car-Commentary-by-Richard-Kloster--56697 (Last visited August 29, 2021).

[7] Testimony of Ben Abrams before the Surface Transportation Board, STB Docket No. EP 754 (May 8, 2019) at 2-3.

[8] *Id*.

enormous investment made by shippers, including ISRI members, by creating sufficient incentives for the Class I railroads to use private cars efficiently.

As the STB explained in its recent policy statement, "[d]emurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (*i.e.*, ''free time'') for loading and unloading."[9] These incentives, however, were created with the assumption that the railroads supplied the majority of railcars in service, and were intended to ensure the efficient use of railroad assets.[10] The STB regulations and precedents fail to recognize the same incentives for private railcar owners. As explained in the Petition, the dramatic shift in car supply and maintenance responsibilities to rail customers, as well as the need for efficiency incentives regardless of whether a rail car is supplied by the railroads or its customer, strongly support the Board promulgating rules to create appropriate and reciprocal incentives to ensure the efficient use of private cars used throughout the rail network. The "Private Railcar Delay Charge" proposed in the Petition provides an appropriate mechanism to address this issue.

Specifically, the Petition proposes the Board to establish a "Private Railcar Delay Charge" that could be assessed by a private railcar provider if a railroad exceeds an "allowable transit idle time," which is defined as "[s]eventy-two (72) consecutive hours of idle time at any point on a railroad's system ... between the time the private railcar is released for transportation to when it is either constructively placed or actually placed at the private railcar provider's facility or designated location."[11] ISRI strongly believes that the "private railcar delay charge" is

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[9] *Demurrage Policy Statement*, 85 Fed. Reg. 26866.
[10] *See* Petition at 9; *see also Allied Corp. v Union Pacific Railroad Co.*, Docket No. 38921, 1 I.C.C.2d 480 (1985).
[11] Petition at 18.

reasonable and necessary. The proposed charge would establish an appropriate incentive for the railroads to efficiently use private cars supplied by non-railroad entities and would fairly compensate the car owner when they are used inefficiently. Ultimately, costs of inefficiencies due to unreasonable idle times are born by the shippers who has invested significant amounts of dollars to acquire and maintain these cars.

The 72 consecutive hours of allowed idle time is also reasonable, as it allows for some level of service variability, while preventing unreasonably long idle times that cause inefficiencies in the network and translate into significant costs for the suppliers of the private cars. ISRI believes that the level of the applicable charge is reasonable as well. The Petition suggests that the amount should be determined as "the greater of either (i) the applicable demurrage charge that a rail carrier assesses its customers ... for holding on to railroad-owned or leased railcars beyond the free time established by the railroad, or (ii) the applicable storage charge that a rail carrier could assess the Private Railcar provider ... for holding onto or storing the private railcar beyond the free time established by the railroad."[12] This methodology is reasonable and comports with the idea of reciprocity, which the Board explored during the oversight hearing on demurrage and accessorial charges in May 2019.[13]

Specifically, in its notice of public hearing in EP 754, the Board asked interested parties to address the following topic in their written testimonies:

> Perspectives on whether demurrage and accessorial tariffs in effect during the past three years have created balanced and appropriate incentives for both customers and railroads, including views on the extent to which reciprocity should be incorporated into demurrage and accessorial charges.[14]

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[12] *Id*. at 18-19.
[13] Notice of Public Hearing, STB Docket No. EP 754 (April 8, 2019).
[14] *Id*.

Ideas similar or identical to the private railcar delay charge proposed by the Petitioners were discussed during the public hearing.[15] ISRI members also highlighted the need for "reciprocal commitments" for both rail customers and railroads.[16] ISRI also agrees with Petitioners that adequate commercial incentives do not exist that would allow private car suppliers to negotiate such incentives in contracts with the railroads. Due to the market power of the railroads and the lack of equal bargaining power in contract negotiations, the railroads typically refuse to agree to commercial incentives supporting the efficient use of private cars.

III. CONCLUSION

Without appropriate incentives based on the reciprocity principle, the national rail network and enormous investments by private car owners are unduly burdened by the inefficiencies caused by the railroads when they unduly hold and delay the return of private cars. The best way to resolve this is for the Board to promulgate rules requiring railroads to pay private railcar delay charges when they hold private cars beyond a reasonable time period, just as rail customers are accountable for demurrage when they hold railroad supplied cars beyond the applicable free time period.

[15] *See e.g.*, Supplemental Submission of NAFCA in Docket No. EP 754 at 2-3.
[16] Testimony of SA Recycling in Docket No. EP 754 (May 8, 2019).

Accordingly, ISRI strongly urges the Board to grant the Petition and institute a rulemaking proceeding based on the proposals set forth in the Petition.

Respectfully submitted,

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Dated: August 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2021, I have served a copy of the accompanying Reply by electronic delivery upon all parties of record.

/s/ Karyn Booth

Karyn Booth